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2010-2011-2012

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

**Australian Charities and Not-for-profits
Commission Bill 2012**

No. , 2012

(Treasury)

**A Bill for an Act to establish the Australian
Charities and Not-for-profits Commission and a
national regulatory framework for the
not-for-profit sector, and for related purposes**

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1 **A Bill for an Act to establish the Australian**
2 **Charities and Not-for-profits Commission and a**
3 **national regulatory framework for the**
4 **not-for-profit sector, and for related purposes**

5 The Parliament of Australia enacts:

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Chapter 1 Introduction

Part 1-1 Preliminary, objects and functions

Division 1 Preliminary

Section 1-5

1 **Chapter 1—Introduction**

2 **Part 1-1—Preliminary, objects and functions**

3 **Division 1—Preliminary**

4 **1-5 Short title**

5 This Act may be cited as the *Australian Charities and*
6 *Not-for-profits Commission Act 2012.*

7 **1-10 Commencement**

- 8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1-5 and 1-10 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Sections 1-15 to 210-20.	1 July 2012	1 July 2012

13 Note: This table relates only to the provisions of this Act as originally
14 enacted. It will not be amended to deal with any later amendments of
15 this Act.

- 16 (2) Any information in column 3 of the table is not part of this Act.
17 Information may be inserted in this column, or information in it
18 may be edited, in any published version of this Act.

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Introduction **Chapter 1**
Preliminary, objects and functions **Part 1-1**
Preliminary **Division 1**

Section 1-15

1 **1-15 Crown to be bound**

2 (1) This Act binds the Crown in each of its capacities.

3 (2) This Act does not make the Crown liable to a pecuniary penalty or
4 to be prosecuted for an offence.

5 **1-20 Extension to external Territories**

6 This Act extends to every external Territory.
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Chapter 1 Introduction

Part 1-1 Preliminary, objects and functions

Division 2 Objects, functions and application

Section 2-5

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2 **Division 2—Objects, functions and application**

3 **2-5 Object**

4 *Object of this Act*

- 5 (1) The object of this Act is to promote public trust and confidence in
6 not-for-profit entities that provide public benefits.

7 *Furthering the object of this Act*

- 8 (2) To further this object:

- 9 (a) this Act aims to:

- 10 (i) promote the good governance, accountability (to donors,
11 to governments and to the public generally) and
12 transparency of such entities (including through the
13 provision of educational information to them and the
14 provision of information to the public about them); and

- 15 (ii) minimise regulatory duplication and simplify such
16 entities' interactions with governments; and

- 17 (b) this Act establishes a process for registering and regulating
18 such entities.

19 Note: Other legislation of the Commonwealth, the States and the
20 Territories may confer concessions, grants and other support in
21 relation to such entities on the basis of their registration under
22 this Act.

23 **2-10 Functions of Commissioner**

24 This Act establishes the Commissioner of the ACNC (see
25 section 160-5). The Commissioner has the following functions:

- 26 (a) registering not-for-profit entities that provide public benefits;

- 27 (b) promoting the good governance, accountability (to donors, to
28 governments and to the public generally) and transparency of
29 such entities;

- 30 (c) providing, in order to further the object of this Act:

- 31 (i) educational information to such entities; and
-

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- 1 (ii) information about such entities to the public and to
2 governments (including through the Commissioner's
3 website);
4 (d) providing a point of contact with government for such
5 entities in order to minimise regulatory duplication and
6 simplify their interactions with governments;
7 (e) monitoring such entities, in order to further the object of this
8 Act;
9 (f) investigating such entities, in order to further the object of
10 this Act;
11 (g) enforcing this Act;
12 (h) cooperating with other Australian government authorities, in
13 order to further the object of this Act;
14 (i) any other function conferred by this Act or another Act (or an
15 instrument under this Act or another Act) on the
16 Commissioner.

17 **2-15 Constitutional limits**

- 18 The Commissioner may perform the functions, and exercise the
19 powers, that this Act confers on him or her only:
20 (a) where it is necessary in order to administer taxation laws; or
21 (b) in relation to entities that are:
22 (i) constitutional corporations; or
23 (ii) trusts, all the trustees of which are constitutional
24 corporations; or
25 (c) in, or for purposes relating to, a Territory (including in
26 relation to activities or parts of activities done solely within a
27 Territory); or
28 (d) for purposes relating to external affairs, including:
29 (i) by way of the performance of the Commissioner's
30 functions in a place outside Australia; or
31 (ii) in relation to activities done solely outside Australia; or
32 (e) for purposes relating to the granting of financial assistance to
33 a State; or
34 (f) for purposes relating to the executive power of the
35 Commonwealth; or

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Chapter 1 Introduction

Part 1-1 Preliminary, objects and functions

Division 2 Objects, functions and application

Section 2-15

- 1 (g) for purposes relating to matters incidental to the execution of
2 any of the legislative powers of the Parliament or the
3 executive power of the Commonwealth.

4 *Note to Division 2: Additional provisions will also be included to clarify*
5 *the operation of parts of the Bill (including Ch 4) having regard to the*
6 *constitutional basis of the Bill. These provisions will further elaborate on its*
7 *application in relation to particular entities and circumstances.*
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2 **Part 1-2—A Guide to this Act**

3 **Division 3—Guide**

4 **3-5 Guide**

5 *Background*

6 The not-for-profit sector plays a unique role in Australia and is
7 funded by donations from members of the public and by tax
8 concessions, grants and other support from Australian
9 governments.

10 This Act recognises that because of their unique role not-for-profit
11 entities must be accountable to donors, governments and to the
12 public more generally.

13 It is intended that this Act will promote public trust and confidence
14 in the not-for-profit sector by the establishment of a national
15 regulatory system that will promote the good governance,
16 accountability and transparency of not-for-profit entities.

17 *The Commissioner*

18 This Act establishes a national regulator for the not-for-profit
19 sector (including charities). The regulator is the Commissioner of
20 the Australian Charities and Not-for-profits Commission (the
21 *ACNC*).

22 The Commissioner of the ACNC will provide not-for-profit entities
23 with a point of contact with government and will provide them
24 with access to information about the sector and educational and
25 guidance materials (including through the Commissioner’s
26 website).

27 Other functions of the Commissioner include the following:

- 28 (a) registering not-for-profit entities;

Comment [A1]: How does this Act extinguish the requirement for registration with State Authorities such as NSW Office of Charities?

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Chapter 1 Introduction

Part 1-2 A Guide to this Act

Division 3 Guide

Section 3-5

- 1 (b) promoting the good governance, accountability and
- 2 transparency of such entities;
- 3 (c) monitoring not-for-profit entities to ensure compliance with
- 4 this Act;
- 5 (d) investigating not-for-profit entities to ensure compliance with
- 6 this Act;
- 7 (e) enforcing this Act;
- 8 (f) cooperating with other government entities, in order to
- 9 further the object of this Act.
- 10

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Registration of not-for-profit entities **Chapter 2**

Registration **Part 2-1**

Purpose of Part **Division 4**

Section 4-1

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Chapter 2—Registration of not-for-profit entities

Part 2-1—Registration

Division 4—Purpose of Part

4-1 Purpose of Part

- (1) Various Commonwealth laws provide benefits, including tax concessions, to not-for-profit entities that provide public benefits. It is the intention of the Parliament that many of these benefits only be available to entities in which the public can have trust and confidence because of the entities' good governance, accountability (to donors, to governments and to the public generally) and transparency.
- (2) **To this end, this Part provides for:**
 - (a) the registration of entities that provide public benefits; and
 - (b) the deregistration of registered entities in circumstances where public trust and confidence in the entities is or may be undermined.
- (3) Other Commonwealth laws provide for the benefits of registration.

Comment [A2]: This provision should be narrowed so that deregistration is contingent on registered entities breaching the Act, rather than being prefaced on subjective matters such as 'public trust and confidence'.

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Chapter 2 Registration of not-for-profit entities

Part 2-1 Registration

Division 5 Entitlement to registration

Section 5-10

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2 **Division 5—Entitlement to registration**

3 **5-10 Entitlement to registration**

- 4 (1) An entity that meets the requirements in subsection (1A) is
5 entitled:
- 6 (a) to registration as a type of registered entity, if it meets the
7 description of that type of registered entity in column 2 of the
8 table in subsection (3); and
- 9 (b) to registration as a subtype of registered entity, if:
- 10 (i) it meets the description of that subtype of registered
11 entity in column 3 of the table in subsection (3); and
- 12 (ii) it is entitled to registration as the type of registered
13 entity that corresponds to that subtype of registered
14 entity.
- 15 (1A) The requirements are as follows:
- 16 (a) the entity is a not-for-profit entity;
- 17 (b) the entity meets the governance requirements set out in the
18 governance section of this Act;
- 19 (c) the entity has an ABN;
- 20 (d) the entity has not previously been a registered entity;
- 21 (e) the entity is not an entity that:
- 22 (i) is a terrorist entity, criminal entity, outlaw entity or
23 similar entity; and
- 24 (ii) is prescribed in the regulations.
- 25 (2) To avoid doubt, an entity may be entitled to registration as:
- 26 (a) one or more types of registered entity; and
- 27 (b) one or more subtypes of registered entity.
- 28 (3) The table is as follows:
- 29

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Registration of not-for-profit entities **Chapter 2**

Registration **Part 2-1**

Entitlement to registration **Division 5**

Section 5-10

Entitlement to registration

Item	Type of registered entity	Subtype of registered entity
1	Charitable purpose	Public benevolent institution
2		Advancement of health
3		Advancement of education
4		Advancement of social and community welfare (including the prevention of poverty)
5		Advancement of religion
6		Advancement of culture (including Australian Indigenous culture and customs)
7		Advancement of natural environment
8		Prevention and relief of suffering of animals
9		Promotion and protection of civil and human rights
10		Protection and safety of the general public
11		Promotion of reconciliation, mutual respect and tolerance in Australia
12		Promotion of other purposes beneficial to the community
13	Promotion of Australian industry	Promotion of the development of aviation or tourism
14		Promotion of the development of agricultural resources
15		Promotion of the development of horticultural resources
16		Promotion of the development of industrial resources
17		Promotion of the development of manufacturing resources
18		Promotion of the development of pastoral resources

Comment [A3]: It is possible that some NFPs may fall outside these types and subtypes (or may not properly suit the prescribed definitions – for example, the Australian Institute of Company Directors). On this basis, perhaps the definition of public benefit should be broadened in the Bill.

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Chapter 2 Registration of not-for-profit entities

Part 2-1 Registration

Division 5 Entitlement to registration

Section 5-10

Entitlement to registration

Item	Type of registered entity	Subtype of registered entity
19		Promotion of the development of viticultural resources
20		Promotion of the development of aquacultural resources
21		Promotion of the development of fishing resources
22		Promotion of the development of Australian information and communications technology resources
23	Encouragement of community entertainment	Encouragement of animal racing
24		Encouragement of art
25		Encouragement of games or sport
26		Encouragement of literature
27		Encouragement of music or musical purposes
28	Scientific purpose	Not applicable
29	Advance and further the interest of employees or employers	Trade union
30		Advance and further the interest of employees (registered or recognised under the <i>Fair Work (Registered Organisations) Act 2009</i>)
31		Advance and further the interest of employers (registered or recognised under the <i>Fair Work (Registered Organisations) Act 2009</i>)
32	Community service purpose (except political or lobbying purpose)	Not applicable

Comment [A3]: It is possible that some NFPs may fall outside these types and subtypes (or may not properly suit the prescribed definitions – for example, the Australian Institute of Company Directors). On this basis, perhaps the definition of public benefit should be broadened in the Bill.

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2 **Division 10—Process of registration**

3 **Subdivision 10-A—Application of Subdivision 10-B to various**
4 **kinds of registration**

5 **10-5 Application of Subdivision 10-426-B to various kinds of**
6 **registration**

7 This Division applies separately in relation to each of these kinds
8 of registration:

- 9 (a) registration as a type of registered entity;
10 (b) registration as a subtype of registered entity.

11 **Subdivision 10-B—Process of registration**

12 **10-15 Applying for registration**

- 13 (1) An entity may apply to the Commissioner for registration.
14 (2) The application must be in the approved form.

15 **10-20 Dealing with an application for registration**

16 *Requiring further information or documents*

- 17 (1) The Commissioner may require an applicant to give the
18 Commissioner specified information, or a specified document, that
19 the Commissioner needs in order to decide whether the applicant is
20 entitled to registration.

21 *Treating application as being refused*

- 22 (2) After the time worked out under subsection (3), the applicant may
23 give the Commissioner written notice that the applicant wishes to
24 treat the application as having been refused, if the Commissioner
25 has not given the applicant before that time written notice that the
26 Commissioner has registered or refuses to register the applicant.

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Chapter 2 Registration of not-for-profit entities

Part 2-1 Registration

Division 10 Process of registration

Section 10-25

1 Note: Section 10-25 requires the Commissioner to give the applicant written
2 notice if the Commissioner registers or refuses to register the
3 applicant.

4 (3) The time is the end of the 60th day after the application was made.
5 However, if before that time the Commissioner requires the
6 applicant under subsection (1) to give information or a document,
7 the time is the later of the following (or either of them if they are
8 the same):

9 (a) the end of the 28th day after the last day on which the
10 applicant gives the Commissioner information or a document
11 he or she has required;

12 (b) the end of the 60th day after the application was made.

13 (4) If the applicant gives notice under subsection (2), section 10-35
14 operates as if the Commissioner has refused the application on the
15 day on which the notice is given.

16 Note: Section 10-35 lets the applicant object against refusal of an application
17 in the manner set out in Part IVC of the *Taxation Administration Act*
18 *1953*. That Part provides for review of the refusal objected against.

19 (5) The notice given by the applicant must be in the approved form.

20 **10-25 Notifying outcome of application for registration**

21 The Commissioner must give the applicant written notice if:

- 22 (a) the Commissioner registers the applicant; or
23 (b) the Commissioner refuses to register the applicant.

24 **10-30 Date of effect of registration**

25 The registration has effect from a date specified by the
26 Commissioner.

27 **10-35 Review of refusal of registration**

28 If the applicant is dissatisfied with the Commissioner's refusal to
29 register the applicant in accordance with the application, the
30 applicant may object against the refusal in the manner set out in
31 Part IVC of the *Taxation Administration Act 1953*.

32 Note: That Part provides for review of the refusal objected against.

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Registration of not-for-profit entities **Chapter 2**

Registration **Part 2-1**

Process of registration **Division 10**

Section 10-35

1 *Note: This section will be reviewed and amended when the review and*
2 *appeal provisions are drafted.*
3

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Chapter 2 Registration of not-for-profit entities

Part 2-1 Registration

Division 10 Process of registration

Section 10-55

1

2 **Subdivision 10-C—Revoking registration**

3 **10-55 Revoking registration**

- 4 (1) The Commissioner may revoke the registration of a registered
5 entity if the Commissioner is satisfied that any of the following
6 conditions are satisfied:
- 7 (a) the registered entity is not entitled to be registered;
 - 8 (b) the registered entity provided, in connection with its
9 application for registration, information that was false or
10 misleading in a material particular;
 - 11 (c) the registered entity has failed to comply with:
 - 12 (i) this Act or the regulations; or
 - 13 (ii) a direction given under Division 140;
 - 14 (d) the registered entity is insolvent, or is likely to become
15 insolvent at some future time;
 - 16 (e) the continuing registration of the registered entity may cause
17 harm to, or jeopardise, the public trust and confidence
18 mentioned in subsection 2-5(1) (Object of this Act).
- 19 (2) Section 459C of the *Corporations Act 2001* (presumption of
20 insolvency) has effect for the purposes of paragraph (1)(d).
- 21 (3) The revocation must be in writing.
- 22 (4) The revocation must specify the day on which the entity's
23 registration is taken to be revoked. The specified day must be:
- 24 (a) if the reason for the revocation is that the entity is not entitled
25 to be registered or that the registered entity provided, in
26 connection with its application for registration, information
27 that was false or misleading in a material particular:
 - 28 (i) the day on which the revocation is made; or
 - 29 (ii) a later day; or
 - 30 (iii) an earlier day (but not earlier than the day on which the
31 entity first ceased to be entitled); or
 - 32 (b) otherwise:

Comment [A4]: How does this registration fit in with the ATO ABN registration? To obtain an ABN and DGR Status, an organisation needs a constitution which is acceptable to the ATO. If then refused by ACNC, what happens with the original ATO registration? Catch 22.

Comment [A5]: This clause is not supported – it empowers the ACNC with pre-emptive and arbitrary authority and undermines the intent of the Bill.

Comment [A6]: This clause is not supported – it is vague and empowers the ACNC with pre-emptive and arbitrary authority and undermines the intent of the Bill.

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Registration of not-for-profit entities **Chapter 2**

Registration **Part 2-1**

Process of registration **Division 10**

Section 10-57

- 1 (i) the day on which the revocation is made; or
2 (ii) a later day.

3 (5) The Commissioner must give the entity written notice if the
4 Commissioner revokes its registration.

5 (6) The Commissioner may revoke the registration of an entity under
6 subsection (1) without having regard to the following:

7 (a) whether or not the Commissioner has issued a show cause
8 notice to the entity under section 10-62;

9 (b) if the Commissioner has issued such a notice to the entity—
10 whether or not the entity has responded to the notice.

11 **10-57 Day when the entity's registration is taken to be revoked**

12 (1) Subject to this section, the entity's registration is taken to be
13 revoked on the day specified in the revocation.

14 (2) Despite subsection (1), the revocation does not take effect until:

15 (a) unless paragraph (b) applies—60 days after the day on which
16 the revocation is made; or

17 (b) if the entity objects to the revocation under the relevant rules
18 within that 60 day period, and the objection is unsuccessful—
19 when the objection is resolved.

20 Example: The Commissioner makes a revocation on 1 March 2014, specifying
21 that the day on which the entity's registration is taken to be revoked is
22 1 February 2014. The entity objects to the revocation on 1 April 2014.
23 The objection is unsuccessful, and is resolved on 1 May 2014. Under
24 this section, the revocation takes effect on 1 May 2014, and the
25 entity's registration is taken to be revoked on 1 February 2014.

26 **10-60 Review of revocation of registration**

27 If the entity is dissatisfied with the revocation of its registration,
28 the entity may object against the revocation in the manner set out
29 in Part IVC of the *Taxation Administration Act 1953*.

30 Note: That Part provides for review of the revocation objected against.

31 *Note: This section will be reviewed and amended when the review and*
32 *appeal provisions are drafted.*

Comment [A7]: The ACNC should be required to show cause notice and should act within its power to seek a response prior to revoking a registration, except under extraordinary circumstances where this is not possible.

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Chapter 2 Registration of not-for-profit entities

Part 2-1 Registration

Division 10 Process of registration

Section 10-62

1 **10-62 Notice to registered entity to show cause**

2 (1) If the Commissioner believes on reasonable grounds that a
3 registered entity is not entitled to be registered, the Commissioner
4 **may** give a written notice (a *show cause notice*) to the registered
5 entity.

Comment [A8]: This should be **MUST**, otherwise the applicant does not know the reason for the decline.

6 (2) The show cause notice must:

- 7 (a) state the grounds on which the notice is given; and
8 (b) invite the registered entity to give the Commissioner, within
9 10 business days after the day the notice is given, a written
10 statement showing cause why the Commissioner should not
11 revoke the registration of the entity.

12 **Subdivision 10-D—Entries on Australian Business Register**

13 **10-65 Entries on Australian Business Register**

14 (1) If an entity is registered in accordance with this Division, the
15 Australian Business Registrar must enter in the Australian Business
16 Register a statement that the entity is so registered for a specified
17 period.

18 (1A) However, the registrar need only enter a statement if the registered
19 entity has also been endorsed to access a tax concession under
20 Division 426 in Schedule 1 to the *Taxation Administration Act*
21 *1953*.

22 (2) The Australian Business Registrar may remove the statement from
23 the Australian Business Register after the end of the period.

24 (3) The Australian Business Registrar must take reasonable steps to
25 ensure that a statement appearing in the Australian Business
26 Register under this section is true. For this purpose, the Registrar
27 may:

- 28 (a) change the statement; or
29 (b) remove the statement from the Register if the statement is not
30 true; or
31 (c) remove the statement from the Register and enter another
32 statement in the Register under this section.

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Registration of not-for-profit entities **Chapter 2**

Registration **Part 2-1**

Process of registration **Division 10**

Section 10-65

- 1 (4) Making, changing or removing an entry in the Australian Business
2 Register as required or permitted by this section does not
3 contravene section 180-15 or 180-20.
4

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Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 50 Record keeping

Section 50-5

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Chapter 3—Duties of registered entities

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Part 3-1—Duties of registered entities

4

Division 50—Record keeping

5

50-5 Registered entities must keep records

6

Registered entities must keep records

7

(1) A registered entity must keep financial records that:

8

(a) correctly record and explain its transactions and financial position and performance; and

9

(b) would enable true and fair financial statements to be prepared and audited or reviewed.

10

11

(2) A registered entity must also keep records that:

12

(a) correctly record and explain its operations and acts; and

13

(b) would enable the Commissioner to assess properly the entity's entitlement to be, or to remain, registered.

14

15

(3) The records must be:

16

(a) in English; or

17

(b) readily accessible and easily convertible into English.

18

19

Registered entities must retain records

20

(4) The registered entity must retain the records for 5 years after the transactions, operations or acts covered by the records are completed, unless the Commissioner notifies the entity that the entity does not need to retain the record.

21

22

23

24

Offence

25

(5) A registered entity commits an offence if the entity does not comply with this section.

26

27

Penalty: 30 penalty units.

Comment [A9]: The draft Bill should specify the value of penalty units for ease of reference. The relevant section of the Bill (Division 190) has not yet been drafted, denying stakeholders the opportunity to properly consider the implications of the Act for registered entities.

20

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Duties of registered entities **Chapter 3**

Duties of registered entities **Part 3-1**

Record keeping **Division 50**

Section 50-5

1 (6) Subsection (5) is an offence of strict liability.

2 Note: For strict liability, see section 6.1 of the *Criminal Code*.

3

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Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 55 Reporting

Section 55-5

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2 **Division 55—Reporting**

3 **Subdivision 55-A—Annual information statements**

4 **55-5 Registered entities must give annual information statements**

5 (1) A registered entity must give a statement (an *information*
6 *statement*) for a financial year to the Commissioner in the
7 approved form.

8 Note: The Commissioner may approve different approved forms for small,
9 medium and large registered entities.

10 (2) The registered entity must give the statement to the Commissioner
11 no later than 31 October in the following financial year.

12 Note: Section 196-55 allows the Commissioner to defer the time for giving
13 an approved form.

14 **Subdivision 55-B—Annual financial reports**

15 **55-10 Medium and large registered entities must give annual**
16 **financial reports**

17 (1) A medium registered entity or a large registered entity must give to
18 the Commissioner a financial report for a financial year.

19 (2) The registered entity must give the financial report to the
20 Commissioner no later than 31 October in the following financial
21 year.

22 **55-15 Contents of annual financial report**

23 A registered entity's *financial report* for a financial year consists
24 of:

- 25 (a) the registered entity's financial statements for the year; and
26 (b) the notes to the financial statements; and
27 (c) the responsible individuals' declaration about the statements
28 and notes.

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name.

Comment [A10]: This is too restrictive. ASIC deadline is end November for June financials. CCNSW does not have its financials ready until mid December for June year ends, as the yearly external audit is delayed so that audit fees are cheaper outside the July to September peak billing period. Consequently, finalisation of the financials is delayed, AGM is delayed, etc.

This clause should note the contents of Subdivision 55-E substituted accounting periods. An existing Entity or new registering Entities should be able to state their 'accounting period' and not have to apply to the ACNC Commissioner. Their financial report to be lodged no later than 4 months after the end of their financial period. This currently works well under the *Corporations Act 2001*.

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55-20 Financial statements and notes

- 1
- 2 (1) The *financial statements* for the financial year are the financial
- 3 statements in relation to the registered entity required by the
- 4 accounting standards.
- 5 (2) The *notes* to the financial statements are:
- 6 (a) disclosures required by the regulations; and
- 7 (b) notes required by the accounting standards; and
- 8 (c) any other information necessary to give a true and fair view
- 9 (see subsection (4)).
- 10 (3) The financial statements and notes must comply with the
- 11 accounting standards.
- 12 (4) The financial statements and notes must give a true and fair view
- 13 of the financial position and performance of the registered entity.

55-25 Responsible individuals' declaration

- 14
- 15 (1) The *responsible individuals' declaration* is a declaration by the
- 16 **responsible** individuals of the registered entity:
- 17 (a) whether, in their opinion, there are reasonable grounds to
- 18 believe that the registered entity will be able to pay its debts
- 19 as and when they become due and payable; and
- 20 (b) whether, in their opinion, the financial statements and notes
- 21 are in accordance with this Act.
- 22 (2) The declaration must be signed by a responsible individual who is
- 23 authorised to do so by the responsible individuals.

Comment [A11]: The definition of responsible individual in the dictionary directs the reader to this clause. This is a non explanatory loop.

55-30 Other requirements

- 24
- 25 The financial report must comply with any further requirements in:
- 26 (a) the regulations; or
- 27 (b) a legislative instrument made by the Commissioner for the
- 28 purposes of this paragraph;
- 29 unless the Commissioner, by notice published on the ACNC's
- 30 website, provides otherwise.

Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 55 Reporting

Section 55-35

1 **55-35 Medium and large registered entities must have annual**
2 **financial reports audited**

- 3 (1) A medium registered entity must:
4 (a) unless the Commissioner, by written notice given to the
5 registered entity, provides that this paragraph does not
6 apply—have its financial report for a financial year reviewed;
7 or
8 (b) do both of the following:
9 (i) have its financial report for a financial year audited in
10 accordance with this Subdivision;
11 (ii) obtain an auditor’s report.
- 12 (2) A large registered entity must:
13 (a) have its financial report for a financial year audited in
14 accordance with this Subdivision; and
15 (b) obtain an auditor’s report.

16 **55-40 Audit**

- 17 (1) The audit or review must be undertaken by a registered company
18 auditor (within the meaning of the *Corporations Act 2001*).
- 19 (2) In the case of a review of the financial report of a medium
20 registered entity, an individual who is taken to be a registered
21 company auditor under section 324BE of the *Corporations Act*
22 *2001* is taken to be a registered company auditor for the purposes
23 of this Subdivision.
- 24 Note: Section 324BE of the *Corporations Act 2001* applies to certain
25 members of professional accounting bodies.
- 26 (3) The auditor must form an opinion about:
27 (a) whether the financial report is in accordance with this Act;
28 and
29 (b) whether the auditor has been given all information,
30 explanation and assistance necessary for the conduct of the
31 audit or review; and

Comment [A12]: It should be noted that in making requirements of Auditors, the Act creates an additional burden for Audit companies, which could increase the cost of financial services to NFPs.

Comment [A13]: This requirement should not duplicate audits performed already under the Corp Act and increase external audit costs.

- 1 (c) whether the registered entity has kept financial records
2 sufficient to enable a financial report to be prepared and
3 audited or reviewed; and
4 (d) whether the registered entity has kept other records as
5 required by this Act.

6 **55-45 Audit to be conducted in accordance with auditing standards**

- 7 (1) The auditor must conduct the audit or review in accordance with
8 the auditing standards.

9 *Offence*

- 10 (2) The auditor commits an offence if the auditor does not comply
11 with this section.

12 Penalty: 50 penalty units.

- 13 (3) Subsection (2) is an offence of strict liability.

14 Note: For strict liability, see section 6.1 of the *Criminal Code*.

15 **55-50 Audit working papers to be retained for 7 years**

- 16 (1) The auditor must retain all audit or review working papers as set
17 out under section 307B of the *Corporations Act 2001*.

- 18 (2) The auditor commits an offence if the auditor does not comply
19 with this section.

20 Penalty: 50 penalty units.

- 21 (3) Subsection (2) is an offence of strict liability.

22 Note: For strict liability, see section 6.1 of the *Criminal Code*.

23 **55-55 Auditor's independence declaration**

- 24 (1) The auditor must give to the responsible individuals of the
25 registered entity:

- 26 (a) a written declaration that, to the best of the auditor's
27 knowledge and belief, there have been:

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Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 55 Reporting

Section 55-55

- 1 (i) no contraventions of the auditor independence
2 requirements in relation to the audit or review; and
3 (ii) no contraventions of any applicable code of professional
4 conduct in relation to the audit or review; or
5 (b) a written declaration that, to the best of the individual
6 auditor's knowledge and belief, the only contraventions of:
7 (i) the auditor independence requirements in relation to the
8 audit or review; or
9 (ii) any applicable code of professional conduct in relation
10 to the audit or review;
11 are those contraventions details of which are set out in the
12 declaration.
- 13 (2) The auditor must give the declaration to the responsible individuals
14 when the auditor gives the auditor report to the responsible
15 individuals.
- 16 (3) The auditor must sign the declaration.
- 17 *Self-incrimination*
- 18 (4) The auditor is not excused from giving the declaration on the
19 ground that giving the declaration might tend to incriminate the
20 auditor or expose the auditor to a penalty.
- 21 (5) However, neither:
22 (a) the information included in the declaration; nor
23 (b) any information, document or thing obtained as a direct or
24 indirect consequence of including the information in the
25 declaration;
26 is admissible in evidence against the auditor in any criminal
27 proceedings, or in any proceedings that would expose the auditor
28 to a penalty, other than proceedings for an offence against:
29 (c) subsection (6); or
30 (d) section 137.1 or 137.2 of the *Criminal Code* (false or
31 misleading information or documents) in relation to the
32 declaration.

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Duties of registered entities **Chapter 3**

Duties of registered entities **Part 3-1**

Reporting **Division 55**

Section 55-60

1 *Offence*

2 (6) The auditor commits an offence if the auditor does not comply
3 with this section.

4 Penalty: 10 penalty units.

5 (7) Subsection (6) is an offence of strict liability.

6 Note: For strict liability, see section 6.1 of the *Criminal Code*.

7 **55-60 Auditor's report on annual financial report**

8 (1) This section applies in the case of an audit.

9 (2) The auditor must report to the responsible individuals of the
10 registered entity on whether the auditor is of the opinion that the
11 financial report is in accordance with this Act. If the auditor is not
12 of that opinion, the auditor's report must say why.

13 (3) If the auditor is of the opinion that the financial report does not
14 comply with this Act, the auditor's report must, to the extent it is
15 practicable to do so, quantify the effect that non-compliance has on
16 the financial report. If it is not practicable to quantify the effect
17 fully, the report must say why.

18 (4) The auditor's report must describe:
19 (a) any defect or irregularity in the financial report; and
20 (b) any deficiency, failure or shortcoming in respect of the
21 matters referred to in paragraph 55-40(2)(b), (c) or (d).

22 (5) The auditor's report must include any statements or disclosures
23 required by the auditing standards.

24 *Offence*

25 (6) The auditor commits an offence if the auditor does not comply
26 with this section.

27 (7) Subsection (5) is an offence of strict liability.

28 Note: For strict liability, see section 6.1 of the *Criminal Code*.

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Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 55 Reporting

Section 55-65

1 **55-65 Auditor's power to obtain information**

2 The auditor:

- 3 (a) has a right of access at all reasonable times to the books of
4 the registered entity; and
5 (b) may require any responsible individual of the registered
6 entity to give the auditor information, explanations or other
7 assistance for the purposes of the audit or review.

8 A requirement under paragraph (b) must be a reasonable one.

9 **55-70 Reporting to the Commissioner**

10 (1) The auditor commits an offence if:

- 11 (a) the auditor is aware of circumstances that:
12 (i) the auditor has reasonable grounds to suspect amount to
13 a contravention of this Act; or
14 (ii) amount to an attempt, in relation to the audit or review,
15 by any person to unduly influence, coerce, manipulate
16 or mislead the auditor; or
17 (iii) amount to an attempt, by any person, to otherwise
18 interfere with the proper conduct of the audit or review;
19 and
20 (b) if subparagraph (a)(i) applies:
21 (i) the contravention is a significant one; or
22 (ii) the contravention is not a significant one and the auditor
23 believes that the contravention has not been or will not
24 be adequately dealt with by commenting on it in the
25 auditor's report or bringing it to the attention of the
26 responsible individuals; and
27 (c) the auditor does not notify the Commissioner in writing of
28 those circumstances as soon as practicable, and in any case
29 within 28 days, after the auditor becomes aware of those
30 circumstances.

31 Penalty: 50 penalty units.

32 (2) Subsection (1) is an offence of strict liability.

33 Note: For strict liability, see section 6.1 of the *Criminal Code*.

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Duties of registered entities **Chapter 3**

Duties of registered entities **Part 3-1**

Reporting **Division 55**

Section 55-70

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Significant contraventions

- (3) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:
- (a) the level of penalty provided for in relation to the contravention; and
 - (b) the effect that the contravention has, or may have, on:
 - (i) the overall financial position of the registered entity; or
 - (ii) the adequacy of the information available about the overall financial position of the registered entity; and
 - (c) any other relevant matter.

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Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 55 Reporting

Section 55-75

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2 **Subdivision 55-C—Errors in information statements and**
3 **financial reports**

4 **55-75 Errors in information statements and financial reports**

5 (1) This section applies if:

6 (a) a registered entity gives its information statement or financial
7 report for a financial year to the Commission at a time; and

8 (b) after that time, the registered entity identifies a material error
9 in the statement or report.

10 (2) The registered entity must give a corrected statement or report to
11 the Commissioner within 28 days after the registered entity
12 identifies the error.
13

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2 **Subdivision 55-D—Additional reporting requirements**

3 **55-80 Additional reporting requirements—particular registered**
4 **entity**

5 *Additional report or additional reporting requirements*

6 (1) The Commissioner may:

7 (a) determine, in writing, that a particular registered entity must
8 prepare a report in addition to any other statement or report
9 the registered entity is required to prepare; or

10 (b) determine, in writing, that a particular registered entity must:

11 (i) include particular additional information in an
12 information statement or financial report; or

13 (ii) meet particular additional requirements in relation to the
14 manner in which an information statement or financial
15 report is to be prepared.

16 Note: This section applies to all registered entities.

17 (2) A determination under subsection (1) is not a legislative
18 instrument.

19 *Additional reports*

20 (3) A determination under paragraph (1)(a) must specify:

21 (a) the information to be included in the report; and

22 (b) any other requirements to be met in relation to the manner in
23 which the report is prepared.

24 (4) A determination under paragraph (1)(a) may require the report to
25 be prepared:

26 (a) for a particular period or periods; or

27 (b) in relation to circumstances as they exist as at a particular
28 date or dates.

29 This subsection does not limit subsection (3).

Comment [A14]: In exercising any power to request additional reports from NFPs, the Commissioner should be obligated to show cause why this additional information is required and how it relates to compliance with this Bill.

Comment [A15]: In exercising any power to request additional reports from NFPs, the Commissioner should be obligated to show cause why this additional information is required and how it relates to compliance with this Bill.

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Chapter 3 Duties of registered entities

Part 3-1 Duties of registered entities

Division 55 Reporting

Section 55-85

1 (5) The determination may require the report to be prepared for all
2 periods of a particular kind that start or end on or after a date
3 specified in the determination. This subsection does not limit
4 subsection (3).

5 *Determination*

6 (6) A determination under subsection (1) may be in respect of a past or
7 future period but if it is in respect of a past period, the
8 determination must be made no later than 6 years after the end of
9 that period.

10 (7) The Commissioner must give the registered entity written notice of
11 the making of the determination.

12 **55-85 Additional reporting requirements—classes of registered**
13 **entities**

14 *Additional reports or additional reporting requirement*

15

- 16 (1) **The Commissioner may:**
- 17 (a) make a determination in writing requiring a particular class
18 of registered entities to prepare a report in addition to any
19 information statement or financial report the entities are
20 required to prepare; or
 - 21 (b) make a determination in writing requiring a particular class
22 of registered entities to:
 - 23 (i) include particular additional information in an
24 information statement or financial report; or
 - 25 (ii) meet particular additional requirements in relation to the
26 manner in which an information statement or financial
27 report is prepared.

28 (2) A determination under subsection (1) is a legislative instrument.

29 *Additional reports*

30 (3) A determination under paragraph (1)(a) must specify:

Comment [A16]: There is no definition of class.

Comment [A17]: These additional requirements will add administrative burden to the sector – surely not the aim of the reforms?

Comment [A18R17]: The Commissioner should be required to show cause for such a determination if these additional requirements are above and beyond generally accepted Accounting Standards.

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Duties of registered entities **Chapter 3**

Duties of registered entities **Part 3-1**

Reporting **Division 55**

Section 55-85

- 1 (a) the information to be included in the report; and
2 (b) any other requirements to be met in relation to the manner in
3 which the report is prepared.
- 4 (4) A determination under paragraph (1)(a) may require the report to
5 be prepared:
6 (a) for a particular period or periods; or
7 (b) in relation to circumstances as they exist as at a particular
8 date or dates.
- 9 This subsection does not limit subsection (3).
- 10 (5) The determination may require the report to be prepared for all
11 periods of a particular kind that start or end on or after a date
12 specified in the determination. This subsection does not limit
13 subsection (4).

14 *Determinations*

- 15 (6) A determination under subsection (1):
16 (a) may be expressed to be subject to conditions; and
17 (b) may be in respect of a past or future period but if it is in
18 respect of a past period, the determination must be made no
19 later than 6 years after the end of that period.
20

Comment [A19]: It's understood that the ATO requires the current fiscal year plus 3 completed years. So term s/be same as ATO, otherwise additional storage costs are incurred.

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Subdivision 55-E—Substituted accounting periods

55-90 Commissioner may approve a different accounting period

- (1) The Commissioner may allow a registered entity to adopt an accounting period which is a period of 12 months ending on a day other than 30 June (that is, a 12-month period that does not align with the financial year), if the registered entity applies to the Commissioner in the approved form.
- (2) If the registered entity adopts such an accounting period, this Division applies in relation to a financial year that starts after the entity adopts the new accounting period as if:
 - (a) each reference in this Division (including this section, but not including this paragraph) to the financial year were a reference to the accounting period that starts during the financial year; and
 - (b) the reference in subsection 55-5(2) to 31 October were a reference to the last day of the fourth month after the end of the accounting period.
- (3) The Commissioner may provide whatever directions are reasonably necessary and appropriate to transition a registered entity from one accounting period to another. The directions must be in writing and given to the registered entity.

Comment [A20]: This requirement for an application and approval implies an additional unnecessary administrative burden on NFPs using non-financial year accounting periods which are otherwise acceptable under the Corporations Act 2001.

Comment [A21]: NFPs with well-established accounting regimes using non-financial year reporting timelines should not be required by the Commissioner to transition from one accounting period to another without due cause.

This would be an unreasonable requirement of a NFP and would create very significant administrative work for no benefits to the NFP. This Bill should reflect the same flexibility the *Corporations Act 2001* provides entities.

Chapter 4—Regulatory powers of the ACNC

Part 4-1—Regulatory powers of the ACNC

Division 100—Australian Charities and Not-for-profits Register

100-10 Commissioner to maintain Australian Charities and Not-for-profits Register

- (1) The Commissioner is to maintain a Register (known as the Australian Charities and Not-for-profits Register) in which the Commissioner includes the following:
- (a) the name of each registered entity;
 - (b) the name of each former registered entity;
 - (c) the contact details of each registered entity;
 - (d) the contact details of each former registered entity;
 - (e) the ABN of each registered entity;
 - (f) the ABN of each former registered entity;
 - (g) the types and subtypes under which each registered entity is registered;
 - (h) the types and subtypes under under which each former registered entity was registered;
 - (j) the date of effect of the each registration of each registered entity;
 - (k) the date of effect of the each registration of each former registered entity;
 - (l) the following details in respect of each **responsible** individual for each registered entity:
 - (i) **the qualifications of the responsible individual in relation to the registered entity;**
 - (ii) the position held by the responsible individual in relation to the registered entity;
 - (iii) the name of each responsible individual;

Comment [A22]: What does this mean?

Comment [A23]: This level of detail should not be included on the Register.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 100 Australian Charities and Not-for-profits Register

Section 100-20

- 1 (m) the governing rules of each registered entity;
2 (n) the details of each warning (if any) issued to each registered
3 entity by the Commissioner;
4 (o) financial reports;
5 (p) information statements;
6 (q) any other information relating to each registered entity that
7 the Commissioner considers reasonably necessary for the
8 purposes of administering this Act.
- 9 (2) The Register may be maintained by electronic means.
- 10 (3) The Register is to be made available for inspection on the internet.

11 Note: The Commissioner can make protected Commission information
12 available to the public only in accordance with Division 180.

13 **100-20 Commissioner may withhold or remove information from**
14 **Register**

- 15 (1) The Commissioner may decline to include information on the
16 Register, or remove information from the Register, if the
17 Commissioner considers that:
18 (a) the information:
19 (i) is commercially sensitive; or
20 (ii) has the potential to cause detriment to the registered
21 entity (or former registered entity) to which it relates, or
22 to an individual; or
23 (b) the information is likely to cause confusion or mislead the
24 public; or
25 (c) the information is inaccurate or likely to mislead; or
26 (d) the information is likely to offend a reasonable person; or
27 (e) the information raises public safety concerns; or
28 (f) if the regulations specify requirements for the purposes of
29 this paragraph—those requirements are satisfied.
- 30 (2) However, the Commissioner may include the information on the
31 Register, or decline to remove information from the Register, if the
32 Commissioner considers that the public interest in the Register

Comment [A24]: Further consultation is required to ensure that an online Register does not unfairly advantage or disadvantage competing NFPs.

Comment [A25]: The Commissioner can make protected Commission information available to the public only in accordance with Division 180.

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Regulatory powers of the ACNC **Chapter 4**

Regulatory powers of the ACNC **Part 4-1**

Investigation powers **Division 120**

Section 120-10

1 including the information outweighs the likely adverse effect of the
2 relevant factor or factors set out in paragraphs (1)(a) to (f).

3 **Division 120—Investigation powers**

4 **Subdivision 120-A—Investigation powers**

5 **120-10 Commissioner’s power**

6 (1) The Commissioner may by notice in writing require an entity to do
7 all or any of the following:

8 (a) to give the Commissioner any information that the
9 Commissioner requires for the purpose of the administration
10 or application of this Act in relation to the entity or any other
11 entity;

12 (b) to attend and give evidence before the Commissioner, or an
13 individual authorised by the Commissioner, for the purpose
14 of the administration or application of this Act in relation to
15 the entity or any other entity;

16 (c) to produce to the Commissioner any documents in the
17 entity’s custody or under the entity’s control for the purpose
18 of the administration or application of this Act in relation to
19 the entity or any other entity.

20 Note: Failing to comply with a direction can be an offence against
21 section 120-20.

22 (2) The Commissioner may require the information or evidence:

23 (a) to be given on oath or affirmation; and

24 (b) to be given orally or in writing.

25 For that purpose, the Commissioner or an ACNC officer may
26 administer an oath or affirmation.

27 (2A) An entity that is required to produce a document in the entity’s
28 custody for the purpose of paragraph (1)(c) may, if the
29 Commissioner consents, provide the Commissioner with a copy of
30 the document certified by an individual before whom a statutory
31 declaration can be made.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 120 Investigation powers

Section 120-20

1 *Scales of expenses*

2 (3) The regulations may prescribe scales of expenses to be allowed to
3 entities required to attend before the Commissioner or an officer.

4 *No self-incrimination*

5 (4) An individual is not required to give information in accordance
6 with a requirement covered by paragraph (1)(a), (b) or (c) if the
7 information might tend to incriminate the individual or expose the
8 individual to a penalty.

9 **120-20 Failure to comply**

10 (1) An entity who refuses or fails to comply with a requirement under
11 section 120-10 commits an offence.

12 Penalty: 30 penalty units.

13 (2) An offence under subsection (1) is an offence of strict liability.

14 Note: For strict liability, see section 6.1 of the *Criminal Code*.

15 (3) Subsection (1) does not apply to the extent that the entity is not
16 capable of complying with the relevant requirement.

17 Note: A defendant bears an *evidential burden* in relation to the matters in
18 subsection (3): see subsection 13.3(3) of the *Criminal Code*.

19 **Subdivision 120-B—Investigation powers**

20 **120-100 General powers of investigation**

21 (1) The Commissioner may make such investigation as he or she
22 thinks expedient for the due administration of this Act, if he or she
23 has reason to suspect that there may have been committed:

24 (a) a contravention of this Act; or

25 (b) a contravention of an Australian law, that is a contravention
26 that:

27 (i) concerns the management or affairs of a registered
28 entity; or

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Investigation powers **Division 120**

Section 120-100

1 (ii) involves fraud or dishonesty by a responsible individual
2 of a registered entity.

3 Note: This section does not restrict or limit the Commissioner's ability to
4 undertake general compliance and monitoring activities.

5 (2) On completion of an investigation, the Commissioner must:

6 (a) prepare a written report of the results of the investigation;
7 and

8 (b) give a copy of the report to the registered entity.

9 Note: The Commissioner may publish a copy of the report on the ACNC
10 website.
11

Comment [A26]: Registered entities should be able to apply to the Commissioner for the information not to be published on the ACNC website if the information in such a report is commercially sensitive or has the potential to cause detriment to the registered entity (or former registered entity), or if the information will unjustifiably erode confidence and trust in the NFP sector.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 120 Investigation powers

Section 120-200

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2 **Subdivision 120-C—Warnings**

3 **120-200 Commissioner may issue formal warning**

4 (1) Subsection (2) applies if the Commissioner has reasonable grounds
5 to believe that:

6 (a) a registered entity, or a responsible individual in respect of a
7 registered entity, has contravened:

8 (i) a provision of this Act; or

9 (ii) an Australian law that relates to the object of this Act;
10 or

11 (b) there has been misconduct or mismanagement in the
12 administration of a registered entity.

Comment [A27]: How is this defined?

13 (2) The Commissioner may, by written notice given to the registered
14 entity, and to each responsible individual in respect of that
15 registered entity:

16 (a) inform the registered entity of the circumstances in
17 paragraphs (1)(a) and (1)(b); and

18 (b) warn the registered entity of the action that may be taken
19 under this Act in response to a contravention of this Act.

20 Note: The Commissioner may publish a copy of the notice on the ACNC
21 website.

Comment [A28]: Registered entities should be able to apply to the Commissioner for the information not to be published on the ACNC website if the information in such a report is commercially sensitive or has the potential to cause detriment to the registered entity (or former registered entity), or if the information will unjustifiably erode confidence and trust in the NFP sector.

22 **Subdivision 120-D—Authority to enter premises and inspection**
23 **powers**

24 **120-410 ACNC officer may enter premises by consent or under a**
25 **warrant**

26 (1) For the purpose of:

27 (a) determining whether this Act has been, or is being, complied
28 with; or

29 (b) substantiating information provided under this Act;
30 an ACNC officer may:

31 (c) enter any premises; and

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Regulatory powers of the ACNC **Chapter 4**

Regulatory powers of the ACNC **Part 4-1**

Investigation powers **Division 120**

Section 120-415

- 1 (d) exercise the inspection powers set out in section 120-415.
- 2 (2) However, an ACNC officer is not authorised to enter the premises
3 unless:
- 4 (a) the occupier of the premises has consented to the entry by the
5 ACNC officer who has shown his or her identity card if
6 required by the occupier; or
- 7 (b) the entry is made under an inspection warrant.
- 8 Note: If entry to the premises is with the occupier's consent, the ACNC
9 officer must leave the premises if the consent ceases to have effect:
10 see section 120-435.
- 11 (3) The occupier of the premises entered or proposed to be entered by
12 an ACNC officer must provide all reasonable facilities and
13 assistance for the effective exercise of powers under this section.

14 **120-415 Inspection powers of ACNC officers**

- 15 (1) The following are the *inspection powers* that an ACNC officer
16 may exercise in relation to premises under section 120-410:
- 17 (a) the power to search the premises and any thing on the
18 premises;
- 19 (b) the power to examine any activity conducted on the premises;
- 20 (c) the power to inspect, examine, take measurements of, take a
21 sample of or conduct tests on any thing on the premises;
- 22 (d) the power to make any still or moving image or any
23 recording of the premises or any thing on the premises;
- 24 (e) the power to inspect any document on the premises;
- 25 (f) the power to take extracts from, or make copies of, any such
26 document;
- 27 (g) the power to take onto the premises such equipment and
28 materials as the ACNC officer requires for the purpose of
29 exercising powers in relation to the premises;
- 30 (h) the powers set out in subsections (2), (3) and (5).

31 *Operating electronic equipment*

- 32 (2) The *inspection powers* include the power to operate electronic
33 equipment on the premises to see whether:
-

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 120 Investigation powers

Section 120-415

- 1 (a) the equipment; or
2 (b) a disk, tape or other storage device that:
3 (i) is on the premises; and
4 (ii) can be used with the equipment or is associated with it;
5 contains information that is relevant to:
6 (c) determining whether this Act has been, or is being, complied
7 with; or
8 (d) substantiating information provided under this Act.
- 9 (3) The **inspection powers** include the following powers in relation to
10 information described in subsection (2) found in the exercise of the
11 power under that subsection:
12 (a) the power to operate electronic equipment on the premises to
13 put the information in documentary form and remove the
14 documents so produced from the premises;
15 (b) the power to operate electronic equipment on the premises to
16 transfer the information to a disk, tape or other storage device
17 that:
18 (i) is brought to the premises for the exercise of the power;
19 or
20 (ii) is on the premises and the use of which for that purpose
21 has been agreed in writing by the occupier of the
22 premises;
23 and remove the disk, tape or other storage device from the
24 premises.
- 25 (4) An ACNC officer may operate electronic equipment as mentioned
26 in subsection (2) or (3) only if he or she believes on reasonable
27 grounds that the operation of the equipment can be carried out
28 without damage to the equipment.
- 29 *Securing things if entry to premises is under an inspection warrant*
- 30 (5) If entry to the premises is under an inspection warrant, the
31 **inspection powers** include the power to secure a thing for a period
32 not exceeding 24 hours if:
33 (a) the thing is found during the exercise of inspection powers on
34 the premises; and

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Regulatory powers of the ACNC **Chapter 4**

Regulatory powers of the ACNC **Part 4-1**

Investigation powers **Division 120**

Section 120-435

- 1 (b) an ACNC officer believes on reasonable grounds that:
2 (i) the thing affords evidence of the commission of an
3 offence against this Act or of an offence against the
4 *Crimes Act 1914* or the *Criminal Code* that relates to
5 this Act; and
6 (ii) it is necessary to secure the thing in order to prevent it
7 from being concealed, lost or destroyed before a warrant
8 to seize the thing is obtained; and
9 (iii) the circumstances are serious and urgent.
- 10 (6) If an ACNC officer believes on reasonable grounds that the thing
11 needs to be secured for more than 24 hours, he or she may apply to
12 a magistrate for an extension of that period.
- 13 (7) The ACNC officer must give notice to the occupier of the
14 premises, or another individual who apparently represents the
15 occupier, of his or her intention to apply for an extension. The
16 occupier or other individual is entitled to be heard in relation to
17 that application.
- 18 (8) The provisions of this Division relating to the issue of inspection
19 warrants apply, with such modifications as are necessary, to the
20 issue of an extension.
- 21 (9) The 24 hour period:
22 (a) may be extended more than once; and
23 (b) must not be extended more than 3 times.

24 **Subdivision 120-E—Obligations and incidental powers of**
25 **ACNC officers**

26 **120-435 Consent**

- 27 (1) An ACNC officer must, before obtaining the consent of an
28 occupier of premises for the purposes of paragraph 120-410(2)(a),
29 inform the occupier that the occupier may refuse consent.
- 30 (2) A consent has no effect unless the consent is voluntary.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 120 Investigation powers

Section 120-440

- 1 (3) A consent may be expressed to be limited to entry during a
2 particular period. If so, the consent has effect for that period unless
3 the consent is withdrawn before the end of that period.
- 4 (4) A consent that is not limited as mentioned in subsection (3) has
5 effect until the consent is withdrawn.
- 6 (5) If an ACNC officer entered premises because of the consent of the
7 occupier of the premises, the ACNC officer, and any individual
8 assisting the ACNC officer, must leave the premises if the consent
9 ceases to have effect.

10 **120-440 Announcement before entry under warrant**

- 11 (1) Before entering premises under an investigation warrant, an ACNC
12 officer must:
- 13 (a) announce that he or she is authorised to enter the premises;
14 and
- 15 (b) show his or her identity card to the occupier of the premises,
16 or to another individual who apparently represents the
17 occupier, if the occupier or other individual is present at the
18 premises; and
- 19 (c) give any individual at the premises an opportunity to allow
20 entry to the premises.
- 21 (2) However, an ACNC officer is not required to comply with
22 subsection (1) if the ACNC officer believes on reasonable grounds
23 that immediate entry to the premises is required:
- 24 (a) to ensure the safety of an individual; or
25 (b) to ensure that the effective execution of the warrant is not
26 frustrated.
- 27 (3) If:
- 28 (a) an ACNC officer does not comply with subsection (1)
29 because of subsection (2); and
30 (b) the occupier of the premises, or another individual who
31 apparently represents the occupier, is present at the premises;

Comment [A29]: Workplace Health & Safety is not the responsibility of the ACNC; this is covered by the new Work Health and Safety Act

Comment [A30]: In these circumstances only suitably experienced authorities should be empowered to enter a premises, such as the police.

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Regulatory powers of the ACNC **Chapter 4**

Regulatory powers of the ACNC **Part 4-1**

Investigation powers **Division 120**

Section 120-445

1 the ACNC officer must show his or her identity card to the
2 occupier or other individual as soon as practicable after entering
3 the premises.

4 **120-445 ACNC officer to be in possession of warrant**

5 If an inspection warrant is being executed in relation to premises,
6 an ACNC officer executing the warrant must be in possession of
7 the warrant or a copy of the warrant.

8 **120-450 Details of warrant etc. to be given to occupier**

9 If:

- 10 (a) an inspection warrant is being executed in relation to
11 premises; and
12 (b) the occupier of the premises, or another individual who
13 apparently represents the occupier, is present at the premises;
14 an ACNC officer executing the warrant must, as soon as
15 practicable:
16 (c) make a copy of the warrant available to the occupier or other
17 individual (which need not include the signature of the
18 magistrate who issued it); and
19 (d) inform the occupier or other individual of the rights and
20 responsibilities of the occupier or other individual under this
21 Division.

22 **Subdivision 120-F—Powers of magistrates**

23 **120-460 Application for warrant**

- 24 (1) An ACNC officer may apply to a magistrate for a warrant under
25 this section in relation to premises.

26 *Issue of warrant*

- 27 (2) The magistrate may issue the warrant if the magistrate is satisfied,
28 by information on oath or affirmation, that there are reasonable
29 grounds for suspecting that there is, or there may be within the next
30 72 hours, evidential material on the premises.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 120 Investigation powers

Section 120-470

- 1 (3) However, the ACNC officer must not issue the warrant unless the
2 magistrate or some other person has given to the magistrate, either
3 orally or by affidavit, such further information (if any) as the
4 magistrate requires concerning the grounds on which the issue of
5 the warrant is being sought.

6 *Content of warrant*

- 7 (4) The warrant must:
- 8 (a) describe the premises to which the warrant relates; and
 - 9 (b) state that the warrant is issued under this Division; and
 - 10 (c) specify the kinds of evidential material that are to be
11 searched for under the warrant; and
 - 12 (d) state that the evidential material specified may be seized
13 under the warrant; and
 - 14 (e) state that any thing found in the course of executing the
15 warrant, that the ACNC officer executing the warrant
16 believes on reasonable grounds to be evidence of the
17 contravention of a related provision, may be seized under the
18 warrant; and
 - 19 (f) name one or more ACNC officer(s); and
 - 20 (g) authorise the ACNC officer(s) named in the warrant:
 - 21 (i) to enter the premises; and
 - 22 (ii) to exercise the powers set out in this Part in relation to
23 the premises; and
 - 24 (h) state whether entry is authorised to be made at any time of
25 the day or during specified hours of the day; and
 - 26 (i) specify the day (not more than 1 week after the issue of the
27 warrant) on which the warrant ceases to be in force.

28 **120-470 Powers of magistrates**

29 *Powers conferred personally*

- 30 (1) A power conferred on a magistrate by this Part is conferred on the
31 magistrate:
- 32 (a) in a personal capacity; and
 - 33 (b) not as a court or a member of a court.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Investigation powers **Division 120**

Section 120-470

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Powers need not be accepted

(2) The magistrate need not accept the power conferred.

Protection and immunity

(3) A magistrate exercising a power conferred by this Part has the same protection and immunity as if he or she were exercising the power:

- (a) as the court of which the magistrate is a member; or
- (b) as a member of the court of which the magistrate is a member.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 140 Commissioner's power to give directions

Section 140-10

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2 **Division 140—Commissioner's power to give directions**

3 **Subdivision 140-A—Commissioner's power to give directions**

4 **140-10 Commissioner may give directions in certain circumstances**

- 5 (1) The Commissioner may give a registered entity a direction of a
6 kind specified in subsection 140-15(1) if the Commissioner has
7 reason to believe that:
- 8 (a) the registered entity has contravened, or is likely to
9 contravene, a provision of:
 - 10 (i) this Act; or
 - 11 (ii) any other Australian law that relates to the object of this
12 Act; or
 - 13 (b) the direction is necessary to advance the purpose for which
14 the registered entity is registered; or
 - 15 (c) the registered entity is conducting its affairs in an improper
16 or financially unsound way; or
 - 17 (d) the direction is otherwise necessary to promote the object of
18 this Act.
- 19 (2) The direction must:
- 20 (a) be given by notice in writing to the registered entity; and
 - 21 (b) specify the ground or grounds referred to in subsection (1) on
22 the basis of which the direction is given.

23 **140-15 Kinds of direction**

- 24 (1) The kinds of direction that the registered entity may be given are
25 directions to do any one or more of the following:
- 26 (a) to comply with the whole or a part of:
 - 27 (i) this Act; or
 - 28 (ii) any other Australian law that relates to the object of this
29 Act;
 - 30 (b) to ensure a responsible individual of the registered entity
31 does not take part in the management or conduct of the

Comment [A31]: An entity's "purpose" may be difficult to define in this context.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Commissioner's power to give directions **Division 140**

Section 140-15

- 1 activities of the registered entity except as permitted by the
2 Commissioner;
- 3 (c) to order an audit of the affairs of the registered entity, at the
4 expense of the registered entity, by an auditor chosen by the
5 Commissioner;
- 6 (d) to not enter into a specified commercial transaction, financial
7 transaction or other transaction, including the following:
- 8 (i) borrowing any amount;
- 9 (ii) repaying any money on deposit or advance;
- 10 (iii) paying or transferring any amount or asset to any entity,
11 or creating an obligation (contingent or otherwise) to do
12 so;
- 13 (e) to comply with the registered entity's governing rules;
- 14 (f) anything else as to the way in which the affairs of the
15 registered entity are to be conducted or not conducted, that is
16 necessary to advance the object of this Act.

17 Note: Information relating to directions, variations of directions and
18 revocations of directions may be placed on the Register in accordance
19 with Division 100.

- 20 (2) A direction under paragraph (1)(d) (to not enter into a specified
21 commercial transaction, financial transaction or other transaction)
22 does not apply to the payment or transfer of money pursuant to an
23 order of a court or a process of execution.
- 24 (3) Without limiting the generality of subsection (1), a direction
25 referred to in a paragraph of that subsection may:
- 26 (a) deal with some only of the matters referred to in that
27 paragraph; or
- 28 (b) deal with a particular class or particular classes of those
29 matters; or
- 30 (c) make different provision with respect to different matters or
31 different classes of matters.
- 32 (4) The direction may deal with the time by which, or period during
33 which, it is to be complied with.

Comment [A32]: The Commissioner should ensure that the costs imposed are reasonable and affordable for the registered entity.

Comment [A33]: This seems to bestow an undue level of authority on a govt agency. Do ASIC and APRA have this ability to go operational?

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 140 Commissioner's power to give directions

Section 140-20

1 **140-20 Power to comply with directions**

2 The registered entity has power to comply with the direction
3 despite anything in its governing rules or any contract or
4 arrangement to which it is a party.

5 **140-25 Variation and revocation of directions**

- 6 (1) The Commissioner may, by notice in writing to the registered
7 entity, vary the direction if, at the time of the variation, it considers
8 that the variation is necessary and appropriate.
- 9 (2) The direction has effect until the Commissioner revokes it by
10 notice in writing to the registered entity. The Commissioner may
11 revoke the direction if, at the time of revocation, it considers that
12 the direction is no longer necessary or appropriate.
- 13 (3) Subsection (4) applies if:
14 (a) either:
15 (i) the Commissioner gives a direction to the registered
16 entity at a time; or
17 (ii) the Commissioner varies a direction at a time; and
18 (b) the Commissioner does not vary or revoke the direction for a
19 period of 12 months after that time.
- 20 (4) The Commissioner must consider within a reasonable time after
21 the end of that 12 months whether it would be reasonable to vary
22 or withdraw the direction.
23

Comment [A34]: It is possible that this could give rise to legal action against the registered entity, jeopardising entities' operational and financial sustainability.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Commissioner's power to give directions **Division 140**

Section 140-110

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2 **Subdivision 140-B—General provisions relating to directions**

3 **140-110 Direction not grounds for denial of obligations**

4 (1) This section applies if a registered entity is party to a contract,
5 whether the proper law of the contract is Australian law or law of a
6 foreign country (including the law of part of a foreign country).

7 (1A) The fact that the registered entity is subject to a direction by the
8 Commissioner under Subdivision 140-A does not allow a party to
9 the contract, other than the registered entity, to deny any
10 obligations under that contract. This subsection has effect subject
11 to subsections (2) and (3).

12 (2) If the registered entity is prevented from fulfilling its obligations
13 under the contract because of a direction under Subdivision 140-A,
14 the other party or parties to the contract are, subject to any orders
15 made under subsection (3), relieved from obligations owed to the
16 registered entity under the contract.

17 (3) A party to a contract to which subsection (2) applies may apply to
18 the Federal Court of Australia for an order relating to the effect on
19 the contract of a direction under Subdivision 140-A. The order may
20 deal with matters including (but not limited to):

21 (a) requiring a party to the contract to fulfil an obligation under
22 the contract despite subsection (2); or

23 (b) obliging a party to the contract to take some other action (for
24 example, paying money or transferring property) in view of
25 obligations that were fulfilled under the contract before the
26 direction was made.

27 The order must not require a person to take action that would
28 contravene the direction, or any other direction under
29 Subdivision 140-A.

30 Note: Information relating to directions, variations of directions and
31 revocations of directions may be placed on the Register in accordance
32 with Division 100.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 140 Commissioner's power to give directions

Section 140-110

1 **140-110 Objections**

2 A registered entity may object against a direction issued by the
3 Commissioner in the manner set out in Part IVC of the *Taxation*
4 *Administration Act 1953*.

5 *Note: This section will be reviewed and amended when the review and*
6 *appeal provisions are drafted.*

7 **140-120 Non-compliance with a direction**

- 8 (1) A registered entity is commits an offence if:
9 (a) it does, or fails to do, an act; and
10 (b) doing, or failing to do, the act results in a contravention of a
11 direction given to it under Subdivision 140-A.

12 Penalty: 50 penalty units.

13 Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of
14 criminal responsibility.

15 Note 2: If a registered entity is convicted of an offence against this subsection,
16 subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a
17 fine of up to 5 times the penalty stated above.

- 18 (1A) If a registered entity does or fails to do an act in circumstances that
19 give rise to the registered entity committing an offence against
20 subsection (1), the registered entity commits an offence against that
21 subsection in respect of:

- 22 (a) the first day on which the offence is committed; and
23 (b) each subsequent day (if any) on which the circumstances that
24 gave rise to the registered entity committing the offence
25 continue (including the day of conviction for any such
26 offence or any later day).

27 Note: This subsection is not intended to imply that section 4K of the *Crimes*
28 *Act 1914* does not apply to offences against this Act or the regulations.

- 29 (2) A responsible individual of a registered entity commits an offence
30 if:

- 31 (a) the responsible individual fails to take reasonable steps to
32 ensure that the registered entity complies with a direction
33 given to it under Subdivision 140-A; and

Comment [A35]: The prospect of criminal liability of responsible individuals will be a disincentive for members of the community considering serving as responsible individuals in NFPs.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Commissioner's power to give directions **Division 140**

Section 140-120

1 (b) the responsible individual's duties include ensuring that the
2 registered entity complies with the direction, or with a class
3 of directions that includes the direction.

4 Penalty: 50 penalty units.

5 Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of
6 criminal responsibility.

7 Note 2: If a registered entity is convicted of an offence against this subsection,
8 subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a
9 fine of up to 5 times the penalty stated above.

10 (2A) If a responsible individual of a registered entity fails to take
11 reasonable steps to ensure that the registered entity complies with a
12 direction given to it under Subdivision 140-A in circumstances that
13 give rise to the responsible individual committing an offence
14 against subsection (2), the responsible individual commits an
15 offence against that subsection in respect of:

- 16 (a) the first day on which the offence is committed; and
17 (b) each subsequent day (if any) on which the circumstances that
18 gave rise to the responsible individual committing the
19 offence continue (including the day of conviction for any
20 such offence or any later day).

21 Note: This subsection is not intended to imply that section 4K of the *Crimes*
22 *Act 1914* does not apply to offences against this Act or the regulations.
23

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2 **Division 141—Enforceable undertakings**

3 **141-5 Enforceable undertakings**

4 (1) The Commissioner may accept a written undertaking given by an
5 entity for the purposes of this section in connection with a matter in
6 relation to which the Commissioner has a power or function under
7 this Act.

8 (2) The entity may withdraw or vary the undertaking at any time, but
9 only with the consent of the Commissioner.

10 (3) If the Commissioner considers that the entity who gave the
11 undertaking has breached any of its terms, the Commissioner may
12 apply to the Court for an order under subsection (4).

13 (4) If the Court is satisfied that the entity has breached a term of the
14 undertaking, the Court may make all or any of the following
15 orders:

16 (a) an order directing the entity to comply with that term of the
17 undertaking;

18 (b) an order directing the entity to pay to the Commonwealth an
19 amount up to the amount of any financial benefit that the
20 entity has obtained directly or indirectly and that is
21 reasonably attributable to the breach;

22 (c) any order that the Court considers appropriate directing the
23 entity to compensate any other entity who has suffered loss
24 or damage as a result of the breach;

25 (d) any other order that the Court considers appropriate.
26

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2 **Division 142—Injunctions**

3 **142-10 Injunctions**

4 *Performance injunctions*

5 (1) If:

6 (a) an entity has refused or failed, or is refusing or failing, or is
7 proposing to refuse or fail, to do an act or thing; and

8 (b) the refusal or failure was, is or would be:

9 (i) a contravention of this Act; or

10 (ii) a contravention of a direction under Subdivision 140-A
11 of this Act;

12 the Court may, on the application of the Commissioner, grant an
13 injunction requiring the entity to do that act or thing.

14 *Restraining injunctions*

15 (2) If an entity has engaged, is engaging or is proposing to engage, in
16 any conduct in contravention of this Act or a direction under
17 Subdivision 140-A of this Act, the Court may, on the application of
18 the Commissioner, grant an injunction:

19 (a) restraining the entity from engaging in the conduct; and

20 (b) if, in the Court's opinion, it is desirable to do so—requiring
21 the entity to do something.

22 **142-15 Interim injunctions**

23 *Grant of interim injunction*

24 (1) If an application is made to the Court for an injunction under
25 section 142-10, the Court may, before considering the application,
26 grant an interim injunction restraining an entity from engaging in
27 conduct of a kind referred to in that section.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 142 Injunctions

Section 142-20

1 *No undertakings as to damages*

- 2 (2) The Court is not to require the Commissioner, as a condition of
3 granting an interim injunction, to give any undertakings as to
4 damages.

5 **142-20 Discharge etc. of injunctions**

6 The Court may discharge or vary an injunction granted under this
7 Division.

8 **142-25 Certain limits on granting injunctions not to apply**

9 *Performance injunctions*

- 10 (1) The power of the Court to grant an injunction requiring an entity to
11 do an act or thing may be exercised:
12 (a) if the Court is satisfied that the entity has refused or failed to
13 do that act or thing—whether or not it appears to the Court
14 that the entity intends to refuse or fail again, or to continue to
15 refuse or fail, to do that act or thing; or
16 (b) if it appears to the Court that, if an injunction is not granted,
17 it is likely that the entity will refuse or fail to do that act or
18 thing—whether or not the entity has previously refused or
19 failed to do that act or thing.

20 *Restraining injunctions*

- 21 (2) The power of the Court under this Division to grant an injunction
22 restraining an entity from engaging in conduct of a particular kind
23 may be exercised:
24 (a) if the Court is satisfied that the entity has engaged in conduct
25 of that kind—whether or not it appears to the Court that the
26 entity intends to engage again, or to continue to engage, in
27 conduct of that kind; or
28 (b) if it appears to the Court that, if an injunction is not granted,
29 it is likely that the entity will engage in conduct of that
30 kind—whether or not the entity has previously engaged in
31 conduct of that kind.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Injunctions **Division 142**

Section 142-30

1 **142-30 Other powers of the Court unaffected**

2 The powers conferred on the Court under this Division are in
3 addition to, and not instead of, any other powers of the Court,
4 whether conferred by this Act or otherwise.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 143 Suspension and removal of corporate responsible individuals etc.

Section 143-120

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2 **Division 143—Suspension and removal of corporate**
3 **responsible individuals etc.**

4 **Subdivision 143-A—Suspension and removal of corporate**
5 **responsible individuals**

6 *Note:* *To be drafted.*

7 **Subdivision 143-B—Suspension and removal of trustees**

8 **143-120 Subdivision applies to registered entity that is a trust**

9 This Subdivision applies in relation to a registered entity that is a
10 trust.

11 **143-125 Suspension or removal of trustees**

12 *Suspension*

- 13 (1) The Commissioner may suspend all of the trustees of a registered
14 entity if the Commissioner is satisfied that the registered entity, or
15 any of the trustees of the registered entity, is conducting its affairs
16 in a way that may cause harm to, or jeopardise, the public trust and
17 confidence mentioned in subsection 2-5(1) (Object of this Act).
- 18 (2) The suspension of a trustee:
- 19 (a) starts when the Commissioner gives the trustee notice of the
20 suspension under subsection (3); and
- 21 (b) ends at the time specified in the notice.
- 22 (3) If the Commissioner decides to suspend a trustee under this
23 section, the Commissioner must give to the trustee a written notice:
- 24 (a) setting out the decision; and
- 25 (b) giving the reasons for the decision; and
- 26 (c) setting out the time the suspension ends.

Comment [A36]: The Commissioner must be required by law to exercise its power in such a way as to support registered entities in complying with this Act for the purposes of avoiding the suspension and removal of responsible individuals. Any such action would reflect a failure not only on the part of the registered entity in question but also on the part of the Commissioner for failure to serve registered entities in accordance with the intent of this Bill.

Comment [A37]: These clauses should also be made available to NFPs for comment and should be inclusive of how the ACNC will assist in such circumstances.

Comment [A38]: The subjective nature of this clause empowers the Commissioner to disproportionately and unjustly apply a suspension on arbitrary grounds.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Suspension and removal of corporate responsible individuals etc. **Division 143**

Section 143-125

1 *Extension of suspensions*

- 2 (4) The Commissioner may change the time the suspension of a trustee
3 ends.
- 4 (5) If the Commissioner decides to change the time the suspension of a
5 trustee ends under this section, the Commissioner must give to the
6 trustee a written notice:
- 7 (a) setting out the decision; and
8 (b) giving the reasons for the decision; and
9 (c) setting out the new time the suspension ends.

10 *Removal*

- 11 (6) The Commissioner may remove all of the trustees of a registered
12 entity if the Commissioner is satisfied that the registered entity, or
13 any of the trustees of the registered entity, is conducting its affairs
14 in a way that may cause harm to, or jeopardise, the public trust and
15 confidence mentioned in subsection 2-5(1) (Object of this Act)
- 16 (7) If the Commissioner decides to remove a trustee under this section,
17 the Commissioner must give to the trustee a written notice:
- 18 (a) setting out the decision; and
19 (b) giving the reasons for the decision.

Comment [A39]: The subjective nature of this clause empowers the Commissioner to disproportionately and unjustly remove trustees on arbitrary grounds.

20 *Review of decisions under this section*

- 21 (8) A trustee who is dissatisfied with any of the following decisions
22 under this section may object in the manner set out in Part IVC of
23 the *Taxation Administration Act 1953*:
- 24 (a) a decision to suspend the trustee;
25 (b) a decision to change the time a suspension of the trustee
26 ends;
27 (c) a decision to remove the trustee.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 143 Suspension and removal of corporate responsible individuals etc.

Section 143-130

1 **143-130 Commissioner to appoint acting trustee in cases of**
2 **suspension or removal**

3 *Appointment of acting trustee*

- 4 (1) If the Commissioner suspends all of the trustees of a registered
5 entity under section 143-125, the Commissioner must appoint a
6 single entity to act as the trustee (the *acting trustee*) of the fund
7 during the period of the suspension.
- 8 (2) If the Commissioner removes all of the trustees of a registered
9 entity under section 143-125, the Commissioner must appoint a
10 single entity to act as the trustee (the *acting trustee*) of the fund
11 until all of the vacancies in the position of trustee are filled.

12 **143-135 Terms and conditions of appointment of acting trustee**

- 13 (1) The Commissioner may determine the terms and conditions of the
14 appointment of the acting trustee, including fees. The
15 determination has effect despite anything in:
- 16 (a) any Australian law other than this section; or
17 (b) the registered entity's governing rules.
- 18 (2) Without limiting subsection (1), the Commissioner may make a
19 determination under that subsection to the effect that the acting
20 trustee's fees are to be paid out of the corpus of the registered
21 entity.

22 **143-140 Termination of appointment of acting trustee**

23 The Commissioner may terminate the appointment of the acting
24 trustee at any time.

25 **143-145 Resignation of acting trustee**

- 26 (1) The acting trustee may resign by writing given to the
27 Commissioner.
- 28 (2) The resignation does not take effect until the end of the seventh
29 day after the day on which it was given to the Commissioner.

Comment [A40]: The Commissioner should keep in mind that the corpus of the registered entity is essentially public funding and any fees should reflect what might reasonably be expected by the public.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Suspension and removal of corporate responsible individuals etc. **Division 143**

Section 143-150

1 **143-150 Property vesting orders**

- 2 (1) If the Commissioner appoints an acting trustee, the Commissioner
3 must make a written order vesting the property of the registered
4 entity in the acting trustee.
- 5 (2) If the appointment ends, the Commissioner must make a written
6 order vesting the property of the fund in the new acting trustee, the
7 previously suspended trustee or trustees or the new actual trustee or
8 trustees (whichever is applicable).
- 9 (3) If the Commissioner makes an order under this section vesting
10 property of a registered entity in an entity or entities, then, subject
11 to subsection (4), the property immediately vests in the entity or
12 entities by force of this section.
- 13 (4) If:
- 14 (a) the property is of a kind whose transfer or transmission may
15 be registered under an Australian law; and
- 16 (b) that law enables the registration of such an order, or enables
17 the entity or entities to be registered as the owner or owners
18 of that property;
- 19 the property does not vest in the entity or entities until the
20 requirements of the law referred to in paragraph (a) have been
21 complied with.

22 **143-155 Powers of acting trustee**

23 Subject to section 143-150:

- 24 (a) the acting trustee has and may exercise all the rights, title and
25 powers, and must perform all the functions and duties, of the
26 original trustee or trustees; and
- 27 (b) the registered entity's governing rules and every Australian
28 law apply in relation to the acting trustee as if the acting
29 trustee were the trustee of the fund.

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Chapter 4 Regulatory powers of the ACNC

Part 4-1 Regulatory powers of the ACNC

Division 143 Suspension and removal of corporate responsible individuals etc.

Section 143-160

1 **143-160 Commissioner may give directions to acting trustee**

- 2 (1) The Commissioner may give the acting trustee a written notice
3 directing the acting trustee to do, or not to do, one or more
4 specified acts or things in relation to the registered entity.
- 5 (2) The acting trustee commits an offence if:
6 (a) the acting trustee engages in conduct (within the meaning of
7 subsection 2(1)); and
8 (b) that engagement in conduct contravenes a notice given to the
9 acting trustee under subsection (1).
- 10 Penalty: 100 penalty units.
- 11 (3) This section does not affect the validity of a transaction entered
12 into in contravention of a notice given under subsection (1).

Comment [A41]: This clause empowers the Commissioner with discretionary authority without due and proper oversight.

13 **143-165 Property vested in acting trustee—former trustees’**
14 **obligations relating to books, identification of property**
15 **and transfer of property**

16 *Books*

- 17 (1) An entity commits an offence if:
18 (a) the Commissioner makes an order under subsection
19 143-150(1) or (2) vesting the property of a registered entity
20 in an acting trustee; and
21 (b) just before the Commissioner made the order, the property
22 was vested in:
23 (i) the entity (the *former trustee*); or
24 (ii) 2 or more entities (the *former trustees*), including the
25 entity; and
26 (c) the former trustee or former trustees do not, within 14 days of
27 the Commissioner making the order, give the acting trustee
28 all books (within the meaning of the *Corporations Act 2001*)
29 relating to the fund’s affairs that are in the former trustee’s or
30 former trustees’ possession, custody or control.

31 Penalty: 50 penalty units.

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Regulatory powers of the ACNC **Chapter 4**
Regulatory powers of the ACNC **Part 4-1**
Suspension and removal of corporate responsible individuals etc. **Division 143**

Section 143-165

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Identification of property and transfer of property

- (2) Subsections (3) to (5) apply if:
- (a) the property of a registered entity is vested in an entity (the **former trustee**) or entities (the **former trustees**); and
 - (b) the Commissioner makes an order under subsection 143-150(1) or (2) vesting the property in an acting trustee.
- (3) The acting trustee may, by notice in writing to the former trustee or former trustees, require the former trustee or former trustees, so far as the former trustee or former trustees can do so:
- (a) to identify property of the fund; and
 - (b) to explain how the former trustee or former trustees have kept account of that property.
- (4) The acting trustee may, by notice in writing to the former trustee or former trustees, require the former trustee or former trustees to take specified action that is necessary to bring about a transfer of specified property of the fund to the acting trustee.
- (5) The former trustee, or each of the former trustees, commits an offence if:
- (a) the acting trustee gives the former trustee or former trustees a notice under subsection (3) or (4); and
 - (b) the former trustee or former trustees do not, within 28 days of the notice being given, comply with the requirement in the notice.

Penalty: 50 penalty units.

Strict liability

- (6) Subsections (1) and (5) are offences of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

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Chapter 4 Regulatory powers of the ACNC

Part 4-2 Reviews and appeals

Division 143 Suspension and removal of corporate responsible individuals etc.

Section 143-165

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Part 4-2—Reviews and appeals

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Note: This Part will be drafted in a manner similar to Part IVC of the Taxation Administration Act 1953.

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Comment [A42]: It is not possible to comment on this section without viewing the draft.

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The Australian Charities and Not-for-profits Commission **Chapter 5**
The ACNC **Part 5-1**
Establishment and function of the ACNC **Division 160**

Section 160-5

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Chapter 5—The Australian Charities and Not-for-profits Commission

Part 5-1—The ACNC

Division 160—Establishment and function of the ACNC

160-5 Establishment

The Australian Charities and Not-for-profits Commission (*ACNC*) is established by this section.

Note: The ACNC does not have a legal identity separate from the Commonwealth.

160-10 Constitution of the ACNC

The ACNC consists of:

- (a) the Commissioner; and
- (b) any staff assisting the Commissioner, whose services are made available to the Commissioner as mentioned in subsection 163-5(1).

160-15 Function of the ACNC

The ACNC's function is to assist the Commissioner in the performance of the Commissioner's functions.

160-20 ACNC to have the privileges and immunities of the Crown

The ACNC has the privileges and immunities of the Crown.

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Chapter 5 The Australian Charities and Not-for-profits Commission

Part 5-2 The Commissioner

Division 161 Establishment, functions and powers of the Commissioner

Section 161-5

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2 **Part 5-2—The Commissioner**

3 **Division 161—Establishment, functions and powers of the**
4 **Commissioner**

5 **161-5 Establishment**

6 (1) There is to be a Commissioner of the ACNC.

7 (2) The Commissioner has:

8 (a) the general administration of this Act; and

9 (b) the other powers and other functions conferred or imposed on
10 him or her by this Act or any other law.

11 **161-10 Powers of Commissioner**

12 The Commissioner has the power to do all things necessary or
13 convenient to be done for or in connection with the performance of
14 his or her functions.

15 **161-15 Working with the Advisory Board.**

16 (1) In performing his or her functions and exercising his or her powers,
17 the Commissioner may (but is not required to) have regard to the
18 advice and recommendations given to him or her by the Advisory
19 Board (whether or not the advice and recommendations were given
20 in response to a request).

21 (2) The Commissioner may attend Advisory Board meetings.
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The Australian Charities and Not-for-profits Commission **Chapter 5**
The Commissioner **Part 5-2**
Terms and conditions of appointment **Division 162**

Section 162-5

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2 **Division 162—Terms and conditions of appointment**

3 **162-5 Appointment**

- 4 (1) The Commissioner is to be appointed by the Governor-General by
5 written instrument.
- 6 (2) The Commissioner is to be appointed on a full-time basis.

7 **162-10 Term of appointment**

8 The Commissioner holds office for the period specified in the
9 instrument of appointment. The period must not exceed 5 years.

10 Note: The Commissioner is eligible for reappointment: see subsection
11 33(4A) of the *Acts Interpretation Act 1901*.

12 **162-15 Acting Commissioner**

- 13 (1) The Minister may appoint an individual to act as the
14 Commissioner:
- 15 (a) during a vacancy in the office of the Commissioner (whether
16 or not an appointment has previously been made to the
17 office); or
- 18 (b) during any period, or during all periods, when the
19 Commissioner is absent from duty or from Australia, or is,
20 for any reason, unable to perform the duties of the office.

21 Note: Section 33A of the *Acts Interpretation Act 1901* has rules that apply to
22 acting appointments.

- 23 (2) Anything done by or in relation to an individual purporting to act
24 under an appointment is not invalid merely because:
- 25 (a) the occasion for the appointment had not arisen; or
26 (b) there was a defect or irregularity in connection with the
27 appointment; or
28 (c) the appointment had ceased to have effect; or
29 (d) the occasion to act had not arisen or had ceased.

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Chapter 5 The Australian Charities and Not-for-profits Commission

Part 5-2 The Commissioner

Division 162 Terms and conditions of appointment

Section 162-20

1 **162-20 Remuneration**

- 2 (1) The Commissioner is to be paid the remuneration that is
3 determined by the Remuneration Tribunal. If no determination of
4 that remuneration by the Tribunal is in operation, the
5 Commissioner is to be paid the remuneration that is prescribed.
- 6 (2) The Commissioner is to be paid the allowances that are prescribed.
- 7 (3) This section has effect subject to the *Remuneration Tribunal Act*
8 *1973*.

9 **162-25 Leave of absence**

- 10 (1) The Commissioner has the recreation leave entitlements that are
11 determined by the Remuneration Tribunal.
- 12 (2) The Minister may grant the Commissioner leave of absence, other
13 than recreation leave, on the terms and conditions as to
14 remuneration or otherwise that the Minister determines.

15 **162-30 Disclosure of interests to the Minister**

16 The Commissioner must give written notice to the Minister of all
17 interests, pecuniary or otherwise, that the Commissioner has or
18 acquires and that conflict or could conflict with the proper
19 performance of the Commissioner's functions.

20 **162-35 Outside employment**

21 The Commissioner must not engage in paid employment outside
22 the duties of his or her office without the Minister's approval.

23 **162-40 Other terms and conditions**

24 The Commissioner holds office on the terms and conditions (if
25 any) in relation to matters not covered by this Act that are
26 determined by the Minister.

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The Australian Charities and Not-for-profits Commission **Chapter 5**
The Commissioner **Part 5-2**
Terms and conditions of appointment **Division 162**

Section 162-45

1 **162-45 Resignation**

- 2 (1) The Commissioner may resign his or her appointment by giving
3 the Governor-General a signed notice of resignation.
- 4 (2) The resignation takes effect on the day it is received by the
5 Governor-General or, if a later day is specified in the resignation,
6 on that later day.

7 **162-50 Termination of appointment**

- 8 (1) The Governor-General may terminate the appointment of the
9 Commissioner:
- 10 (a) for misbehaviour or physical or mental incapacity; or
11 (b) if the Commissioner:
12 (i) becomes bankrupt; or
13 (ii) applies to take the benefit of any law for the relief of
14 bankrupt or insolvent debtors; or
15 (iii) compounds with his or her creditors; or
16 (iv) makes an assignment of his or her remuneration for the
17 benefit of his or her creditors; or
18 (c) if the Commissioner is absent, except on leave of absence,
19 for 14 consecutive days or for 28 days in any 12 months; or
20 (d) if the Commissioner engages, without the Minister's
21 approval, in paid employment outside the duties of his or her
22 office (see section 162-35); or
23 (e) if the Commissioner fails, without reasonable excuse, to
24 comply with section 162-40.

25 **162-55 Delegation**

- 26 (1) The Commissioner may, by instrument in writing, delegate any of
27 the Commissioner's powers or functions to a person holding the
28 position of, or performing the duties of, a SES employee for the
29 purpose of the *Public Service Act 1999*.
- 30 (2) In exercising powers under a delegation, the delegate must comply
31 with any written directions of the Commissioner.
- 32 Note: See section 34AAB of the *Acts Interpretation Act 1901*.
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Chapter 5 The Australian Charities and Not-for-profits Commission

Part 5-2 The Commissioner

Division 163 Staff and consultants

Section 163-5

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2 **Division 163—Staff and consultants**

3 **163-5 Staff**

- 4 (1) The staff assisting the Commissioner are to be persons engaged
5 under the *Public Service Act 1999* and made available for the
6 purpose by the Commissioner of Taxation.
- 7 (2) When performing services for the Commissioner under this
8 section, a person is subject to the directions of the Commissioner.

Comment [A43]: Greatly clarity on the ACNC governance structure (e.g. reporting arrangements) in the context of the Uhrig review might be good.

9 **163-15 Consultants**

- 10 (1) The Commissioner may engage a person (other than a member of
11 the advisory board) who has suitable qualifications and experience
12 as a consultant to the Commissioner.
- 13 (2) The terms and conditions of engagement are to be determined, in
14 writing, by the Commissioner.
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The Australian Charities and Not-for-profits Commission **Chapter 5**
Finance and reporting requirements **Part 5-3**
ACNC Special Account **Division 164**

Section 164-5

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2 **Part 5-3—Finance and reporting requirements**

3 **Division 164—ACNC Special Account**

4 **164-5 ACNC Special Account**

- 5 (1) The Australian Charities and Not-for-profits Commission Special
6 Account is established by this section.
- 7 (2) The Account is a Special Account for the purposes of the *Financial*
8 *Management and Accountability Act 1997*.

9 **164-10 Credits to the Account**

10 There may be credited to the Account amounts equal to the
11 following:

- 12 (a) amounts received by the Commonwealth in connection with
13 the performance of the Commissioner's functions under this
14 Act;
- 15 (b) amounts received by the Commonwealth in relation to
16 property paid for with amounts debited from the Account;
- 17 (c) amounts of any gifts given or bequests made for the purposes
18 of the Account.

19 Note: An Appropriation Act provides for amounts to be credited to a Special
20 Account if any of the purposes of the Account is a purpose that is
21 covered by an item in the Appropriation Act.

22 **164-15 Purposes of the Account**

23 The purposes of the Account are as follows:

- 24 (a) paying or discharging the costs, expenses and other
25 obligations incurred by the Commonwealth in the
26 performance of the Commissioner's functions;
- 27 (b) paying any remuneration and allowances payable to any
28 person under this Act;
- 29 (c) meeting the expenses of administering the Account.

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Chapter 5 The Australian Charities and Not-for-profits Commission

Part 5-3 Finance and reporting requirements

Division 164 ACNC Special Account

Section 164-15

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Note: See section 21 of the *Financial Management and Accountability Act 1997* (debits from Special Accounts).

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The Australian Charities and Not-for-profits Commission **Chapter 5**
Finance and reporting requirements **Part 5-3**
Annual report **Division 165**

Section 165-5

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Division 165—Annual report

165-5 Annual report

Annual report to be given to Minister

- (1) The Commissioner must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report (an **annual report**) on the Commissioner's operations during that year.

Note: See also section 34C of the *Acts Interpretation Act 1901*, which contains provisions about annual reports.

Contents of annual report

- (2) The Commissioner must include in a report relating to a financial year the following:
- (a) an evaluation of the ACNC's overall performance during the year;
 - (b) the financial statements in respect of the special account established by section 164-5;
 - (c) an audit report on those statements under section 57 of the *Financial Management and Accountability Act 1997*.

Comment [A44]: Will the annual report be routinely published on the ACNC website, along with other documents relating to the ACNC's expenditure and performance?

Comment [A45]: The NFP sector will see it as a double standard if the ACNC does not provide a high level of reporting transparency, including online annual reports.

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Chapter 6 The Advisory Board

Part 6-1 The Advisory Board

Division 170 Establishment, functions and powers

Section 170-5

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Chapter 6—The Advisory Board

Part 6-1—The Advisory Board

Division 170—Establishment, functions and powers

170-5 Establishment

The Advisory Board of the ACNC is established by this section.

170-10 Membership

The Advisory Board is to consist of at least 2, but no more than 8, members (other than ex-officio members) with the following:

- (a) expertise relating to not-for-profit entities (including charities);
- (b) experience and appropriate qualifications in relation to either law, taxation or accounting.

Comment [A46]: 2 members does not constitute a sufficiently broad scope of advisory capacity.

Comment [A47]: To provide a breadth of advice to the ACNC members should also be sought from governance backgrounds and qualifications as well as Human Resources.

170-15 Function of Advisory Board

- (1) The Advisory Board's function is, at the request of the Commissioner, to provide advice and make recommendations to the Commissioner in relation to the Commissioner's functions under this Act.
- (2) The Advisory Board has power to do all things necessary or convenient to be done for or in connection with the performance of its function.
- (3) To avoid doubt, the Advisory Board cannot give any directions to the Commissioner.

Example: The Advisory Board could not direct the Commissioner in relation to the management of the ACNC.

Comment [A48]: See previous comments re governance and reporting arrangements. What are the Commissioner's powers? How are they delegated? To whom does the Commissioner report?

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The Advisory Board **Chapter 6**

The Advisory Board **Part 6-1**

Terms and conditions of appointment of members of the Advisory Board **Division 171**

Section 171-5

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Division 171—Terms and conditions of appointment of members of the Advisory Board

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171-5 Appointment

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(1) A member is to be appointed by the Minister by written instrument, on a part-time basis.

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(2) A person is eligible to be appointed as a member only if the person is ordinarily resident in Australia.

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(3) The Minister must appoint one member to be the Chair and another member to be the Deputy Chair.

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(4) A person's appointment as a member, the Chair or the Deputy Chair is not invalid because of a defect or irregularity in connection with the person's appointment.

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(5) The Minister may appoint ex-officio members to the Board.

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171-10 Term of appointment

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A member (other than an ex-officio member) holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

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Note: A member is eligible for reappointment: see section 33AA of the *Acts Interpretation Act 1901*.

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171-15 Remuneration and allowances

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(1) A member (other than an ex-officio member) is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed by the regulations.

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(2) A member (other than an ex-officio member) is to be paid the allowances that are prescribed by the regulations.

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Chapter 6 The Advisory Board

Part 6-1 The Advisory Board

Division 171 Terms and conditions of appointment of members of the Advisory Board

Section 171-20

- 1 (3) This section (other than subsection (2)) has effect subject to the
2 *Remuneration Tribunal Act 1973*.

3 **171-20 Standing obligation to disclose interests**

- 4 (1) A member must give written notice to the Minister of all interests,
5 pecuniary or otherwise, that the member has or acquires and that
6 conflict or could conflict with the proper performance of the
7 Advisory Board's function.

- 8 (2) The notice must be given to the Minister as soon as practicable
9 after the member becomes aware of the potential for conflict of
10 interest.

11 **171-25 Other terms and conditions**

12 A member holds office on the terms and conditions (if any) in
13 relation to matters not covered by this Act that are determined, in
14 writing, by the Minister.

15 **171-30 Resignation**

- 16 (1) A member (other than an ex-officio member) may resign his or her
17 appointment by giving the Minister a signed notice of resignation.
- 18 (2) The Chair may resign his or her appointment as the Chair without
19 resigning his or her appointment as a member.
- 20 (3) The Deputy Chair may resign his or her appointment as the Deputy
21 Chair without resigning his or her appointment as a member.
- 22 (4) The resignation takes effect on the day it is received by the
23 Minister or, if a later day is specified in the resignation, on that
24 later day.

25 **171-40 Termination of appointment**

26 The Minister may terminate a member's appointment at any time.
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2 **Division 172—Advisory Board procedures**

3 **172-5 Meetings of the Advisory Board**

4 *Holding meetings*

- 5 (1) The Chair:
- 6 (a) may convene meetings of the Advisory Board during the
- 7 period beginning on the day this section commences (the
- 8 **commencement day**) and ending on the last day of the
- 9 financial year in which the commencement day occurs; and
- 10 (b) must convene 4 meetings of the Advisory Board in each
- 11 financial year (other than the financial year mentioned in
- 12 paragraph (a)); and
- 13 (c) may convene such meetings as are necessary for the efficient
- 14 performance of the Advisory Board's function.

15 *Procedure of meetings*

- 16 (2) Subject to subsection (4), the Commissioner may, by writing,
- 17 determine matters relating to the operation of the Advisory Board.
- 18 (3) Subject to subsection (4), if no determination is in force for the
- 19 purposes of subsection (2), the Advisory Board may operate in the
- 20 way it determines.
- 21 (4) The Chair must ensure that minutes of meetings are kept.

22 *Disclosure of interest by a member*

- 23 (5) If a member has a direct or indirect financial interest in a matter
- 24 being considered, or about to be considered, at a meeting, being an
- 25 interest that could conflict with the proper performance of the
- 26 Advisory Board's function, then the member must disclose that
- 27 interest to the other members as soon as practicable.

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Chapter 6 The Advisory Board

Part 6-1 The Advisory Board

Division 172 Advisory Board procedures

Section 172-5

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Disclosure to be recorded in the minutes of the meeting

- (6) Any disclosure under subsection (5), and any decision made by the Advisory Board in relation to the disclosure, must be recorded in the minutes of the meeting.
- (7) The member must not take part in the making of a decision by the Board in relation to the matter referred to in subsection (5) unless the Chair agrees or, if the member is the Chair, the Commissioner agrees.

Attendance by Commissioner

- (8) The Chair may invite the Commissioner to attend all or part of an Advisory Board meeting.

Determination not a legislative instrument

- (9) A determination made under subsection (2) is not a legislative instrument.

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Chapter 7—Miscellaneous

3

Part 7-1—Secrecy and whistleblower protection

4

Division 180—Secrecy

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Subdivision 180-A—Application of Division

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180-5 Objects of Division

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The objects of this Division are:

8

(a) to protect confidential and personal information by imposing strict obligations on ACNC officers (and others who acquire protected Commission information), and so encourage people to provide correct information to the Commissioner; and

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(b) to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected Commission information for specific, appropriate purposes.

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180-10 Application of Division

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This Division applies in relation to the following entities in the same way as it applies in relation to ACNC officers:

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- (a) an entity engaged to provide services relating to the Commission;
- (b) an individual employed by, or otherwise performing services for, an entity referred to in paragraph (a);
- (c) an individual:
- (i) appointed or employed by, or performing services for, the Commonwealth or an authority of the Commonwealth; and
- (ii) performing functions or exercising powers under or for the purposes of this Act.

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Chapter 7 Miscellaneous

Part 7-1 Secrecy and whistleblower protection

Division 180 Secrecy

Section 180-10

1 **Subdivision 180-B—Disclosure of protected information by**
2 **ACNC officers**

3 **180-10 Meaning of protected Commission information and ACNC**
4 **officer**

- 5 (1) *Protected Commission information* means information that:
6 (a) was disclosed or obtained under or for the purposes of this
7 Act when the information was disclosed or obtained; and
8 (b) relates to the affairs of an entity; and
9 (c) identifies, or is reasonably capable of being used to identify,
10 the entity.
- 11 (2) *ACNC officer* means:
12 (a) the Commissioner; or
13 (b) a member of an advisory board established under Chapter 6;
14 or
15 (c) an individual appointed or engaged under the *Public Service*
16 *Act 1999* and performing duties in the Commission.

17 Note: This Division applies to certain other entities as if they were ACNC
18 officers: see section 180-10.

19 **180-15 Offence—Disclosure or use of protected Commission information**

- 20 (1) An entity commits an offence if:
21 (a) the entity is, or has been, an ACNC officer; and
22 (b) the entity has obtained protected Commission information in
23 the entity's capacity as an ACNC officer; and
24 (c) the entity:
25 (i) discloses the information to another entity (other than
26 the entity to whom the information relates or that
27 entity's agent in relation to the information); or
28 (ii) uses the information.

29 Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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Exceptions

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- (2) Each of the following is an exception to the prohibition in subsection (1):

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(a) the disclosure or use is authorised by this Act;

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(b) the disclosure or use is in compliance with a requirement under an Australian law;

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(c) to the entity to which the information relates, or its legal personal representative, its legal advisers, or the responsible individuals of the entity in question, or to an agent acting on behalf of the entity.

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Note: A defendant bears an evidential burden in relation to a matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

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- (3) Except where it is necessary to do so for the purposes of giving effect to this Act, an ACNC officer is not to be required:

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(a) to produce to a court or tribunal a document containing protected Commission information; or

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(b) to disclose protected Commission information to a court or tribunal.

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180-20 Offence—On-disclosure of protected Commission information

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An entity commits an offence if:

21

(a) the entity:

22

(i) discloses the information to another entity (other than the entity to whom the information relates or that entity's agent in relation to the information); or

23

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(ii) uses the information (except in a manner consistent with the reason for the original disclosure); and

26

27

(b) the first-mentioned entity knows that the first-mentioned entity acquired the information under an exception or authorisation in this Act; and

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(c) the first-mentioned entity did not acquire the information as an ACNC officer.

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Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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Chapter 7 Miscellaneous

Part 7-1 Secrecy and whistleblower protection

Division 180 Secrecy

Section 180-25

1 **180-25 Authorised disclosure—to advance the objects of the Act**

- 2 (1) An ACNC officer may disclose protected Commission information
3 by making the information available to the public if:
4 (a) the information relates to a particular registered entity; and
5 (b) the disclosure is necessary to promote the object of this Act;
6 and
7 (c) if a determination under subsection (2) is in force—the
8 disclosure complies with the requirements specified in the
9 determination; and
10 (d) the information is not personal information.
- 11 (2) The Minister may, by legislative instrument, determine
12 requirements for the purposes of paragraph (1)(c).

13 **180-30 Authorised disclosure—to an authority of the Commonwealth, a**
14 **State or a Territory**

- 15 An ACNC officer may disclose protected Commission information
16 if:
17 (a) the disclosure is to an authority of the Commonwealth, a
18 State or a Territory; and
19 (b) the disclosure is also for the purposes of this Act; and
20 (c) if the information is personal information—the disclosure is
21 in accordance with the requirements of the *Privacy Act 1988*.

22 **180-35 Authorisation—Authorised disclosure and consent**

- 23 An ACNC officer may disclose protected Commission information
24 that relates to the affairs of an entity if:
25 (a) the entity has consented to the disclosure; and
26 (b) the disclosure is in accordance with that consent.

27 **180-40 Authorised disclosure—lawfully made available to the public**

- 28 An ACNC officer may disclose protected Commission information
29 if it has already been lawfully made available to the public.

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Miscellaneous **Chapter 7**
Secrecy and whistleblower protection **Part 7-1**
Secrecy **Division 180**

Section 180-45

1 **180-45 Authorised disclosure—to the Advisory Board**

2 An ACNC officer may disclose protected Commission information
3 to the advisory board established under section Chapter 6.
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Chapter 7 Miscellaneous

Part 7-1 Secrecy and whistleblower protection

Division 181 Whistleblower protection

Section 180-45

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Division 181—Whistleblower protection

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Note: To be drafted.

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Comment [A49]: It is a concern that the draft Bill has been released without this section included.

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Miscellaneous **Chapter 7**
Common rules about penalties **Part 7-2**
General criminal penalties **Division 190**

Section 180-45

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Part 7-2—Common rules about penalties

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Division 190—General criminal penalties

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*Note: This Subdivision will be drafted in a manner similar to provisions
in the Taxation Administration Act 1953*

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Comment [A50]: Again, it is a concern that an incomplete draft of the Bill has been released for comment. Given the significance of criminal penalties to registered entities, this section should have been included in the Bill for comment.

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Chapter 7 Miscellaneous

Part 7-2 Common rules about penalties

Division 195 Administrative penalties

Section 180-45

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2 **Division 195—Administrative penalties**

3 **Subdivision 195-A—False or misleading statements**

4 *Note: This Subdivision will be drafted in a manner similar to provisions*
5 *in the Taxation Administration Act 1953*

6 **Subdivision 195-B—Failing to lodge documents in time**

7 *Note: This Subdivision will be drafted in a manner similar to provisions*
8 *in the Taxation Administration Act 1953*

9 **Subdivision 195-C—Miscellaneous administrative penalties**

10 *Note: This Subdivision will be drafted in a manner similar to provisions*
11 *in the Taxation Administration Act 1953*

12 **Subdivision 195-D—Machinery provisions for administrative**
13 **penalties**

14 *Note: This Subdivision will be drafted in a manner similar to provisions*
15 *in the Taxation Administration Act 1953*

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Miscellaneous **Chapter 7**
Application of the Act to certain non-legal entities **Part 7-3**
Administrative penalties **Division 195**

Section 180-45

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2 **Part 7-3—Application of the Act to certain**
3 **non-legal entities**

4 *Note: This Subdivision will be drafted in a manner similar to provisions*
5 *in the Taxation Administration Act 1953*

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Chapter 7 Miscellaneous

Part 7-4 Forms and regulations

Division 196 Requirements about giving material

Section 196-5

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2 **Part 7-4—Forms and regulations**

3 **Division 196—Requirements about giving material**

4 **Subdivision 196-A—Object of Division**

5 **196-5 Object of Division**

6 The object of this Division is to set out requirements to ensure the
7 integrity and efficiency of giving material to the Commissioner and
8 other entities.

9 **Subdivision 196-B—General provisions**

10 **196-50 Approved forms**

- 11 (1) A return, notice, statement, application or other document under
12 this Act is in the *approved form* if, and only if:
- 13 (a) it is in the form approved in writing by the Commissioner for
14 that kind of return, notice, statement, application or other
15 document; and
- 16 (b) it contains a declaration signed by an entity or entities as the
17 form requires (see section 196-75); and
- 18 (c) it contains the information that the form requires, and any
19 further information, statement or document as the
20 Commissioner requires, whether in the form or otherwise;
21 and
- 22 (d) for a return, notice, statement, application or document that is
23 required to be given to the Commissioner—it is given in the
24 manner that the Commissioner requires (which may include
25 electronically).
- 26 (2) Despite subsection (1), a document that satisfies paragraphs (1)(a),
27 (b) and (d) but not paragraph (1)(c) is also in the *approved form* if
28 it contains the information required by the Commissioner. The
29 Commissioner must specify the requirement in writing.

1 (3) The Commissioner may combine in the same approved form more
2 than one return, notice, statement, application or other document.

3 (4) The Commissioner may approve a different approved form for
4 different entities.

5 **Example:** The Commissioner may require medium and large registered entities
6 to lodge a different annual information statement to that required to be
7 lodged by small registered entities.

Comment [A51]: If this is the case then it should be the same as required under the *Corporations Act 2001*.

8 **196-55 Commissioner may defer time for lodgement**

9 The Commissioner may defer the time within which an approved
10 form is required to be given to the Commissioner or to another
11 entity.

12 **196-60 Declaration by entity**

13 If an entity gives a return, notice, statement, application or other
14 document to the Commissioner in the approved form, the entity
15 must make a declaration in the approved form that any information
16 in the document is true and correct.

17 **196-65 Declaration by entity where agent gives document**

- 18 (1) If a return, notice, statement, application or other document of an
19 entity is to be given to the Commissioner in the approved form by
20 an agent on the entity's behalf, the entity must make a declaration
21 in writing:
- 22 (a) stating that the entity has authorised the agent to give the
23 document to the Commissioner; and
 - 24 (b) declaring that any information the entity provided to the
25 agent for the preparation of the document is true and correct.
- 26 (2) The entity must give the declaration to the agent.
- 27 (3) The entity must retain the declaration or a copy of the declaration
28 for:
- 29 (a) 5 years after it is made; or
 - 30 (b) a shorter period determined by the Commissioner in writing
31 for the entity; or

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Chapter 7 Miscellaneous

Part 7-4 Forms and regulations

Division 196 Requirements about giving material

Section 196-70

- 1 (c) a shorter period determined by the Commissioner by
2 legislative instrument for a class of entities that includes the
3 entity.
- 4 (4) A determination under paragraph (3)(c) may specify different
5 periods for different classes of entities.
- 6 (5) The entity must produce the declaration or copy if requested to do
7 so within that period by the Commissioner.
- 8 (6) The agent must not give the document to the Commissioner before
9 the entity makes the declaration.
- 10 (7) The entity must sign the declaration.

196-70 Declaration by agent

- 11 If an agent gives a return, notice, statement, application or other
12 document to the Commissioner in the approved form on behalf of
13 another entity, the agent must, if the document so requires, make a
14 declaration in the approved form stating that:
15
- 16 (a) the document has been prepared in accordance with the
17 information supplied by the other entity; and
18 (b) the agent has received a declaration from the other entity
19 stating that the information provided to the agent is true and
20 correct; and
21 (c) the agent is authorised by the other entity to give the
22 document to the Commissioner.

196-75 Signing declarations

- 23 (1) An entity must sign a declaration in a return, notice, statement,
24 application or other document the entity gives to the Commissioner
25 in paper form.
26
- 27 (2) If an entity agent gives a return, notice, statement, application or
28 other document to the Commissioner on the entity's behalf in paper
29 form, the document must contain:
30 (a) if the document so requires—a declaration made by the entity
31 with the entity's signature; and

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Miscellaneous **Chapter 7**
Forms and regulations **Part 7-4**
Requirements about giving material **Division 196**

Section 196-75

- 1 (b) if the document so requires—a declaration made by the agent
2 with the agent’s signature.
- 3 (3) Any return, notice, statement, application or other document of an
4 entity’s that is lodged electronically:
- 5 (a) if the entity gives it to the Commissioner—must contain the
6 entity’s declaration (see section 196-60) with the entity’s
7 electronic signature; or
- 8 (b) if the entity’s agent gives it to the Commissioner—must
9 contain the agent’s declaration (see section 196-70) with the
10 agent’s electronic signature.
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2 **Division 197—Address for service**

3 **197-5 Address for service**

- 4 (1) An entity's *address for service* for the purposes of this Act is:
- 5 (a) a physical address in Australia; or
- 6 (b) a postal address in Australia; or
- 7 (c) an electronic address;
- 8 that the entity has given the Commissioner as the entity's address
- 9 for service for the purposes of this Act.
- 10 (2) If an entity has given the Commissioner more than one address for
- 11 service for the purposes of subsection (1), the entity's address for
- 12 service is such of those addresses as the Commissioner considers
- 13 reasonable in the circumstances.
- 14 (3) If an entity has not given the Commissioner an address for service,
- 15 the entity's address for service is the address that the
- 16 Commissioner reasonably believes to be the entity's address for
- 17 service for the purposes of this Act.

18 **197-10 How documents may be given**

- 19 (1) For the purposes of this Act, a document (however described) may
- 20 be given to an entity:
- 21 (a) in the manner specified in section 28A of the *Acts*
- 22 *Interpretation Act 1901*; or
- 23 (b) if the entity's address for service is an electronic address—by
- 24 sending it to that address; or
- 25 (c) if the entity is a company and a liquidator of the company has
- 26 been appointed—by leaving it at, or posting it to, the address
- 27 of the liquidator's office in the most recent notice of that
- 28 address lodged with ASIC; or
- 29 (d) if the entity is a company and an administrator of the
- 30 company has been appointed—by leaving it at, or posting it
- 31 to, the address of the administrator in the most recent notice
- 32 of that address lodged with ASIC.

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Miscellaneous **Chapter 7**
Forms and regulations **Part 7-4**
Address for service **Division 197**

Section 197-10

- 1 (2) Despite section 29 of the *Acts Interpretation Act 1901*, a document
2 under subsection (1) of this section is taken to be given at the time
3 the Commissioner leaves or posts it.
- 4 (3) This Division has effect despite paragraphs 9(1)(d) and 9(2)(d) of
5 the *Electronic Transactions Act 1999*.
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Chapter 7 Miscellaneous

Part 7-4 Forms and regulations

Division 198 Regulations

Section 198-5

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2 **Division 198—Regulations**

3 **198-5 Regulations**

4 The Governor-General may make regulations prescribing matters:

5 (a) required or permitted by this Act to be prescribed; or

6 (b) necessary or convenient to be prescribed for carrying out or
7 giving effect to this Act.

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Chapter 8—Interpretation

Part 8-1—Core concepts

Division 210—Core concepts

210-5 Entities

- (1) **Entity** means any of the following:
- (a) an individual;
 - (b) a body corporate;
 - (c) a body politic;
 - (d) a partnership;
 - (e) any other unincorporated association or body of persons;
 - (f) a trust.

Note: The term *entity* is used in a number of different but related senses. It covers all kinds of legal person. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.

(2) Paragraph (1)(e) does not include a non-entity joint venture (within the meaning of the *Income Tax Assessment Act 1997*).

(3) The trustee of a trust is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees, at any given time.

Note 1: This is because a right or obligation cannot be conferred or imposed on an entity that is not a legal person.

Note 2: The entity that is the trustee of a trust does not change merely because of a change in the person who is the trustee of the trust, or persons who are the trustees of the trust.

(4) A legal person can have a number of different capacities in which the person does things. In each of those capacities, the person is taken to be a different entity.

Example: In addition to his or her personal capacity, an individual may be:

- (a) sole trustee of one or more trusts; and
- (b) one of a number of trustees of a further trust.

Comment [A52]: Is a Public Company Limited by Guarantee an Entity in this meaning?

Comment [A53]: How does this Bill correlate with the legal incorporation of an Entity under the *Corporations Act 2001* and State legislation for incorporated Associations?

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Chapter 8 Interpretation

Part 8-1 Core concepts

Division 210 Core concepts

Section 210-10

1 In his or her personal capacity, he or she is one entity. As trustee of
2 each trust, he or she is a different entity. The trustees of the further
3 trust are a different entity again, of which the individual is a member.

4 (5) If a provision refers to an entity of a particular kind, it refers to the
5 entity in its capacity as that kind of entity, not to that entity in any
6 other capacity.

7 Example: A provision that refers to a company does not cover a company in a
8 capacity as trustee, unless it also refers to a trustee.

9 **210-10 Small, medium and large registered entities**

Comment [A54]: Dollar limits should be indexed over time.

- 10 (1) A registered entity is a *small registered entity* in a particular
11 financial year if:
12 (a) it is not a deductible gift recipient at any time during the
13 financial year; and
14 (b) the revenue of the registered entity for the financial year is
15 less than \$250,000, or any other amount prescribed by the
16 regulations for the purposes of this paragraph.
- 17 (2) A registered entity is a *medium registered entity* in a particular
18 financial year if:
19 (a) it is not a small registered entity in the financial year; and
20 (b) the revenue of the registered entity for the financial year is
21 less than \$1,000,000, or any other amount prescribed by the
22 regulations for the purposes of this paragraph.
- 23 (3) A registered entity is a *large registered entity* in a particular
24 financial year if it is not a small registered entity or a medium
25 registered entity in the financial year.
- 26 (4) Revenue is to be calculated for the purposes of this section in
27 accordance with accounting standards in force at the relevant time
28 (even if the standard does not otherwise apply to the financial year
29 of the registered entity concerned).

30 **210-15 Responsible individuals**

- 31 (1) If an individual is covered under one or more of the following
32 paragraphs, the individual is a *responsible individual* of the
33 registered entity:
-

- 1 (a) in the case of a registered entity that is a trust—an individual:
2 (i) who is a trustee of the registered entity; or
3 (ii) who is a director or officer of a trustee of a registered
4 entity (if the trustee is not an individual);
5 (b) an individual who is a director or officer of the registered
6 entity;
7 (c) an individual:
8 (i) who makes, or participates in making, decisions that
9 affect the whole or a substantial part, of the registered
10 entity's activities; or
11 (ii) who has the capacity to affect significantly the
12 registered entity's financial standing; or
13 (iii) in accordance with whose instructions or wishes the
14 responsible individuals of the registered entity are
15 accustomed to act (excluding advice given by the
16 individual in the proper performance of functions
17 attaching to the individual's professional capacity or
18 their business relationship with the registered entity);
19 (d) an individual who is any of the following:
20 (i) a receiver, or receiver and manager, of the property of
21 the registered entity;
22 (ii) an administrator of the registered entity;
23 (iii) an administrator of a deed of company arrangement
24 executed by the registered entity;
25 (iv) a liquidator of the registered entity;
26 (v) a trustee or other entity administering a compromise or
27 arrangement made between the registered entity and
28 someone else.

29 **210-20 Purposes for which a registered entity is registered**

- 30 (1) If a registered entity is registered as a subtype of registered entity,
31 the entity is registered for the purpose that corresponds with the
32 description of that subtype of registered entity in column 3 of the
33 table in subsection 5-10(3).
34 (2) To avoid doubt, a registered entity may be registered for more than
35 one purpose.

Comment [A55]: If, for purposes of administrative ease, an entity is registered for only one purpose, but serves several purposes, what are the implications for the registered entity in accordance with this Bill?

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Chapter 8 Interpretation

Part 8-1 Core concepts

Division 210 Core concepts

Section 210-20

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Example: Volumes of Respect Ltd is registered as 2 subtypes of registered entity, as mentioned in items 11 and 26 of the table in subsection 5-10(3). This means that each of the following is a purpose for which Volumes of Respect Ltd is registered:

- (a) the promotion of reconciliation, mutual respect and tolerance in Australia;
- (b) the encouragement of literature.

1

2

Part 8-2—Dictionary

3

Division 900—Dictionary

Comment [A56]: The following explanations require more detail.

4

900-5 Dictionary

5

In this Act:

6

ABN has the meaning given by the *Income Tax Assessment Act 1997*.

7

8

accounting standards has the same meaning as in the *Corporations Act 2001*.

9

10

ACNC officer has the meaning given by section 180-10.

11

approved form has the meaning given by section 196-50.

12

ASIC means the Australian Securities and Investments Commission.

13

14

audit means an audit conducted for the purposes of this Act.

15

auditing standard has the same meaning as in the *Corporations Act 2001*.

16

17

auditor independence requirements means the requirements of Divisions 2, 3 and 5 of Part 2M.4 of the *Corporations Act 2001*.

18

19

auditor's report means a report under section 55-60.

20

Australian Business Register has the meaning given by the *Income Tax Assessment Act 1997*.

21

22

Australian law has the meaning given by the *Income Tax Assessment Act 1997*.

23

24

constitutional corporation means:

25

- (a) a corporation to which paragraph 51(xx) of the Constitution applies; or

26

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Chapter 8 Interpretation

Part 8-2 Dictionary

Division 900 Dictionary

Section 900-5

1 (b) a body corporate that is incorporated in a Territory.

2 **Court** means:

3 (a) the Federal Court of Australia; or

4 (b) a court of a State or Territory that has jurisdiction in relation
5 to matters arising under this Act.

6 **deductible gift recipient** has the same meaning as in the *Income*
7 *Tax Assessment Act 1997*.

8 **electronic signature** of an entity means a unique identification of
9 the entity in electronic form that is approved by the Commissioner.

10 **entity** has the meaning given by section 210-5.

11 **financial records** has the same meaning as in the *Corporations Act*
12 *2001*.

13 **financial report** has the meaning given by section 55-15.

14 **financial statements** has the meaning given by section 55-20.

15 **former registered entity** means an entity that is not a registered
16 entity, but that used to be a registered entity.

17 **information statement** has the meaning given by section 55-5.

18 **large registered entity** has the meaning given by section 210-10.

19 **lodge electronically:** a document is lodged electronically if it is
20 transmitted to the Commissioner in an electronic format approved
21 by the Commissioner.

22 **medium registered entity** has the meaning given by section 210-10.

23 **notes**, to financial statements, has the meaning given by
24 section 55-20.

25 **personal information** has the same meaning as in the *Privacy Act*
26 *1988*.

27 **protected Commission information** has the meaning given by
28 section 180-10.

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Interpretation **Chapter 8**

Dictionary **Part 8-2**

Dictionary **Division 900**

Section 900-5

1 **Register** means the Australian Charities and Not-for-profits
2 Register mentioned in section 100-10.

3 **registered entity** means an entity that is registered under
4 Division 10.

5 **responsible individuals' declaration** has the meaning given by
6 section 55-25.

7 **review** means a review of a financial report for a financial year
8 conducted for the purposes of this Act.

9 **small registered entity** has the meaning given by section 210-10.

10 **taxation law** has the same meaning as in the *Income Tax*
11 *Assessment Act 1997*.

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