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Mr Murray Crowe  
Individuals and Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By Email: [ACNCreview@Treasury.gov.au](mailto:ACNCreview@Treasury.gov.au)

28 February 2018

Dear Mr Crowe,

Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

Please find attached Inner North Community Foundation's submission in response to the Australian Government's Review of Australian Charities and Not-for-profits Commission (ACNC) legislation terms of reference.

The Inner North is pleased to support the position of Australian Community Philanthropy, the peak body for community foundations. The ACNC provides key support for charities in our community, and the Foundation welcomes the opportunity to contribute to this consultation. Please do not hesitate to contact me if there are further opportunities to discuss the matters outlined in this submission.

Yours Sincerely,

Dr Christopher Baker,  
Chair

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# Australian Community Philanthropy Submission- Review of ACNC legislation

## OVERVIEW

Australian Community Philanthropy (ACP) welcomes this opportunity to provide input into the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation.

A community foundation is a charitable organisation created by and for a community of people. It is supported by local donors and governed by a board of volunteers who work toward the greater good of local people. Funds come from a variety of sources, including bequests and sub-funds, and are invested in perpetuity. The investment earnings are then distributed to organisations and causes.

As a valuable and unique form of community infrastructure, community foundations empower communities to address local challenges themselves. They seek to build social capital, catalyse development and strengthen community; they engage with their constituents as donors, advisors and volunteers. Community foundations are responsive to the challenges facing their communities and leverage their deep local knowledge to respond to need through their purposeful grant making.

Australian Community Philanthropy (ACP) is the peak membership organisation for community foundations in Australia. Founded in 2008 by a group of community foundation practitioners to provide support to the voluntary boards and professional staff of new and established community foundations, ACP exists to connect, support and represent the community foundation movement and to strengthen its resources, capacity and impact.

Collectively, Australia's 38 community foundations:

- have presence in over 80% of Australian LGAs
- hold more than \$310 million in funds under management
- grant at least \$21 million annually within their communities
- support hundreds of charitable grass roots projects and initiatives through their granting and community strengthening programs

There is growing acceptance that the complex and difficult problems facing communities around Australia can more effectively be addressed with an integrated, multi-faceted, place-based response.

Community Foundations are uniquely placed to provide a grassroots brokering role, bringing together people with the capacity and interest to be philanthropic, with community groups. Further detail about ACP is contained in Appendix 1, Overview of Community Foundations.

## KEY AREAS OF INTEREST TO COMMUNITY FOUNDATIONS

ACP considers the following five areas will sustain and increase the effectiveness of charities, in order to better serve people across the Country.

### [Ensuring the integrity of charitable donations in wind-up provisions](#)

ACP agrees that ACNC needs greater powers to protect charitable assets from being transferred to private benefit or from sitting dormant at the end of a charity's life.

At the moment when the ACNC revokes charity registration for failure to lodge AIS's, for example, there is nothing that can be done to make sure any remaining assets are transferred to a registered charity.

If there are still people involved this means they could transfer the funds for their own benefit without accountability or, more likely, the funds remain dormant and become unclaimed monies and are not then applied for the charitable purposes for which they were intended.

Community foundations are an independent way to honor donor intentions and ensure a legacy for funds raised. They offer:

- **Civic infrastructure** to strengthen local prosperity, connectedness and cohesion through grants, leadership and growing people's generosity.
- **A community resource in perpetuity:** community foundations have an endowment model that use returns on invested funds to make local grants, while protecting the initial capital.
- **A safe pair of hands:** over the last three years, the Foundation has had an average investment return of 9%, higher than the interest paid on unclaimed money accounts.

#### Example 1 – Revoked funds put back to work

On the 20<sup>th</sup> of November 2017, the charity status of Childs Vision Pty Ltd, a Sunshine Coast based charity was revoked.

Their last Annual Information Statement, submitted in 2016, demonstrated assets worth \$70,000. Using the wind-up clause, a sub fund could be created with Queensland Community Foundation that continues the objects of the organisations being *to provide training and services for indigenous and disadvantaged persons in need of employment, and to assist them in the creation of their own business ventures.*

This sub-fund would ensure that there is ongoing benefit of these funds. The initial sum of \$70,000 would be invested as a management account. Each year, 4% of funds would be distributed to local charities. The benefit of using this resource strategically and in perpetuity would:

- Give \$100,000 in grants to organisations in the first 15 years
- Triple the amount of funds available to respond to the training needs of disadvantaged persons to \$220,000 after 17 years
- Distribute just under \$300,000 over a 30 year period.

Other opportunities that this resource brings – inspiring others to give, resourcing critical activity articulated by local need and strengthening local communities - would be an additional benefit.

ACP would strongly support the introduction of a measure which enables the ACNC to protect the charitable assets of a deregistered charity and believes that this should be a priority.

However, any funds received as a result of such a measure should not be subsumed into the Australian Government's consolidated revenue. Rather, an appropriate framework should be established to ensure that they are provided to other charities which can use them to further charitable purposes.

There is an opportunity to think about the strategic, long-term resourcing of community groups through philanthropy. Rather than use the transfer of assets in a wind-up phase for a once-off injection of capacity, existing philanthropic organisations could support diversification of funding streams.

Community Foundations are ideally placed to ensure the legacy of community efforts are continued, and respond to emerging need in the time ahead.

### Example 2 – Continuing an important legacy

Examples from other jurisdictions demonstrate how regulators work with Community Foundations to maintain trust in the charity sector.

The UK Charity Commission and Community Foundations have worked closely in recent years to ensure that trustees seeking to revitalise dormant or ineffective trust funds (and who are looking for an effective way of carrying on their good work in future years) can release their funds to a Community Foundation as part of their appraisal of options.

The Charity Commission encourages charities to ask themselves whether they should work with Community Foundations as an alternative to continuing, particularly if they can answer yes to one or more of the following questions:

- We find it difficult to identify beneficiaries
- We cannot spend the income of the charity
- We find ourselves providing money to the same people or groups every year
- We find it difficult to attract trustees
- We would like to be involved in how the money is spent but we do not want the legal responsibility of being a trustee
- The work of administering the charity and its investment is becoming onerous or disproportionate to the level of funding
- We wish that we knew more about local issues and opportunities and who else was funding what

Assets are encouraged to be used to strengthen local philanthropy so that charities are sustainable for the long term. The Charity Commission acknowledges that Community Foundations have a reputation for the effective management of charitable funds in order to maximise their impact at a local level.

### Retain existing objects of ACNC

Since establishment, the ACNC has provided a comprehensive and significant transparency to guide trust in Australia's charity sector. The 38 members of ACP use the ACNC register on a daily basis for due diligence to ensure charitable funds are used appropriately.

ACP endorses the current regulatory approach. Education of organisations and people has been effective, as demonstrated by ever increasing number of register views. Effective giving is increased by transparency and trust in a regulator. Community foundations are a significant funder of grass roots organisations doing great work, thus ACP believes it has a clear role in supporting local people to give.

The current objects of ACNC help ACP members achieve this. ACP supports the retention of the three current objects, and does not believe there is a need for the addition of further objects. Please see Appendix 2: Philanthropy Australia for further detail that is supported by ACP.

### Further reduce red tape

The ACNC's important work in reducing red tape should continue. The current regulatory context is confusing, and ACNC should have powers to streamline regulatory compliance that decreases burden, and increases trust from donors.

### Improve transparency

The ACNC register is an important tool to increase transparency for donors. The current register would be improved by:

- Including the DGR status on the main page, rather than requiring cross reference to the Australian Business Register ABN lookup tool.
- Maintaining the Objects of a charity in the main page, rather than looking through the governing document. This would increase efficiencies by allowing for data to be more easily collected for granting purposes

Please see Appendix 2: Philanthropy Australia for further detail that is supported by ACP.

### Charities and Advocacy

ACP supports the requirement for Australian charities to legitimately undertake advocacy to address the root causes of social and environmental problems that relate to their charitable purpose. Any charity engaging in advocacy does so within a prescribed legal framework and has access to guidance from the ACNC to ensure it does so appropriately.

Australian charities can only advocate on their cause. Our experience is that this is an important tool for local organisations – meeting with politicians, providing information and educating local people – is important for democratic societies.

## Appendix 1 - Overview of ACP

Australian Community Philanthropy (ACP) is the peak membership organisation for community foundations in Australia. Founded in 2008 by a group of community foundation practitioners to provide support to the voluntary boards and professional staff of new and established community foundations, ACP exists to connect, support and represent the community foundation movement and to strengthen its resources, capacity and impact.

- **What is a community foundation?** Community foundations are community-owned, not-for-profit, charitable organisations which exist for public benefit in a specific, named geographic area. Their shared purpose is to attract resources to support and revitalise local communities and build social capital. They make philanthropic grants, and often seek to build a perpetual financial asset for their community.
- **Who is involved?** They are governed by voluntary boards, or have input from advisory committees from the local area. Many community foundations also employ a small number of staff, often only 1 or 2 paid employees supported by volunteers. They have multiple sources of funding from a range of donors and supporters.
- **Why are they important?** Community foundations are a valuable and unique form of community infrastructure. They operate at the grassroots to understand community needs at the coal face, and apply their expertise and experience to make better grants. They act as a leader, connector, convenor and funder within communities and encourage civic engagement, volunteering and philanthropy.

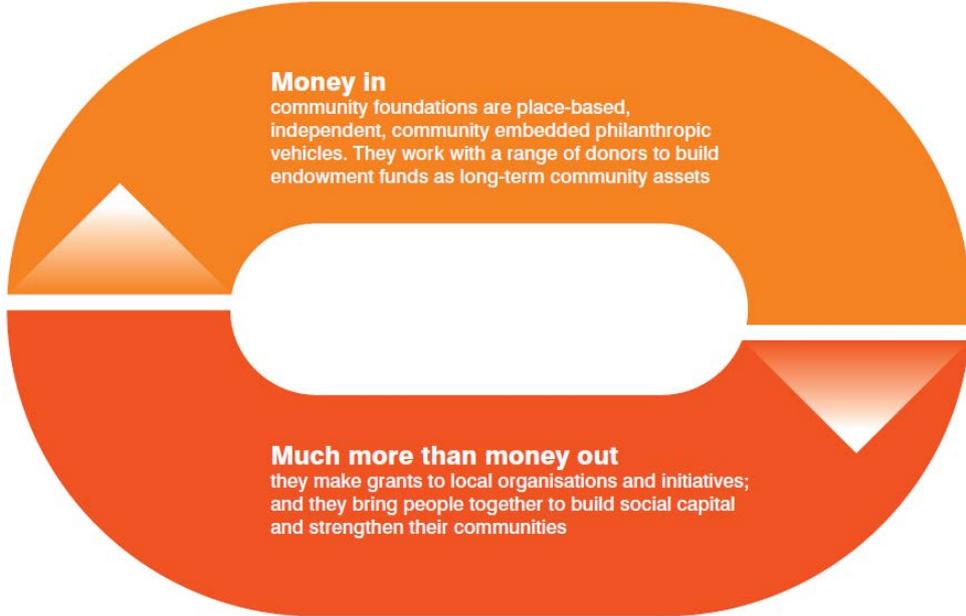
Australian community foundations are part of a thriving global sector of more than 1,800 place based foundations which collectively have:

- US\$6.3billion in financial reserves
- Granted more than US\$5billion (last fiscal year reported)
- 65% have five or less paid staff

Australian community foundations generally operate a 'public ancillary fund' (an 'Item 2' deductible gift recipient) and, as such, provide grants to 'Item 1' deductible gift recipients

Collectively, Australia's 38 community foundations:

- have presence in over 80% of Australian LGAs
- hold more than \$310 million in funds under management
- grant at least \$21 million annually within their communities
- support hundreds of charitable grass roots projects and initiatives through their granting and community strengthening programs



## Appendix 2 – Philanthropy Australia submission

ACP supports the other remarks made by Philanthropy Australia outlined below.

### General Comments

Philanthropy Australia believes that a well-regulated not-for-profit sector is essential to support and foster a culture of giving in Australia, which in turn benefits the community.

According to the Australian Charities Report 2016<sup>1</sup>, donations and bequests made up 7.3% or \$10.5 billion of all charity revenue. They were a source of revenue for 70.1% of charities.

Effective regulation is essential for ensuring that donors are confident to give to charities. It is important for ensuring that we have vibrant and innovative charities, who can rely on the support of the community to help achieve their charitable purposes.

At the same time, it is important to note that most philanthropic organisations, such as income tax exempt charitable trusts and public and private ancillary funds, are themselves charities and therefore subject to the oversight of the ACNC. Effective regulation is also essential for ensuring that the broader community views philanthropic organisations as legitimate.

For these reasons, Philanthropy Australia strongly supports the role of the ACNC, and believe that it plays a critical role within Australia's broader regulatory architecture.

In the time since its establishment in 2012, the ACNC has done an exceptional job building a new regulatory framework from scratch. This has not been without its challenges, given that for much of this time, there was uncertainty about its future.

It has done this in a professional manner, demonstrating a commitment to best practice regulation and the importance of effective stakeholder engagement.

Philanthropy Australia wishes to acknowledge the leadership of the inaugural Commissioner of the ACNC, Ms Susan Pascoe AM, the ACNC's Assistant Commissioners David Locke and Murray Baird and their team of dedicated and expert staff. It is our hope that the commitment to best practice regulation and the importance of effective stakeholder engagement will continue under the leadership of the new Commissioner, the Hon Dr Gary Johns.

Like with any new regulatory framework, there are always challenges. When drafting legislation to establish the framework, it is not possible to foresee every issue or matter which may arise down the track. Therefore, it is opportune that a review of the ACNC legislation is taking place.

Overall, Philanthropy Australia believes that the ACNC regulatory framework is generally working well, and that wholesale change is neither necessary nor desirable. What is needed are targeted and precise amendments to the ACNC legislation and associated regulation to address specific issues with the existing framework and enhance its effectiveness going forward.

The following section sets out the priorities for Philanthropy Australia in this regard

### 1. Specific Comments

#### **Objects of the *Australian Charities and Not-for-profits Commission Act 2012***

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<sup>1</sup> Available here: <http://australiancharities.acnc.gov.au>

### *Existing Objects*

The following objects are set out in Division 15 of the *Australian Charities and Not-for-profits Commission Act 2012* (the Act):

1. To maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
2. To support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
3. To promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

Philanthropy Australia believes these objects continue to provide an appropriate framing for the roles and responsibilities of the ACNC. They are also an important tool for shaping the organisational culture of the ACNC as it seeks to fulfil these roles and responsibilities.

The first object, which could be described as the ‘public object’, focuses on the relationship between the sector and the broader community. This emphasises that the sector relies on the community’s support in order to achieve its charitable purposes, and that it will not be able to do this if they are not seen as legitimate by the community. This reflected in paragraph 1.88 of the Act’s Explanatory Memorandum, which states that:

*High levels of public trust and confidence in the NFP sector encourage philanthropic giving, volunteerism and public engagement with the sector.*

The second object, which could be described as the ‘sector object’, focuses on charities themselves. This object is important because it emphasises that the ACNC has a role as a ‘facilitative regulator’ which carries out its functions in a manner that is not only responsive to the expectations of the broader community but also the sector which it regulates<sup>2</sup>. A regulator which has a focus on the needs of the sector it regulates, and cultivates a positive and cooperative relationship with it, will find it easier to encourage a culture of proactive compliance.

The third object, which could be described as the ‘regulatory obligations object’, focuses on how the ACNC achieves the other two objects. It includes an implicit assertion that reducing regulatory obligations is a good thing, and that the ACNC must work to achieve this. This object is important for two reasons. Firstly, ensures that the ACNC is mindful of any regulatory burden which its own activities may impose on charities, and seeks to ensure that these are kept to the minimum level necessary in order for it to be able to achieve its other objects. Secondly, it emphasises that as the national charities regulator, it has a role driving change to improve the overall regulatory framework within which charities operate within. However, we do not that the ACNC is not a policy making body, and therefore its ability to affect such change is limited. However it has had notable successes in a number of areas by working in a very constructive manner with regulators at both a Commonwealth and State level on a bilateral basis.

Philanthropy Australia supports the retention of these three objects, and does not believe there is a need for the addition of further objects.

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<sup>2</sup> For a discussion of the ACNC’s role as a facilitate regulator, see: K Seibert, ‘Navigating Reform in Contested Spaces: Reflections on not-for-profit sector regulatory reform in Australia, 2010–2013’ in ‘The Three Sector Solution : Delivering public policy in collaboration with not-for-profits and business’ (Edited by J Butcher and D Gilchrist), ANU Press, 2016. Available here: <http://press-files.anu.edu.au/downloads/press/n1949/html/ch07.xhtml>

### *Additional Objects*

Philanthropy Australia notes that the ACNC has proposed the addition of two further objects<sup>3</sup>:

1. To promote the effective use of the resources of not-for-profit entities; and
2. To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public

Philanthropy Australia does not believe that these further objects are necessary.

Regarding the first proposed object, we do not believe that it is the core role of a regulator to promote the effective use of resources – this is something which is the core responsibility of the boards, staff, beneficiaries and donors of charities. We would be concerned that this object could imply a shift in the ACNC regulatory framework to one which is much more interventionist.

Regarding the second proposed object, its inclusion would seem superfluous given that the existing first object of the Act, which focuses on ‘maintaining, protecting and enhancing public trust and confidence in the Australian not-for-profit sector’, by its very nature requires accountability of not-for-profit entities. In addition, we note that section 15.10 of the Act already specifies that:

*In performing his or her functions and exercising his or her powers, the Commissioner must have regard to the following:*

...

- b. the need for transparency and accountability of the not-for-profit sector to the public (including donors, members and volunteers of registered entities) by ensuring the public has access to information about not-for-profit entities;*

...

### **Recommendation 1**

***That the existing Objects set out in Division 15 of the Australian Charities and Not-for-profits Commission Act 2012 be retained. No new objects should be added.***

### *ACNC Resourcing*

It is Philanthropy Australia’s understanding that the ACNC has only been resourced to fulfil its first existing object. We would therefore recommend that the Australian Government work with the ACNC to assess the adequacy of resourcing for fulfilling the second and third existing objects.

### **Recommendation 2**

***That the Australian Government work with the ACNC to assess the adequacy of resourcing for fulfilling the second and third objects of the Australian Charities and Not-for-profits Commission Act 2012.***

### *Matters Which the Commissioner is to Have Regard To*

Section 15.10 of the Act specifies certain matters which the Commissioner of the ACNC is to have regard to in exercising their powers and functions.

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<sup>3</sup> Recommendation 2 of the ACNC submission.

Philanthropy Australia believes that there would be benefit in adding one sub-section, which reflects the fact that charities achieve their purposes using a variety of approaches and methods, including but not limited to delivering services, undertaking trading activities, making grants, conducting research and undertaking advocacy.

The new sub-section would make clear that provided charities comply with the Act and associated legislation such as the *Charities Act 2013*, the ACNC should draw distinctions between the different approaches and methods which charities use to achieve their purposes.

### **Recommendation 3**

***That the following additional sub-section be added to Section 15.10 of the Act:***

- i. The diverse approaches and methods not-for-profit entities use to achieve their purposes, including but not limited to delivering services, undertaking trading activities, making grants, conducting research and undertaking advocacy.***

### **Protecting Accumulated Charitable Assets**

Philanthropy Australia notes the comments of the ACNC in paragraph 1.40 of its submission that:

*that there is currently no provision at the Commonwealth level for protecting the charitable assets of a deregistered charity. This responsibility is within the jurisdiction of State and Territory Attorneys-General in their capacity as guardian of the public interest in the enforcement of charities.*

*In some jurisdictions with charity registration systems, deregistered charities are required to wind up within a specified time period and distribute their surplus assets to a similar charity or pay a 'revocation' tax.*

We are very concerned that charities may be deregistered, and that no measures exist to ensure that their assets are used for charitable purposes. These assets may include funds received from donors, and it is essential that they be used for charitable purposes as this is the reason they were donated.

Philanthropy Australia would strongly support the introduction of a measure which enables the ACNC to protect the charitable assets of a deregistered charity and believes that this should be a priority. Options such as Canada's 'revocation tax' should be explored.

However, any funds received as a result of such a measure should not be subsumed into the Australian Government's consolidated revenue. Rather, an appropriate framework should be established to ensure that they are provided to other charities which can use them to further charitable purposes.

### **Recommendation 4**

***That the Australian Government prioritises the introduction of a measure which enables the ACNC to protect the charitable assets of a deregistered charity.***

### **Enhancing the Usability of the ACNC Register**

Philanthropy Australia believes that the ACNC Register is an important centralised source of information about charities. It is a useful tool for our Members when conducting due diligence about grant applicants.

Philanthropy Australia believes that the usability of the ACNC Register for philanthropic organisations would be greatly enhanced if it were to include the following information, which can be sourced from the Australian Taxation Office (ATO):

- Whether a charity has deductible gift recipient (DGR) status, and importantly, whether this is so called 'Item 1' or 'Item 2' DGR status
- Whether a charity has an income tax exemption

Most philanthropic organisations require a charity to have an income tax exemption, and they currently search the ABN Lookup to access this information.

Many philanthropic organisations, such as private and public ancillary funds also require a charity to have so called 'Item 1' DGR status.

Given that philanthropic organisations already access the ACNC Register for due diligence purposes, it would be beneficial if all the relevant tax concessions for a charity were listed there, to obviate the need to also check the ABN Lookup.

The ATO would need to provide guidance to state that using the ACNC Register to ascertain a charity's income tax exemption and Item 1 DGR status is sufficient to meet the requirement for due diligence under the *Public Ancillary Fund Guidelines 2011* and the *Private Ancillary Fund Guidelines 2009*.

#### **Recommendation 5**

***That the ACNC be permitted to provide the following information on the ACNC Register:***

- ***Whether a charity has deductible gift recipient (DGR) status, and importantly, whether this is a so called 'Item 1' or 'Item 2' DGR***
- ***Whether a charity has an income tax exemption***

#### **Secrecy Provisions**

Philanthropy Australia believes that the current secrecy provisions within the Act are too restrictive. It is not conducive to supporting public trust and confidence in charities if the ACNC cannot communicate with the public about the reasons for its decisions with regards to the registration of particular charities, nor confirm whether an investigation is being undertaken into a particular charity and the outcome of that investigation.

For this reason, Philanthropy Australia supports recommendations 10, 11 and 12 made by the ACNC in its submission to this Review, namely:

*[Recommendation 10] Amend the ACNC Act to give the Commissioner a discretion to publish the reasons for decision on an application for registration where the Commissioner considers that it would be in the public interest to do so.*

*[Recommendation 11] Amend s 40-5 of the ACNC Act to provide that the ACNC Register is to include the grounds under s 35-10(1) on which a decision to revoke a charity is based, and a summary of the reasons for revocation.*

*[Recommendation 12] Amend Subdivision 150-C of the ACNC Act to provide that ACNC officers are authorised to disclose protected ACNC information for the purpose of making a public comment or publishing information about the Commissioner's regulatory activities when it is in the public interest to do so. Specifically, this may include confirming that an investigation has been commenced, disclosing action that the ACNC has taken or is proposing to take in relation to a registered charity or a responsible person and disclosing a regulatory outcome (e.g. that the ACNC and a registered charity have entered into a*

*compliance agreement or that the ACNC has provided regulatory guidance to a registered charity).*

In relation to Recommendation 12, in the interests of transparency it would be beneficial if statements provided to the media regarding a particular charity are made available in a central location on the ACNC website, so it can be easily accessed by the public (for example in the media section, or the ACNC Register, or both).

### **Recommendation 6**

***That the Australian Charities and Not-for-profits Commission Act 2012 be amended in accordance with Recommendations 10, 11 and 12 of the ACNC Submission.***

#### **Financial Reporting Arrangements**

Philanthropy Australia notes that the Australian Accounting Standards Board is examining possible options to reform the financial reporting framework for charities<sup>4</sup>. This is referred to in paragraphs of 8.13 to 8.18 of the ACNC's submission.

We agree with the comments made by the ACNC in its submission, and believe that there are issues with the existing financial reporting framework for charities, for example around the measurement of fundraising costs.

However, information about the needs of users of financial statements is essential to ensure that changes to the financial reporting framework for charities achieve their purpose. This information is currently lacking.

Therefore, prior to any changes being made to the financial reporting framework for charities, detailed and independent research about the needs of users of financial statements should first be conducted. These users would include the public, philanthropic organisations, government and regulators.

### **Recommendation 7**

***That detailed and independent research about the needs of users of financial statements should be conducted prior to any changes being made to the financial reporting framework for charities.***

#### **More Effective Private Ancillary Fund Privacy Protection**

When the ACNC bills were introduced into the Parliament in 2012, a regulatory power was included in the then *Australian Charities and Not-for-profits Commission Bill 2012* (Cth) in order to protect the privacy of private donors, such as those who maintain a private ancillary fund (PAF). The then Assistant Treasurer, the Hon David Bradbury MP, stated in his second reading speech that:

*A new regulatory power has been included in the bill, to provide that the ACNC Commissioner must not include certain information on the register in prescribed circumstances. The government intends to use this power to make regulations to protect the privacy of private donors, such as those who maintain a private ancillary fund. The government strongly supports the role and importance of philanthropy in the Australian community, and will ensure that the ACNC provides a supportive framework for the important contribution of Australia's many philanthropists.*

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<sup>4</sup> See: <http://www.aasb.gov.au/News/AASB-past-events/Australian-Reporting-Framework-for-Charities.aspx>

Philanthropy Australia advocated for the inclusion of this regulatory power, and was consulted by the Treasury as part of developing the relevant regulations to give effect to this commitment in the second reading speech, which are contained in Clause 40.10 of the *Australian Charities and Not-for-profits Commission Regulation 2013* (the Regulation). The Clause provides that certain information which may identify an individual donor associated with a PAF is not to be published on the ACNC Register.

However, it now appears that the regulation is not meeting its objective. This is despite the commendable efforts of the ACNC staff, who have adopted a very constructive approach to administering the Regulation, and have sought to implement the Regulation in as best a way as possible. However, the options available to them are constrained by the Regulation they are required to administer.

Philanthropy Australia therefore believes that the Regulation requires amending in order to ensure that the privacy of PAF donors is adequately protected.

#### *The Problems with Clause 40.10 of the ACNC Regulation*

There are a number of problems with Clause 40.10 of the Regulation.

Firstly, the Clause is unnecessarily complicated. In attempting to address instances where the privacy of donors to a PAF may be impacted, it deals with each individual source of information reported by a PAF to the ACNC where an individual donor may be identified. This includes the PAF's name, its governing documents, the names of its responsible entities, the PAF's 'Annual Information Statement', and financial reports. This requires that a PAF must examine each of these documents, and then apply for information to be redacted accordingly.

An application will include a number of requests for redaction, which must then be considered one by one by the ACNC. Any redactions must be carried out by the PAF itself, which adds to the compliance burden. Furthermore, whenever a new Annual Information Statement is submitted, another application must be made, and this process is repeated. This is a time consuming and inefficient process.

Secondly, the Clause requires the making of subjective judgements regarding what information can and cannot be redacted. This usually involves judgements about whether the publication of a particular piece of information is likely to lead to the identification of an individual donor. Philanthropy Australia appreciates that all regulatory frameworks involve the making of subjective judgements, however in the interests of certainty and simplicity, we believe that where possible the need to make such judgements should be kept to a minimum. One by-product of this is that time and effort is spent by PAFs and ACNC staff discussing instances where there are disagreements, and these instances arise in a number of areas.

Thirdly, and perhaps most importantly, the Clause is leading to inadequate outcomes in that it does not ensure that the privacy of PAF donors is protected in all instances.

#### *A Proposed Solution*

Philanthropy Australia has met with the ACNC to discuss this issue, and it is apparent that the administration of Clause 40.10 not only places a burden on PAFs, but also on ACNC staff. The ACNC has advised that because the Clause is drafted in such a restrictive manner, there is little scope to change the way the ACNC administers it to make the process simpler.

Philanthropy Australia's preferred solution would be to amend the Clause to provide that where a PAF has living donors, *all* information from the PAF can be withheld from being

published on the ACNC Register (without the need to meet any additional conditions), but that de-identified information will be made available by the ACNC through the 'data.gov.au' portal. No names (including that of the PAF and donors/responsible entities), addresses or other identifying information would be included, but the following data items could be made available:

- a. The structure of the entity, i.e. that it is a PAF
- b. The categories of beneficiaries supported by the PAF
- c. The size of the PAF
- d. The date of the PAF's financial year end
- e. The states and territories, or countries where the PAF operates
- f. The charitable purpose(s) of the PAF
- g. When the PAF was registered with the ACNC
- h. Financial information

The rationale for this is that although it is very important to protect the privacy of PAF donors who wish to give discretely, there would be benefits to having information available to analyse the size and activities of PAFs, provided that individual PAFs and donors cannot be identified.

It is our understanding that such information is not currently made available through the 'data.gov.au' portal, and therefore the proposed solution will actually provide for *more* information to be publicly available, albeit in a de-identified format.

The proposed arrangement could operate using an 'opt-in' system, whereby a PAF would need to notify the ACNC if it does not wish to have its information published on the ACNC Register.

Philanthropy Australia would intend that the proposal only applies to PAFs without living donors, giving that the privacy of donors is not a relevant consideration if donors are no longer alive.

We believe be a simple and workable arrangement, which meets the intent of ACNC regulatory framework as articulated in the second reading speech for the ACNC Bills.

#### *A Rationale for PAF Privacy Protection*

PAFs are amongst the most regulated charitable structure in Australia. They are subject to detailed compliance requirements sets out the in the *Private Ancillary Fund Guidelines 2009* and report to both the ACNC and the ATO.

Philanthropy Australia strongly supports these arrangements, and we believe that it is important that PAFs are accountable to a regulator to ensure that public trust and confidence in philanthropy is retained and enhanced.

However, we believe that requiring transparency through the publication of PAF information on the ACNC Register would have unintended consequences.

The PAF structure is a relatively new innovation, and many PAF donors still wish to undertake their philanthropy discretely. Some do not wish to draw attention to their wealth, and they may also be unable to manage the requests for funding they may receive if their information were made publicly available on the ACNC Register.

Some PAF donors would close their PAFs if they there were required to make all their information publicly available on the ACNC Register. It would also dissuade some prospective donors from establishing PAFs.

Over time, Philanthropy Australia believes that PAF donors will become more comfortable with mandatory transparency requirements. The topic of transparency something we actively discuss with our Members, and we are pursuing a number of strategic initiatives in this area which seek to highlight the benefits of transparency and openness.

However at this point in time, we believe that if we are to grow our culture of giving in Australia and encourage more individuals and families to engage in structured philanthropy, it is important to ensure that the ACNC regulatory framework is sufficiently flexible to provide targeted exemptions from mandatory transparency requirements to help achieve this.

### **Recommendation 8**

***That Clause 40.10 of the Australian Charities and Not-for-profits Commission Regulation 2013 be redrafted to provide more effective private ancillary fund privacy protection.***