Australian Not For Profit Accountants Network Inc.

ABN 58 728 133 062

THE ACNC DRAFT BILL

This submission is made on behalf of the Members of Australian Not For Profit Accountants Network Inc. being the professional Accounting Practices identified below:

Shedden & Green - Sydney
K C Smith Chartered Accountant – Melbourne
Renshaw Dawson Lang – Melbourne
Saward Dawson – Melbourne
Harding & Thornbury – Perth
R J Campbell & Associates Accountants – Perth
Thornburys,– Perth
Powell Accounting – Launceston
Preece Martin – Launceston
D G Martin, Chartered Accountant – Darwin

There are also a similar number of other accounting practices around Australia that are associated with the Network and participate in our activities who would, we believe, share our views. All Network Members are Registered Company Auditors.

The Network comprises an informal but active group of accountants working largely in the Charity Sector that provides audit services together with a significant advisory service. We work with a very diverse group of charities ranging from the very small to the very large. This gives us a broad perspective of the issues of concern within the sector, and its strengths and weaknesses.

We are supportive of and encourage the current process of reform of the regulation of the Sector.

RESPONSE TO THE DRAFT BILL AND EXPLANATORY MATERIAL

INTRODUCTION:

1. **The Draft Bill, and the Explanatory Materials that accompany it are, we believe, needing to be re-drafted in a number of areas of significance.** The documents use terminology that leaves in serious doubt the intention when read in the light of Australian Accounting and Auditing Standards. This issue in itself, in our view, means a conflict with the Standards will arise almost immediately, and since both Standards are now Law for many NFP's this means legal confusion at best or else legal conflict. The references made in the drafts to "general reports" and "special reports" are confusing as they are not consistent with accounting terminology that are enshrined in current law. Even the possibility of replacing Companies Limited by Guarantee with some other form of NFP entity will not obviate this concern. In places the documents, and the also the Governance document, infer that Special Purpose Financial Reports (SPFR) are able to

be used. In other instances the inference is made that General Purpose Financial Reports (GPFR) will be required. The ACNC are not able, in our understanding, to impose reporting obligations that are inconsistent with the present Accounting Reporting and Audit Standards – which means the decision as to the format of the reports is to be left to the Boards of each entity to sort out any confusion and in particular to have regard to the needs of users. This suggests a lack of adequate consultation and research in the drafting. If the Bill was to become law in its present inadequate form the result within the NFP Sector would be substantial confusion. Many charities would be unable to identify just how they were to comply with at times contradictory and confusing laws.

A major revision is required that includes the active co-operation of accountants who are actively involved the preparation and review of NFP financial reports.

2. The numbering provisions of the Explanatory Material (EM) are unclear and we suggest these need revision if it is to be used as the basis for the Explanatory Memorandum presented to the Parliament.

A more normal numbering procedure would be to utilize the same prefix as is used for the chapter. However in the Explanatory Material the numbering system is fragmented. It changes on pages 13, 48, 69, 71, 81, 95, 97, 99 and 101. Yet the principal prefix continues to be "1" – with some notable exceptions. The EM can only be followed by referring to page numbers as well as paragraphs numbers.

3. The Chapter headings in the EM do not consistently follow the structure of the Draft Bill and this has made it difficult for those seeking to follow with care the intended structure of the links between the two documents. We can only presume that the EM was prepared in advance of the Draft Bill and before its structure was finalised.

4. Education: -

- In the Assistant Treasurer's (Bill Shorten) Media Release Number 167 in paragraph 6, he states, "An education role for the NFP Sector will be a core function of the ACNC and is an inherent power of the regulator."
- In the Fact Sheet headed "Education Compliance and Enforcement", it states "In its objects and functions …. ACNC will be responsible for the provision of educational information to the NFP Sector". It also states "Education will be an inherent role of the regulator". The inference is that as education is an inherent role of ACNC the Draft Bill does not need to expand.
- The Draft Bill, at Section 2–5 (2) states that the Objects include the provision of educational information. Chapter 4 of the Draft Bill deals with the regulatory powers of the ACNC. Chapter 6 of the Explanatory Material is headed "Education Compliance and Enforcement". However the caption "Education" for Chapter 6 is a misnomer, as at present there is nothing in the Chapter at all about education.
- We also note that in the Governance Discussion Paper there are significant matters referred to, accompanied by terms such as "minimum standards",

"obligations", and "mandated". Such terms, along with the significant focus on the regulatory role of ACNC, suggest that greater emphasis is being placed on compelling the Sector to comply instead of guiding it to best practice.

Our point is that all along education has been emphasised as a primary function of ACNC however it seems to be hidden away as a minor issue. We note that the Discussion Paper on Implementation Design states, in the Executive Summary, that 'Education' will be limited to the issuing of information. We would have hoped that some introductory seminars and other information sessions would have been provided across the nation both in the introductory phase of the ACNC and also in its continuing role.

We express our significant concern in this downplaying of the educational function, which we have been assured, would be a key function. Given the voluntary attribute of many of those charged with governance in the sector ad hoc sector development is asking for issues that would be avoided if there was an effective and proactive education campaign.

5. We believe the Draft Bill contains significant flaws. Our subsequent comments will make it clear that we have concerns about much of the detail. The result will impose additional work-force requirements and financial imposts on the Charity Sector – contrary to stated objectives. **It is important for us to confirm that we do give support for the overall objective and also the substance of the proposed reforms, subject to significant improvement in the detail.**

It is also important to state that it has been very difficult for any entity or group of entities in the Charitable Sector to respond to the raft of documentation that has issued from Treasury given the very short response times. In addition some important sections are not included on the basis that they are still to be drafted, for example the definition of charity, the submissions to COAG on the future of the Company Limited by Guarantee structure and the associated consideration of whether a new form of NFP entity can be (constitutionally) adopted (possibly with co-operation of the States).

We submit that much of the matter covered by the current drafts would have been more properly left to the ACNC to bring to finality. A significantly longer public consultation would have been very beneficial to all concerned. This is still possible and should be given due consideration.

6. The Table in Section 5-10 sets out sub-types of 'charity'. This presumes the existence of a new definition of charity that is in contemplation, and not yet in place. Further, it is not contemplated being finalised until possibly 1 July 2013.

It is our view that the Bill, when submitted to Parliament, can only describe the Common Law meaning of charity, which is the current position. The EM in support of the Draft Bill can refer to what is in contemplation, subject to the subsequent decision of Parliament.

It is unclear under which Head of Charity, if any, that Harm Prevention Charities will fall. This does not seem to fit well under "Advancement of Health".

7. The overall implication emerging from the Bill, and the several discussion papers made available, is that a significant obligation in reporting and governance matters will be imposed on the Sector. Despite stated intentions to minimize red tape, the impact of these changes will be substantial on the small entities in Tier 1 in particular. By force of the proposed changes it appears likely that a potentially large number will be unable to afford the cost of professional advice to enable the required degree of compliance. **We observe that many small churches, charities and community organisations, do not have the resources to handle the changes proposed. This is an inappropriate and inequitable impost on the small end of the Sector.**

The public statements by Government have inferred a broadening of the definition of charity and better accountability. We support these objectives. **However we cannot support the exclusion of the many small entities that we represent. The ACNC needs to be more pro-active in educating the Sector than is currently proposed.**

8. Section 900-5 of the Draft Bill is the Dictionary however it is incomplete. There are some terms within the Draft Bill that are not adequately defined, or not defined at all. There are some definitions included within the Draft Bill, which also need to be in the Dictionary. We presume this is a matter that will be addressed before the Bill is presented to the Parliament.

COMMENTARY ON DETAILS:

Headings will refer to a Section of the Draft Bill unless it is clear that reference to the Explanatory Materials (EM) is intended.

9. 5–10 (1A) (d) seems to be saying that an entity that has previously been a registered entity is no longer eligible to be registered. In other words, if registration is lost, it is lost once and for all with no hope of re-entering the system. It is our hope that this is not the intention. **We request a rephrasing of the sub-clause.**

10. 5–10 (1A) (a) requires an entity to be a Not-for-Profit entity. The same terminology is used in the EM at 1.4 on page 15. The term "Not-for-Profit entity" is not defined in the Draft Bill. We understand the intention is for it to be defined in other legislation. **The definition needs to be identified in the Dictionary with the appropriate references in place.**

11. 5-10 (3) Table identifies the types of registered entities. It has expanded the heads of charity from four to twelve. In a review of the Definition of Charity we have supported an expansion in the number of heads, provided the Public Benefit Test was not an obligation where there is a specific head and is only a requirement for the last more general head "Other purposes beneficial to the community". We also have concern that Item 4 includes "prevention of poverty". **We submit that the meaning of the phrase "relief of poverty" is**

already made very clear in the present Common Law and the wording from Pemsel's case should be retained as a specific head rather than expose the new regulatory framework to additional clarifying legal debate.

12. 5-10 Table – includes reference to type and sub-type of registered entity. The EM page 18 at 1.6 to 1.9 clarifies the issue regarding sub-types. We note in Attachment A to the Implementation Design Discussion Paper that it only requests identification of type – no reference to sub-type. It is unclear how the additional information regarding sub-type will be collated by ACNC. **We also suggest that charities and others applying for endorsement in the first instance would likely have some difficulty in understanding the need or otherwise to include reference to sub-types, if it was to be included in the form.**

It is unclear to us how ACNC will establish the initial information for its Portal when much of the information that ATO will have on record will not be current. We note initial endeavours by the ATO which are encouraging ATO registered entities to update their ABN records leading into the new regime. We are concerned that ACNC might be contemplating a requirement for all currently endorsed charities to complete an application/renewal form in an early stage of the ACNC notwithstanding the understanding received previously that there will be a transition period of three years.

13.10-57 Revocation of Registration will *apply from the date of the Commissioner's decision subject to its Objection rights*. However the example given in the Bill indicates that the revocation may be backdated but gives no reason regarding revocation. The EM at 1.33 on page 22 does explain the reasons. For the benefit and protection of all **we suggest Section 10-57 be expanded to identify the circumstances when the revocation can be backdated.** This could be done by way of an explanatory note.

14.10-62 (2) (b) gives the entity ten business days to object. **We are shocked at this proposed short notice.** The majority in number of NFPs in Australia are small and staffed by volunteers. In rural and remote areas the appropriate responsible person would frequently not receive the notice within the nominated time let alone be able to respond appropriately. Notices issued just prior to the Christmas holiday break may not even reach the intended recipient within 10 business days. In many instances the notice will impute a need to obtain professional advice in order to fulfill the person's duties of acting responsibly. **We submit that thirty days is the minimum reasonable notice and that there should be provision for a further thirty days extension being granted upon request** (particularly for remote and very small entities). We have been assured that ACNC intends to be friendly to the Sector, but this short notice does not help ACNC fulfill this objective.

15. 50-5 (4) (see also EM at 1-64 page 27). There is an apparent conflict with Section 55 – 80 which refers, in a different context, to preparing a Special Report for a period going back six years "*after the end of that period"*. Section 50-5 (4) should refer to "six years after close of that financial year" to be consistent. Otherwise time references are not workable. There is also a difficulty with the words "after the transaction". **A more appropriate wording would be "after the close of that financial year" or similar.**

16. Division 55 - While the Draft Bill allows the Commissioner to grant an alternative accounting period, the requirement for a 30 June balance date imposes an impracticable burden on the Charitable Sector and the accounting profession alike. The appropriate year for many churches and many other community bodies including the charitable schools is the calendar year. The appropriate year for many sporting bodies is also the calendar year. Other Charities will have adopted other alternative dates, for reasons that fit their own activities. We also note that the Charities Commission of England and Wales accepts the position of the charity entity adopting a substituted accounting period without difficulty. **The Act should, we submit, be amended to delete reference to a specific financial year date to ensure the whole NFP Sector can operate on an efficient basis arising from their own operational reasons**.

The additional and closely related concern is the inability of the accounting and auditing profession to cope with an audit load which concentrates the NFP Sector on a 30 June balance date only and requires the lodgment of all financial reports for the Sector within four months of balance date. Audit (or review) is becoming more complex. The audit of the NFP Sector – particularly the Charitable Sector – is a more specialised area than many audits in the for-profit area. Associations, whether audited or not, under present State Laws typically have until six months from balance date to lodge their reports.

With the introduction of the ACNC it appears reasonably certain that some accounting practices that are currently providing audit services as a sideline to their main general accounting functions will cease to do so, on the grounds that the significantly changed environment requires new skills and it would not be economically viable for them to continue with those audits. To better explain this comment please note –

- In 2000 with the significant changes arising from the introduction of GST a significant number of Accountants/Registered Tax Agents who were moving towards retirement accelerated the process and closed their doors. Altogether ATO advised that about 25% of Tax Agents did not renew their registration around that time.
- Other accounting practices that had provided some audit support to charities chose to limit auditing services because charities were now subject to some additional, seemingly more complex, rules and concessions than for-profit entities.
- Later, with the introduction of the revised Australian Auditing Standard (Clarity), also known as Clarity Auditing Standards, more accounting firms only involved in the audit of a small number of charities decided to withdraw from provision of audit and review services altogether.
- The audit requirements in the Bill in Section 55-35 seem to require a Registered Company Auditor (RCA) for Tier 3 and at least an accountant with a Public Practice Certificate to conduct a review for Tier 2. This requirement adds to the pressure on those accounting practices which specialise in Not-For-Profit auditing. Most of those charities currently fortunate enough to have an honorary auditor who is a retired practitioner will now find they need to go to the profession and pay a fee.

- There is a lack of clarity regarding the audit and review requirements for Tier 1 and Tier 2. The definition at 210-10 (1) (a) indicates that a DGR will not be Tier 1. It does not state that it will be Tier 2, which may be the inference, but it is not clear. We ask that the position be clarified, as Tier 2 has the option of either review or audit. We specifically ask:
  (i) "What is the audit/review requirement for a Tier 1 DGR entity?"
  (ii) "Can the Commissioner relieve a Tier 2 entity from the obligations in Section 55-35 (1), or is the intention of the sub-clause to impose an audit obligation in lieu of the review obligation in some instances?" and
  (iii) "Can a Tier 1 DGR entity Review Engagement be handled by a practitioner in accordance with Section 55-40 (2)?"

We believe there will be an increase in the demand for audit services imposed upon the profession arising from the obligations for Tier 2 and 3 entities, combined with fewer firms being available to conduct audits and fewer retired practitioners being available. This is a practical, financial and workforce issue. The Sector and the accounting profession will struggle (at best) or more likely be unable to cope with the changed reporting and auditing environment. This will lead to an increased focus by smaller charities on the administrative requirements of the ACNC regime instead of the Objects of the charity and will be a diversion of valuable resources from the charitable work of the Sector.

This has a significantly wider impact particularly on the Christian community, as many of the thousands of smaller (Tier 1) and also many Tier 2 churches throughout Australia currently have their audits conducted by either a commercial or retired accountant on a pro bono basis. While many churches will come under the Tier 1 umbrella, the change from voluntary audit for churches in the Tier 2 category will be significant in itself.

The only recognised endorsement for an auditor is currently that of a Registered Company Auditor. Yet this RCA status entitles an auditor to audit any type of corporation under Corporations Act whether it is a listed public company or the smallest company limited by guarantee. Representations have been made in the past, without success, for two levels to be set for an RCA, with the higher level being set for the audit of a public listed company. The Corporations Act recognizes two levels of Liquidators in apparent recognition that certain types of liquidations require a greater level of knowledge or oversight, or both.

We suggest that the ACNC establish a class of auditor to be known as a Registered Charity Auditor. Such an auditor would need to be able to demonstrate knowledge and experience in accounting, in audit and also knowledge and experience specifically in the special requirements of the Not-For-Profit Sector (not just Charities). Given that there is lack of awareness of the Not-For-Profit Sector accounting and auditing requirements within the wider accounting professions, this would help meet a significant need.

There is also a place for a lower level of recognition similar to the English Charities Commissions Examiner. We understand from David Locke, the Executive Director of the Charities Commission of England & Wales, that this beneficially serves the interests of the large number of smaller charities in England and Wales. It is relevant to note that the

Anglican Church in Victoria is adopting a class of Examinations for local parishes within that State modelled on the English position. We understand the wider Anglican Communion within Australia is watching this development with interest.

We recommend that the Commissioner be authorised to: -

- **Increase the levels for measuring the Tiers annually to allow for inflationary movements, thus preserving equitably the revenue levels. Alternatively that the legislation index the thresholds.**
- **Approve the appointment of experienced persons to conduct a Review or an Audit for Tier 1 and Tier 2 in accordance with Australian Auditing Standards (which include standards for Review engagements) where the charity is unable due to remoteness or other significant reason to obtain the services of a Registered Company Auditor. For Tier 3 entities, we note that in most States there are very few RCAs outside the main metropolitan and larger regional centres. Even in the capital cities it is our experience that the number of RCAs who are also adequately knowledgeable in the NFP Sector is quite limited.**

We also recommend that the responsible Minister be authorised to:

- **Establish a procedure for the appointment of Examiners, in respect of Tier 1 entities and in certain cases Tier 2 entities and also establish guidelines for Examinations, by reference to the provisions now existing in England under their Charity Commission.**
- **Establish a new arrangement for the appointment of a class of Registered Charity Auditors who have demonstrated experience in the Not-For-Profit Sector, such auditors not needing to comply with present tests for an RCA.**

17. The forms in Implementation Design require lodgment after the AGM due to the presumption of a change in officer-bearers (refer to Item 4 on the Annual Return form). However the requirement is to lodge the Returns within four months of balance date. **We ask that ACNC provide a similar period of five months for holding an AGM and six months for filing of report on the grounds of practical necessity.** We agree that lodgment within four months for Tier 3 charities would be desirable in the public interest.

18. 55-20 (3) requires financial statements and notes to comply with Australian Accounting Standards. Paragraph 111, page 20 of the Governance document states that financial reports are to be prepared in accordance with Australian Accounting Standards, indicating the most common Standards to be applied and infers that Special Purpose Financial Reports (SPFR) as allowed in the Australian Accounting Standards would be normally acceptable. This would depend upon the size of the entity and its reporting obligations under the same Standards. However the EM at 1.72 on page 28 states that revenue is to be calculated in accordance with the relevant Accounting Standard. The implication is that all recognition and measurement principles in Australian Accounting Standards need to be applied. There are other inferences in the EM in this area that are hard to interpret. In paragraph 107 on page 20 of the

Governance document, it seems to be emphasising different requirements will apply at the different Tiers. However it also states that ACNC will be introducing a "General Purpose Reporting Framework". This would appear to remove the option of Special Purpose Financial Reports. **To the accounting profession that term suggests an intention to introduce General Purpose Financial Reports, which would be an onerous and unnecessary obligation on the Sector**. It does not seem from other statements, such as paragraph 111 in the Governance document that this is the intention.

The EM on page 31, paragraph 1.110 and subsequent paragraphs further confuses the issue by referring to 55-80 of the Bill's "Additional Reporting requirements" as being "Special Purpose Reporting". The words "Special Purpose Reporting" carry a particular meaning in the context of the Australian Accounting Standards and particularly for the Not-For-Profit Sector who are significant users of Special Purpose Financial Reports and the use of these words to describe the ability of the Commissioner to require additional information to be included in a financial report or in a supplementary report will be confusing.

The Draft Bill and the EM need to be reviewed in this area to ensure there is clarity.

We recommend that consultation with the accounting profession include accountants experienced in auditing entities at Tier 1 and Tier 2 levels. Firms only experienced with Tier 3 level will almost certainly have inadequate understanding in this area. Unless this is done there will be practical difficulties emerging that neither the Sector nor ACNC will welcome.

All Deductible Gift Recipients (DGR) regardless of size will be classified as either Tier 2 or Tier 3 for reporting purposes. Current laws do not automatically impose an audit obligation on DGRs. Although audit is not always an obligation a significant number, and probably the substantial majority of DGR entities, do ensure an audit is carried out. However, there are a number of instances with small DGRs where an accountant without a current practicing certificate conducts the audit. There will be a reasonable number of DGR entities in this category that will now require audits to be conducted by a person who meets the requirements of a Registered Company Auditor in accordance with the Corporations Act.

This will be an additional workload for the accounting profession and an additional cost to these DGR entities.

19. 55-60 (2) requires the auditor to report to the Responsible Individuals. The EM at 1.131 on page 34 makes the same comment without amplification. In instances where the responsible individuals are the Trustees of a Trust this requirement would be consistent with current practice. However the normal provision regarding audit reports and appointment of auditors is that the auditor is appointed by the Members and that the auditor report to the Members.

Reporting to the responsible individuals is helpful for good governance provided there is also reporting to the membership. However where the responsible individuals are the ones causing the breach then solely reporting to those individuals may well not be effective.

The requirement to communicate to the responsible individuals is already a requirement with the Clarity Auditing Standards insofar as they apply to companies. As such they are already promulgated in Commonwealth Law. **We recommend that the legislation should merely refer to Australian Auditing Standards and require that the requirement be that the audit be conducted in accordance with those Standards.**

We note: -

In **ASA 260** "***Communication of Audit Matters with Those Charged with Governance"*** at paragraph 16 to communicate with those charged with governance:

(a) The auditor's views about significant qualitative aspects of the entity's accounting practices, including accounting policies, accounting estimates and financial report disclosures. When applicable, the auditor shall explain to those charged with governance why the auditor considers a significant accounting practice, that is acceptable under the applicable financial reporting framework, not to be most appropriate to the particular circumstances of the entity; (Ref: Para. A17)

(b) Significant difficulties, if any, encountered during the audit; (Ref: Para. A18)

(c) Unless all of those charged with governance are involved in managing the entity:

(i) Significant matters, if any, arising from the audit that were discussed, or subject to correspondence with management; and (Ref: Para. A19)

(ii) Written representations the auditor is requesting; and

(d) Other matters, if any, arising from the audit that, in the auditor's professional judgement, are significant to the oversight of the financial reporting process. (Ref: Para. A20)

*In **ASA 265 " Communicating Deficiencies in Internal Control to Those Charged with Governance and Management"***

***7**. The auditor shall determine whether, on the basis of the audit work performed, the auditor has identified one or more deficiencies in internal control. (Ref: Para. A1-A4)*

***8**. If the auditor has identified one or more deficiencies in internal control, the auditor shall determine, on the basis of the audit work performed, whether, individually or in combination, they constitute significant deficiencies. (Ref: Para. A5-A11)*

***9.** The auditor shall communicate in writing significant deficiencies in internal control identified during the audit to those charged with governance on a timely basis. (Ref: Para. A12-A18, A27)*

***10**. The auditor shall also communicate to management at an appropriate level of responsibility on a timely basis: (Ref: Para. A19, A27)*

(a) In writing, significant deficiencies in internal control that the auditor has communicated or intends to communicate to those charged with governance, unless it would be inappropriate to communicate directly to management in the circumstances; and (Ref: Para. A14, A20-A21)

(b) Other deficiencies in internal control identified during the audit that have not been communicated to management by other parties and that, in the auditor's professional judgement, are of sufficient importance to merit management's attention. (Ref: Para. A22-A26)

***11**. The auditor shall include in the written communication of significant deficiencies in internal control:*

(a) A description of the deficiencies and an explanation of their potential effects; and (Ref: Para. A28)

(b) Sufficient information to enable those charged with governance and management to understand the context of the communication. In particular, the auditor shall explain that: (Ref: Para. A29-A30)

(i) The purpose of the audit was for the auditor to express an opinion on the financial report:

(ii) The audit included consideration of internal control relevant to the preparation of the financial report in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of internal control; or

Aus 11.1 In circumstances when the auditor has a responsibility to express an opinion on the effectiveness of internal control in conjunction with the audit of the financial report, the auditor shall omit the phrase that the auditor's consideration of internal control is not for the purpose of expressing an opinion on the effectiveness of internal control; and

(iii) The matters being reported are limited to those deficiencies that the auditor has identified during the audit and that the auditor has concluded are of sufficient importance to merit being reported to those charged with governance.

*Further, in **ASA 250** "**Consideration of Laws and Regulations in an Audit of a Financial Report"** states in paragraph 4 **"**the auditor is not responsible for preventing non-compliance and cannot be expected to detect non-compliance with all laws and regulations ". Similar to ORIC audits the proposal requires the Auditor to determine whether the registered entity has kept "other records" as required by the ACNC Act. This requirement extends the current audit reporting requirements to specifically require reporting on these matters whether or not any shortcomings are rectified. A recent ORIC audit extended to 28 pages in listing every such breach since there is frequently a minutia of consequent breaches that can arise from incorrect or invalid records.*

***ASA 705** "Independent Auditors Report" requires"*

***28.** When the auditor expects to modify the opinion in the auditor's report, the auditor shall communicate with those charged with governance the circumstances that led to the expected modification and the proposed wording of the modification.*

Reporting to the Members increases the level of auditor independence and is a more effective protection for all concerned.

We recommend that the Section be modified to provide for both reporting to those responsible persons and also to members. In the alternative we believe that unless it is explicit, there are likely to be instances where members will no longer see the audit report and possibly will not see the financial report also, notwithstanding the increased availability online of such documents arising from ready availability of lodged reports.

20. 55-60 (4) the reference to paragraph 55-40 appears to be an incorrect reference. There may have been some changes in the original drafting of the Draft Bill, but the referencing needs to be corrected.

21. 55-60 sets out the requirements regarding the auditor's report. However there is no similar requirement for a review engagement. **We recommend that an appropriate new section related to the reviewer's report be included and that it be consistent with the applicable Auditing Standard. Alternatively that these requirements be deleted and the Audit Standards instead be amended to include the requirements.**

22. 55-65 (a) grants the auditor right of access to the books of an NFP. **This sub-clause should refer to the books and records of the entity.** See also the EM at 1.137.

23. 55-70 (1) (a) (i) requires an auditor to notify ACNC where the auditor "suspects" there has been a contravention of the Act. In our view this is an unreasonable and unworkable position. While the sub-clause refers to "reasonable grounds" for a suspicion, it needs to be stated that a suspicion that is unsupported by factual evidence has no place in an audit report which by its nature requires evidence to support its opinion. A mere suspicion is not evidence and is problematic under Australian Auditing Standards. **These provisions either need to be removed or substantially modified.**

It is also extremely difficult to justify a reference to a suspicion or an emotional feeling in a Report to Management/those charged with governance and /or responsible individuals.

We recommend that reference to a "suspicion" be removed.

It is unclear whether the requirement for auditors of companies limited by guarantee to report to ASIC within 28 days will be removed as a result of the same reporting requirement now identified as needing to be made to the ACNC (refer to CLERP 9 and Practice Note 34 clause 34.6).

24. 55- 80 (6) authorises ACNC to obligate an entity to prepare a report for a period no later than six years after the end of that period. See here our comments at Section 50 – 5 (4) which refer to an obligation on an entity to retain records for five years **after a transaction,** not after the **end of the financial period**. **Either Section 50 – 5 needs to be increased to six years *after the end of the period* or Section 55 – 80 (6) needs to be reduced to five years and an appropriate adjustment made to Section 50 – 5 (4).**

25. The EM provides Chapter 4 on Governance comprising three pages. There is also the separate consultation paper on Governance comprising of 42 pages. There is no specific

section on Governance in the Draft Bill that we have identified – although principles in relation to governance clearly arise throughout the document.

The EM at 1.158 (page 39) provides a definition of a responsible individual. An identical definition is provided in the Governance document at page 15. The EM at 1.157 states, "the Governance requirements will likely apply to all responsible individuals". The definition of responsible individual is quite broad as it includes a reference to *a person who participates in making decisions* – which in its context infers a limited authority and as such will be of clear assistance to the auditor in the fulfillment of the auditor's responsibilities. However it has more onerous implications for Board Members and other persons who come within the scope of the definition. When a person accepts responsibility as an office-bearer of an entity or appointment to a senior management position in an entity, we believe that they have committed themselves to substantial responsibilities. When a person accepts appointment to a Board, but not as a Board Officer, they do not have the same level of responsibility or authority. The definition, given the way the term "responsible individual" is referred to throughout the Bill, would cause many potentially useful Board Members to decline appointment to a public office – to the detriment of the whole community. **We recommend that some softening of the responsible individuals' obligations needs to be provided where a lower level of authority exists.** We are aware that case law regarding The Corporations Act does not appear to differentiate between levels of responsibility, but there is an issue of principle that the greater the level of authority then the greater the responsibility. Surely this could be enshrined in the Bill to provide a greater comfort to the volunteer.
(Refer to our responses to Governance Review paper Questions 1, 2 & 3)

26. 55–90 grants ACNC a discretion regarding the provision of an alternative accounting period. In our view the obligation to normally impose a 30 June reporting date on entities, unless ACNC had granted a concession, is inappropriate. **We submit the Draft Bill needs to be significantly changed so that the financial year for an entity could be such a period as meets the need of the entity.** As stated earlier, (in paragraph 16 above), a 31 December balance date is clearly an appropriate period for educational institutions and also for many sporting and other community organisations.

It is not sufficient to say that an entity may apply and the Commissioner will normally grant a concession. Any concession will also need guidelines to ensure fair and consistent treatment for all entities. This all immediately imposes a further administrative responsibility on both ACNC and the myriad of entities which serves no useful purpose.

27.100–10 (1) (l) (i) refers to the qualifications of a responsible individual being included on the Public Register. Other provisions under sub-clause l require the name and position of each responsible individual to be shown on the Register. This presumably means the information will also be shown on the ACNC Portal. However the forms in the Implementation Design Paper identify that only 'Officers' (an undefined and unexplained term) will be shown on the Portal. Refer also to our response to Question 2 in that paper. This change in terminology is another example of the lack of clarity in these published documents. If 'Officer' means the executive of the governing body (President, Secretary, Treasurer), we can support the proposal. **If, on the other hand, the intention is to record all members of the governing**

body on the Portal, we express our strong objection. It would fulfill no useful function. It would be a deterrent to some public figures being available for appointment. It will cause others who are concerned for their privacy to step aside. There is also a concern that, due to the wide definition of 'responsible person', that it could be difficult for a person completing forms for the ACNC to be consistently accurate. Therefore the Portal record would likely not be accurate. This is where the definition of responsible individual being so wide creates a problem – particularly where the office bearer filing the appropriate information with ACNC will not necessarily be aware of the breadth of the definition.

We recommend that the Portal only publicly display the names and positions of the executive of the governing body.

At sub-clause l (i) the qualifications of a responsible individual are requested. They are also requested on the application for registration. **We ask, "What is the purpose of the question?" and "Why is this deemed necessary?"** The term "qualifications" is not explained so presumably it refers to tertiary or trade qualifications and does not refer to experience. Such qualifications may or may not have relevance to the administration of an entity. However real life experience in the management of an entity is often a far greater qualification than a professional qualification, particularly if it is in an irrelevant discipline. ***(Refer to our responses to Governance Review Questions 4, 5 & 6)***

We recommend this sub-clause be removed.

28. 100–10 (1) (n) identifies that the Register, and presumably also the Portal, will provide details of each warning issued by ACNC. Refer to our comments on Section 55 – 5 (paragraph 16 of this submission) of the Bill in respect to the four-month reporting obligations and the difficulties for the accounting and auditing professions with coping with such a deadline.
We recommend it would be inappropriate to identify on the Portal late compliance with filing of annual reports, especially when the Draft Bill imposes an impracticable deadline.

29. The EM Chapter 6 refers to Education, Compliance and Enforcement. The Draft Bill itself, at Part 4 – 1, refers to regulatory powers of the ACNC. At Part 7 – 2 it refers to "criminal and administrative penalties'. There is no specific part of the Draft Bill as yet that refers to education. **We submit the chapter heading in the EM, by including the word "education' is misdirecting. The word needs to be withdrawn.**

It is to be hoped that Government will make a substantial further comment in respect to the educational role of ACNC to put this matter into clearer focus. Given the earlier assurances by Government that education would be a key focus, the lack of any emphasis on education in the Bill, together with the inconsistencies between the various documents that have issued is a major concern.

We suggest that the ACNC could well consider the benefits of a programme similar to that provided by the WA Department of Commerce with its "Think Safe Small Business Programme" for OHS (Occupational Health & Safety) matters.

See also our comment in paragraph 3.

Our plea is that the current statement by Government that education will be a very limited aspect of the ACNC, and will not extend to the provision of direct face-to-face seminars and similar activities be reversed. There is a major need for the ACNC to be very much pro-active in the educational area.

30. EM page 49, paragraph 1.5 refers to conversion to a for-profit entity. Such a situation could conceivably arise when an incorporated association migrates from State jurisdiction to the Corporations Act. If subsequently a company limited by guarantee or a special purpose non-profit company changes its constitution to become a for-profit company there is the significant possibility that the members of the company could profit from such a change. This would be a consequence that should not occur.
We recommend that the Corporations Act be amended to prevent such an occurrence, or, at the very least that such a change in legal status can only occur with the consent of the Commissioner of ACNC.

31. The EM, at 1.20 on page 51, refers to statutory thresholds in relation to ACNC enforcement powers. This information is not as yet in the Draft Bill; therefore we are unable to comment.

32. Part 4–1 of the Draft Bill refers to the regulatory powers of ACNC. The ACNC needs an overall authority to enquire, to investigate and to enforce where circumstances warrant. Without specific supporting detail we **cannot** support the necessity of such authority being granted. The application of this authority in a manner appropriate for the Sector is the key to this matter. Until ACNC is operative we withhold comment.

33. The Draft Bill, at Part 4 – 2 refers to Review and Appeal. There is currently no detail available here apart from general advice that it will be similar to the provisions of the Taxation Administration Act 1953. We withhold comment.

34. The EM – chapter 8 on Secrecy – is out of sequence with the Draft Bill itself. The Draft Bill provision on Secrecy is under Part 7.1 of the Draft Bill.

35. The EM at paragraph 1.183 on page 74 comments on items that would not be considered "protected Commission information". The second line of this paragraph where it reads "is reasonably capable of being used to identify an entity" could be read as contradicting the earlier part of the paragraph**.**
We suggest the paragraph needs further clarification.

36. Division 181- Whistleblower Protection Section of the Bill is yet to be drafted.

37. Division 190 – General Criminal Penalties – is yet to be drafted. A note identifies this will be drafted in a manner similar to the division in the Taxation Administration Act 1953.

38. Part 7 – 3 refers to the application of the Act to certain non-legal entities. This is yet to be drafted – "in a manner similar to Taxation Administration Act 1953."

39. Section 195 – 65 refers to an entity authorising an agent. At sub-clause 3 it requires the entity to retain a copy of the Declaration for five years.
We recommend that this period be changed to comply with the minimum period of six years as earlier recommended.

40. Section 197 – 5 identifies that an entity's address for the purpose of service of notices can be its physical address, postal address or an electronic address. We support the broadening of the address provisions to include an electronic address, subject to the Commission having a physical address available in addition to the electronic address.

41. 210 – 5 defines the meaning of "Entity". **We suggest the definition needs to be expanded.** The Goods and Services Tax Act at 184.1 (1) includes the term "A body corporate" which we consider should be included in the Bill. **We also recommend that the Bill definition be clarified as to whether it includes an entity incorporated under a Private Act of Parliament and also whether it applies to joint ventures.** Perhaps a more general final sub-clause to allow ACNC authority to widen that provision in special circumstances would also be beneficial.

42. 900 – 5 The term "Accounting Standards" here refers to Corporations Act 2001. The Corporations Act 2001 refers to Australian Accounting Standards. There are a very significant number of Accounting Standards issued by the Australian Accounting Standards Board. Nevertheless within the various documents the term(s) are used in a manner that suggest that the term is not adequately understood by Government. There seems to be a lack of understanding, as revealed in the in the EM and Draft Bill, of the relevance of General Purpose Financial Reports, Special Purpose Financial Reports and the Reduced Disclosure Regime. An example is in the Governance Paper at paragraph 111, where it refers to AASB 7. The Reduced Disclosure Regime excludes most of this. Also AASB 120 specifically does NOT apply to the Not-For-Profit Sector. Refer to AUS1.1 (a), (b) and (c).

Nevertheless it appears from the material issued thus far, (such as paragraph 111 on page 20 of the Governance Consultation Paper) that Special Purpose Financial Reports are proposed to continue to be accepted, as that is currently what is commonly applicable to the Sector.

The issue will always be "who are the users?" Australian Accounting Standards specify this. **We recommend that the current practice of preparing Special Purpose Financial Reports be continued for Tier 1 and Tier 2 entities whereby charities will identify the Reporting Standards applicable to their entity be continued.**

Greater clarity both in definition here and in the Act generally appears to be needed.

43. The EM refers to matters yet to be drafted, including: -

- Penalties;
- Consequential amendments;
- Transitional provisions;
- Regulation impact statements.

The fact that some material both in the EM and the Draft Bill is not yet final means that consultation with the Sector is also not final until this information is available.

44. The EM at paragraph 1.161 on page 41 refers to the ACN Register. Given that an ACN is well known and used in the community as representing the Australian Company Number there will be the potential for misunderstanding.
We recommend that the Register be known as the ACNC Register.

45. The EM at paragraph 1.189, page 47, permits an ACNC officer to enter any premises and gather information. It is unclear how this measure deals with legal privilege. Many charities will be churches, which in some circumstances are considered sanctuary. It is unclear how this power may be exercised and how its exercise may be restrained in relation to any such circumstances. **We request that these matters be clarified.**

46. The EM at paragraph 1.33, page 53, permits the Commissioner to require information and evidence to be given orally and also permits the Commissioner or ACNC to administer an oath or affirmation. It is unclear how the legal rights of a person being so examined are to be protected e.g. whether they have the right to legal representation. **This needs to be rectified.**

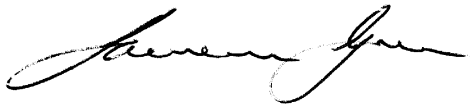
47. The EM at paragraphs 1.82-1.86, page 59 explains that a charity will be required to compensate donors and others in certain circumstances. However most small charities do not carry reserves and so will not be in a position to undertake such compensation. It is likely they would not be able to raise donor support for such compensation either. Therefore the responsible persons may well become responsible to make up the compensation. Small entities and other entities not carrying unrestricted reserve funds will need to carry Directors and Officers insurance. In many States such insurance has a seven-year tail requiring a reserve of funds to be available on winding up to provide Director and Officer cover for the ensuing seven years – assuming funds are available for such a purpose**. If the provision is to be retained it also needs to provide protection to the responsible persons in such an eventuality. We ask that this matter be addressed.**

48. The EM at paragraph 1.82, page 59, refers to entities and other individuals but the definition of entities includes individuals.

49. Part 6-1 provides for the establishment of an Advisory Board. Its function is to advise the Commissioner – but only when the Commissioner requests such advice. It cannot initiate matters. Nevertheless it is obligated to hold a minimum of four meetings each year (Section 72-5). We suggest that the function of the Board be broadened to enable it to also initiate

certain matters. This should enable it to receive comment from the Not-For-Profit Sector thus providing the Sector with a voice.

50. It is our view that the present reform process provides also an opportunity to reduce the forms of incorporation that exist possibly down to a single national form of incorporation such as a Charitable Corporation (somewhat similar to Aboriginal Corporations) and dispense with the existing forms of incorporation such as Associations, Co-operatives and companies limited by guarantee. While in UK and NZ Charitable Trusts have been the preferred charitable structure we are unsure whether Australia could follow that track for reasons of limitations of Commonwealth Constitutional powers.



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27 January 2012