



**LAW
INSTITUTE
VICTORIA**

ACNC Legislation Review

LAW INSTITUTE OF VICTORIA SUBMISSION

To: ACNC Legislation Review Panel
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INTRODUCTION

The Law Institute of Victoria

The Law Institute of Victoria (**LIV**) is the peak body for the Victorian legal profession and represents more than 19,500 members in Victoria, interstate and overseas. Together with its members, the LIV advocates justice for all and promotes excellence in the practice of law, advancing social and public welfare in the operation of the courts and legal system as well as advancing education and public confidence both in the legal profession and in the processes by which the law is made and administered.

Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues. The LIV also assures the standards and professionalism of lawyers, including accreditation and specialisation in contemporary legal disciplines.

The current consultation

Background

Under s 16(1) of the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth), a review must be undertaken of the first five years of the operation of that Act and the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**). Together, these Acts are referred to as the 'ACNC Acts'.

As the ACNC Acts commenced on 3 December 2012, the review was scheduled to be undertaken from December 2017. Accordingly, Treasury released a Terms of Reference for the Review of ACNC Legislation (**ACNC Legislation Review**) on 20 December 2017 and a Review Panel was formed by Government.

Broadly, under the Terms of Reference, the Review Panel is to 'inquire into and make recommendations on appropriate reforms to ensure that the regulatory environment established by the ACNC Acts continues to remain contemporary, that the ACNC Acts deliver on their policy objectives and that the ACNC Acts do not impair the work of the ACNC Commissioner to deliver against the objects of the [ACNC Act]'.

This submission

The LIV is pleased to provide its submission in response to the ACNC Legislation Review.

For ease of reference, the LIV has elected to answer each of the nine focusing questions which were identified in the Terms of Reference for the Review. They are:

1. Are the objects of the ACNC Act still contemporary?
2. Are there gaps in the current regulatory framework that prevent the objects of the Act being met?
3. Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?
4. What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?
5. Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?

6. Have the risks of misconduct by charities and not-for-profits, or those that work with them, been appropriately addressed by the ACNC legislation and the establishment of the ACNC?
7. Are the powers of the ACNC Commissioner the right powers to address the risk of misconduct by charities and not-for-profits, or those that work with them, so as to maintain the public's trust and confidence? Is greater transparency required and would additional powers be appropriate?
8. Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?
9. Has the ACNC legislation and efforts of the ACNC over the first five years struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct?

The LIV's responses are set out accordingly, with an additional 'Other issues' section addressing matters outside of the focusing questions but nonetheless relevant to the operation of the ACNC Act and the ACNC itself.

This submission was informed by contributions from a working group of the LIV's Charities & Not-for-profits Committee (**Committee**). The Committee itself comprises members who are subject-matter experts, and regularly or exclusively practice within the charities and not-for-profits (**NFP**) sectors. Committee members hail from a wide range of organisations with diverse backgrounds and experiences, from in-house practitioners at charities and NFP organisations to private practice.

The LIV has also benefited from having had an opportunity to consider the Law Council of Australia's (**LCA**) submission. As a constituent body, the LIV endorses the LCA submission insofar as the two submissions are consistent or where the LIV has not indicated otherwise.

Further consultation and contact

The LIV would be pleased to engage in further discussions with Treasury or the Review Panel in relation to this submission. Please contact Barton Wu, LIV Commercial Law Section lawyer, on (03) 9607 9357 or at bwu@liv.asn.au, to arrange a time to meet, together with representatives of the Committee.

SUBMISSIONS

Question 1: Are the objects of the ACNC Act still contemporary?

Donor accountability

The LIV notes that, in its submission to the Review, the ACNC recommends expanding the objects of the ACNC Act to include: 'to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public'.¹

In the LIV's view, there is insufficient evidence to justify this expansion. We consider that the current object to 'maintain, protect and enhance public trust and confidence', under s 15-5(1)(a) of the ACNC Act, is adequate.

The LIV is concerned about the practical and legal difficulties in expanding the objects, as recommended by the ACNC, which effectively shifts the overall focus of the ACNC Act to target 'donor accountability'.

If the ACNC is to have the function of regulating donor accountability, then substantial changes will need to be made to the ACNC Act beyond its objects. Further powers will need to be conferred on the ACNC and the Australian Charities and Not-for-profits Commissioner (**Commissioner**) to enable them to achieve the object, and additional requirements would need to be imposed on charities to require them to act in certain ways having regard to the object. Indeed, the LIV notes that the ACNC's submission foreshadows something to this effect at paragraph 2.6: '[i]f additional objects were added to the ACNC Act, then consideration would need to be given to whether additional powers and functions would be needed'.²

The LIV is conscious that the responsible entities of charities regulated by the ACNC are already subject to a range of duties, including common law and statutory duties. In some cases, these are fiduciary in nature. They include specific duties that govern what responsible entities must consider when making decisions regarding charitable assets. These include, for example, using the assets for the purposes of the charity (as set out in its constituent documents), and acting for a proper purpose and in the best interests of the charity.³ Accommodating the wishes or directions of a donor may or may not always be consistent with these overarching obligations, particularly as gifts may be made in perpetuity and circumstances change over time. As the ACNC also has a function of regulating many of these various duties (as they are expressed in the ACNC's Governance Standards), the LIV is concerned that conferring on the ACNC a general function of regulating donor accountability may invite tensions between its different functions, and have the flow-on effect of impacting responsible entity decision-making.

There are also specific rules regarding the granting of gifts to charities, and the extent to which donors may impose conditions and still be entitled to claim tax deductions where gifts are made to Deductible Gift Recipients (**DGRs**) under div 30 of the *Income Tax Assessment Act 1997* (Cth). If the objects of the ACNC Act are expanded to include a donor accountability function, there will need to be careful consideration to ensure that it does not create an expectation in the minds of donors that is inconsistent with the 'gift' rules for DGR entities.

¹ Australian Charities and Not-for-profits Commission, Submission to the Treasury Review Panel, *Review of the operation of the Australian Charities and Not-for-profits Commission Act 2012 (Cth) and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth)*, 19 January 2018, 22.

² *Ibid* 21.

³ See, eg Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45 *Australian Business Law Review* 127.

Interface between objects

There is ambiguity as to how the objects in ss 15-5(1)(a), (b) and (c) of the ACNC Act interact, and whether they are independent or complementary. It would be necessary to clarify how the individual objects are interpreted and their relationship with each other, in order to provide certainty to the sector.

As it stands, the LIV considers that:

- there is considerable scope for the Commissioner to interpret the objects in order to achieve specific goals. For example, he or she can give precedence to s 15-5(1)(a) – to maintain, protect and enhance public trust and confidence in the sector – potentially at the expense of the other objects; and
- there is conceivable conflict when applying the object to reduce red tape (para (c)) and to maintain, protect and enhance public trust in the sector (para (a)).

The LIV's preferred approach would be to adopt the object in s 15-5(1)(b) – to support and sustain the sector – as the primary, overarching object, and recast the objects in ss 15-5(1)(a) and (c) as ancillary or supporting objects.

In addition, the LIV suggests that the ACNC be required to report on all three objects, on an annual basis, to ensure accountability. However, it notes that this can only be achieved once the above issues, as to conflicting objects and the independent or complementary operation of the objects, are resolved.

Alternatively, the LIV supports recasting the objects as recommended by the University of Melbourne Law School's Not-for-profit Project in its Submission to the Treasury, Exposure Draft, Australian Charities and Not-for-profits Commission Bill 2012. That is:

'...the ultimate goal of regulation of the sector is to facilitate the sector to fulfil, in diverse ways, its goals for the public or community benefit. The promotion of public trust and confidence, loyalty to mission, and enhancing the effectiveness of the sector are identified as second-order goals, followed by a third tier objectives which include ensuring transparency and accountability to donors, beneficiaries, other stakeholders, and the public.'⁴

Subject of regulation

The LIV recommends that amendments be made to the objects of the ACNC Act so that it is framed in a manner that is consistent with the existing functions of the ACNC and Commissioner.

Ch 2 of the ACNC Act provides for the registration of NFPs. However, as a result of s 25-5(5), only charities are entitled to register for the purposes of the Act. Therefore, whilst the objects refer to the broader NFP sector, the ACNC only regulates charities as a sub-class within the sector.

It is submitted that the objects of the ACNC Act should reflect the actual subject of regulation. That is, until it is determined that the ACNC should, in fact, regulate other classes of NFPs other than charities, the LIV recommends that the objects are amended to reflect the ACNC's specific role as the regulator of charities only.

The above recommendation is made notwithstanding the LIV's response to the question of extending the regulatory framework to cover other classes of NFPs (see response to question 3, below).

⁴ Not-for-profit Project, University of Melbourne Law School, Submission to Treasury, *Exposure Draft, Australian Charities and Not-for-profits Commission Bill 2012*, 21 January 2012, 15.

Question 2: Are there gaps in the current regulatory framework that prevent the objects of the Act being met?

Fundraising

The LIV acknowledges the importance of charities respecting the wishes, intentions and directions of donors, and that it is vital to maintain public trust and confidence in the sector. However, the LIV also notes the extent to which the Australian Consumer Law (**ACL**) now governs fundraising activities of charities, as explained in the Australian Competition & Consumer Commission's (**ACCC**) *Guide to the ACL for Charities, Not-for-profits & Fundraisers*.⁵

To that end, the LIV endorses the LCA's submissions that the ACL 'provides the ideal legal framework' for governing fundraising activities, and that the ACNC should be conferred with certain powers or responsibilities to assist the ACCC in its enforcement activities.⁶

Harmonisation and red tape reduction

The LIV endorses the LCA's views that:

'...to enable the ACNC to pursue its red tape reduction Object, and indeed its other Objects...the ACNC is conferred with the ability to make recommendations to the Minister on changes to the [ACNC] Act or Charities Act that could assist with harmonisation of laws and reduction of red tape.'⁷

See also below response to question 8.

Question 3: Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?

Divs 40.1, 40.5 and 40.10 of the ACNC Act, refer and apply to registered charities. The LIV recognises the original intention to extend the ACNC to regulate all NFPs but queries whether ACNC legislation should be extended beyond charities to other classes of NFPs. Where certain classes of NFPs already come under other regulatory frameworks, additional regulation through ACNC legislation would unnecessarily increase or duplicate regulatory burden. The purpose to be achieved by any expansion of regulatory function ought to be borne in mind.

The LIV acknowledges the LCA's views that whilst there may be benefit in adopting one regulatory framework for NFPs, particularly those with similar tax concessions, there also needs to be recognition of the culture and unique nature of the ACNC as a dedicated charities regulator.

Should the ACNC's remit be expanded to cover other classes of NFPs, careful consideration needs to be given to clarifying the definition of 'not-for-profit' for the purposes of the Act, and aligning that definition with other legislation to ensure that there is no duplication. Accordingly, the LIV endorses the measures proposed by the LCA in paragraph 15, page 7 of its submission.⁸

⁵ Australian Competition & Consumer Commission, *Guide to the ACL for Charities, Not-for-profits & Fundraisers* (18 December 2017) <https://www.accc.gov.au/system/files/guide_acl_fundraising-1.pdf>.

⁶ Law Council of Australia, Submission to the Treasury Review Panel, *Review of the Australian Charities and Not-for-Profits Commission Legislation*, 28 February 2018, 16.

⁷ Ibid 17.

⁸ Ibid 7.

Question 4: What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?

The ACNC's *Public Trust and Confidence in Australian Charities 2017* market research report⁹ identified six main influencers which affect public trust in a charitable entity, these are:

- the charity was for a worthy cause;
- a high portion of funds go to those in need;
- the charity was for a cause that the individual believed in;
- the charity provides information how it spends its funds;
- the charity has an excellent reputation; and
- the charity is well-known.

Activities or behaviours that reduce the public's perception of these influencers are, therefore, more likely to have greater negative impact. This may include specific examples of illegality, misrepresentation to donors, or serious inefficiency, waste or mismanagement by charities that are brought to the attention of the public. The LIV notes that the current regulatory framework already provides for regulation of these activities through a combination of the ACNC's Governance Standards, the ACL and State and Territory fundraising laws.

However, it is equally important to understand that public statements by regulators, the media or even other charities shape the public's perception of charities. For example, the ACNC's FAQs on charities and administration costs¹⁰ provide helpful education to donors and other members of the public on the complexities and the resources which are required to run charities, and help to explain how charities spend their funds. Conversely, the ACNC collaborated with Australian Transaction Reports and Analysis Centre (**AUSTRAC**) in 2017 to assess the risks of money-laundering and terrorism financing in the NFP sector – as a result of which the sector as a whole was given a 'medium' risk rating.¹¹ These examples show how regulators can positively influence the public perception of the sector, but also, equally, the potential for damage to the sector if actions or statements are poorly explained or not based on solid evidence.

Moving forward, the LIV suggests that the ACNC's resources would be best used by addressing problems or issues as they arise and identifying solutions in specific contexts – for example, through use of case studies – rather than raising any potential or unsubstantiated concerns.

Further, the LIV recommends that a requirement be introduced, where any statements made by the ACNC be appropriately substantiated with qualitative or quantitative evidence. This would avoid unwarranted damage to the charities sector and would promote the ACNC's role in maintaining public trust and confidence in the sector.

Overall, when addressing the issue of public trust and confidence, there also needs to be recognition that activities and behaviours vary significantly across different parts of the sector. For example, organisations that rely on donations face different risks to private charitable trusts, and organisations that care for children will face different risks to environmental organisations.

⁹ Australian Charities and Not-for-profits Commission, *Public Trust and Confidence in Australian Charities 2017* <http://www.acnc.gov.au/ACNC/Publications/Reports/Public_Trust_2017.aspx>.

¹⁰ Australian Charities and Not-for-profits Commission, *Charities and Administration Costs* <http://www.acnc.gov.au/ACNC/FAQs/FAQ_Charities_and_administration_costs.aspx>.

¹¹ AUSTRAC and Australian Charities and Not-for-profits Commission, *Australia's NPO Sector Risk Assessment* (August 2017) AUSTRAC <<http://www.austrac.gov.au/australias-npo-sector-risk-assessment>>.

Question 5: Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?

The ACNC maintains a register of charities (**Register**) which is publicly accessible. The LIV recognises the importance the Register has for transparency and in maintaining the public's confidence in the charities sector. Therefore, it queries whether the list of information on the register, under s 40-5(1) of the ACNC Act, should be expanded for improved transparency and usability. Charities may often wish to include additional information that does not relate directly to ACNC regulatory matters.

However, LIV members have also raised concerns that Register information is being used to target board members of controversial organisations, potentially undermining participation in the sector. The LIV endorses the submission of the LCA at paragraphs 36 to 38 regarding the content of the Register.¹²

The LIV supports the retention of the secrecy provisions in relation to ongoing investigations where public knowledge of an ACNC investigation itself can be damaging to a charity. It should be emphasised, however, that only where there is an eventual finding of wrongdoing or misconduct should investigations be made public, if at all.

Finally, the LIV recommends the introduction of an internal review process for decisions made in relation to the Register, which would ensure greater transparency in decision-making by the ACNC.

Question 6: Have the risks of misconduct by charities and not-for-profits, or those that work with them, been appropriately addressed by the ACNC legislation and the establishment of the ACNC?

The LIV notes that the purpose of Governance Standard 4: Suitability of Responsible Persons (**GS4**) is to 'ensure that registered charities are not controlled by persons who pose a risk to a charity's financial position or pursuit of charitable work'. To better achieve this purpose, it is queried whether GS4 needs to be expanded. If GS4 were to be expanded, there must be recognition of the risk of undue regulatory burden on the charities sector.

The LIV is conscious that the ACNC, appropriately, recognises obligations charities have under the ACL. For instance, those organisations with fundraising activities which are classed as 'in trade or commerce' must avoid engaging in misleading or deceptive conduct or unconscionable conduct.

Conditions for registration – criminal activities

S 25-5(3) of the ACNC Act sets out the conditions that an entity must satisfy in order to qualify for registration, including para (d) as follows:

- (d) the entity is not covered by a decision in writing made by an Australian government agency (including a judicial officer) under an Australian law that provides for entities to be characterised on the basis of them engaging in, or supporting, terrorist or other criminal activities.

In the LIV's view, the current drafting of the para (d) condition is much broader than what may have been originally intended. It is clear that the paragraph was intended to cover individuals or organisations listed as

¹² Law Council of Australia, above n 6, 13-15.

terrorists under the various lists maintained by the Department of Foreign Affairs and Trade (**DFAT**) and the Commonwealth Attorney-General's Department (**AGD**).

Whilst the LIV supports the application of this condition to terrorist individuals and organisations, in our view there are three main issues with the condition as drafted:

- the condition applies to 'other criminal activities' (including criminal offences under fundraising laws) which may not have as sufficient gravity as terrorist activities to justify preventing registration;
- the lack of specificity in 'criminal activities' creates uncertainty, noting some States such as Queensland specifically categorise criminal offences into 'crimes', 'misdemeanours', 'simple offences' and 'regulatory offences' (s 3, *Criminal Code Act 1899* (Qld)); therefore, the scope of 'other criminal activities' is, potentially, extremely broad and its meaning is unclear; and
- as the ACNC has already submitted, there is some doubt as to whether 'Australian government agency' might extend to local authorities. If so, it would greatly expand the application of para (d), unjustifiably so in the LIV's view.

Accordingly, the LIV recommends that the condition in para (d) be narrowed to refer specifically to individuals or organisations:

- listed under the *Charter of the United Nations Act 1945* (Cth) and the *Autonomous Sanctions Act 2011* (Cth) (i.e. on the Consolidated List maintained by DFAT); or
- proscribed by the Government as terrorist organisations under div 102 of the *Criminal Code Act 1995* (Cth) (i.e. on the list of terrorist organisations maintained by the AGD).

It is submitted that other criminal activity of sufficient gravity are already addressed in para (b) which requires compliance with the governance standards and the external conduct standards.

Question 7: Are the powers of the ACNC Commissioner the right powers to address the risk of misconduct by charities and not-for-profits, or those that work with them, so as to maintain the public's trust and confidence? Is greater transparency required and would additional powers be appropriate?

The ACNC's enforcement powers are set out in pt 4-2 of the ACNC Act and are designed to allow the ACNC to maintain, protect and enhance public trust and confidence by addressing issues of non-compliance. However, the LIV is concerned that the powers set out in pt 4-2 are inadequate to protect charitable assets, and that they do not contain proper legislative constraints to meet Australia's international obligations.

Protection gaps

Federally regulated entities

The LIV is concerned that gaps in the Commissioner's power results in an inability to adequately protect charitable assets. Under the ACNC Act, the Commissioner is conferred with a range of enforcement powers in pt 4-2. These include:

- giving warnings (div 80);
- issuing directions (div 85);
- accepting enforceable undertakings (div 90);

- obtaining an injunction from a Court (div 95); and
- suspending, removing and replacing responsible entities (div 100).

A key limitation of these powers is that they are only exercisable in relation to 'federally regulated entities' (except in the case of suspected breaches of external conduct standards). A federally regulated entity (**FRE**) is defined in s 205-15 of the ACNC Act as:

- (a) a constitutional corporation; or
- (b) a trust, all of the trustees of which are constitutional corporations; or
- (c) a body corporate that is taken to be registered in a Territory under section 119A of the *Corporations Act 2001*; or
- (d) a trust, if the proper law of the trust and the law of the trust's administration are the law of a Territory; or
- (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.

There are a significant number of entities that do not qualify as FREs. Yet, the Commissioner's powers in respect of non-FREs are limited to information gathering and monitoring (pt 4-1), and revocation of registration (div 35).

The LIV does not consider revocation of registration as an acceptable solution as it lacks precision to ensure that charitable property is protected. While the power for revocation may result in an entity losing its entitlement to taxation concessions, it falls short of allowing the Commissioner to take proactive steps to ensure that charitable assets are applied for charitable purposes, and not misapplied for private benefit or similar. This gap in power does not foster public trust and confidence as the ability for the Commissioner to be effective in addressing the risk of misconduct by charities and NFPs is limited by an FRE designation.

Charitable trusts

The LIV notes that the protection of charitable trusts fall within the roles of the Attorneys-General of each State, as *parens patriae*. The LIV recommends that consideration should be given to conferring on the ACNC the ability to bring an action before a court, where it is otherwise sanctioned by the Attorney-General of a State. The ability for the ACNC to access a court action would ensure that the gap created by constitutional limitations is narrowed and that the overarching objective of the ACNC is more fully realised.

Protection from excess governmental power and compatibility with human rights

Objecting to decisions and removal of responsible persons

Under div 100 of the ACNC Act, the Commissioner is conferred with the ability to suspend or remove a responsible entity (subdiv 100-D). As defined, a responsible entity includes a director of a company or a person who performs those functions, a member of a committee of management of an association, or a trustee (ss 205-30 and 300-5.). In effect, these are the persons comprising the governing body of an organisation, whether incorporated or not.

If a person is suspended or removed from their position as a responsible entity, he or she commits an offence which is punishable by one year's imprisonment or 50 penalty units, or both if he or she:

- makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the charity (s 100-25);
- exercises the capacity to significantly affect the charity's financial standing (s 100-25); or
- communicates instructions, or wishes, to the remaining responsible entities of the charity, knowing, or intending that, they will act in accordance with those instructions or wishes (s 100-25).

The first element of each offence is that the person must be removed or suspended as a responsible entity, and strict liability applies (s 100-25(4)).

The grounds on which the Commissioner can suspend or remove someone are as follows (s 100):

- the Commissioner reasonably believes that the charity has contravened a provision of the ACNC Act, or it is more likely than not to contravene a provision of the Act (in the case of FREs);
- the Commissioner reasonably believes that the charity has not complied with a Governance Standard, or it is more likely than not that it will not comply with a Governance Standard (in the case of FREs); or
- the Commissioner reasonably believes that the charity has not complied with an external conduct standard, or that it is more likely than not that it will not comply with an external conduct standard (in the case of all charities, not just FREs).

The LIV suggests that when the full scope of requirements under the ACNC Act and the Governance Standards are considered, it appears the threshold for the Commissioner exercising a power under the Act is technically quite low.

For example, Governance Standard 3: Compliance with Australian Law (**GS3**) provides that charities must not commit an offence under any Australian law or breach a law that may result in a penalty of 60 penalty units or more. Incidentally, s 9 of the *Fundraising Act 1988* (Vic) creates an offence for a person conducting an appeal where he or she fails to ensure that collectors display appropriate identification badges (e.g. 'paid collector' or 'volunteer collector'), the contravention of which is punishable by 60 penalty units.

The relatively low threshold for the Commissioner to exercise a power gives rise to concerns about the ability of a charity, or responsible entity, to question itself or challenge the Commissioner's decision. Indeed, the ability of a charity to object to a decision of the Commissioner under the ACNC Act is not clear – under s 100-15(7), a responsible entity may object to the decision, but it is not clear if a registered charity may object.

Even if a registered charity could object to the decision (despite the absence of any specific provision in the ACNC Act), the bar set for a successful challenge appears to be quite high.

The ability of a charity to object to a registration decision of the Commissioner was recently considered in *Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission* (**Waubra**). It was held in *Waubra* that:

- it is not enough to prove that there was an error in the Commissioner's decision; it must be proved that the decision should not have been made, or that it should have been made differently; and
- the applicant has the burden of proof, and it may only agitate before the tribunal on certain grounds. That is, the grounds it raised in a notice of objection. A tribunal is not invited to consider the matter *de novo*.¹³

Charities often have limited resources and are unlikely to engage legal advice in order to properly state an objection at the early stages of a matter. This could have the effect of prejudicing any case it may have and any action it may pursue down the line.

There are also obvious difficulties with a responsible entity seeking to object to the decision by the Commissioner to suspend or remove him or her. These include significant financial costs, as well as the potential for such an objection, in practical terms, to lead to a breach of s 100-25 of the ACNC Act (communicating instructions or wishes to the remaining responsible entities).

¹³ *Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission* [2017] AATA 2424.

The LIV is, therefore, concerned that neither the registered charity, nor the responsible entity, would be able to effectively object to an improper exercise of a power to remove or replace a responsible entity.

The LIV understands that the ACNC has stated it will take a proportional approach to misconduct.¹⁴ It is also noted that the Commissioner is bound to have regard to the principle of proportionate regulation, under s 15-10 of the ACNC Act, when exercising any powers under the Act. However, there is a broad range of matters the Commissioner is directed to consider under s 15-10, and the relative weight to given to competing considerations is not specified.

In these circumstances, having regard to the difficulties of challenging a decision of the Commissioner and the low threshold for the exercise of the relevant powers under pt 4-2, as well as the potentially severe consequences of possible infringements (e.g. imprisonment) and the fact that regulatory approaches can change over time, the LIV is concerned that the current legislative restraints on the exercise of powers by the Commissioner, under pt 4-2, are inadequate.

Appointment of responsible entity

Under s 100-25 of the ACNC Act, the Commissioner can appoint another person ('acting responsible entity') in the vacancy created by the removal or suspension of a responsible entity (subdiv 100-C). This appointment has the following effect:

- the acting responsible entity is granted 'all the rights, title and powers, and must perform all the functions and duties' of the person who was removed or suspended (s 100-55);
- the governing rules and every Australian law apply in relation to the acting responsible entity, as if the acting responsible entity occupied the same office as the suspended or removed responsible entity (s 100-55); and
- the Commissioner can issue directions and require the acting responsible entity to do (or not do) one or more specific things (s 100-60).

The LIV notes that Australia is a party to the *International Covenant on Civil and Political Rights (ICCPR)*, under which, *inter alia*, the rights to freedom of association (art 22) and freedom of religion (art 18) are protected. In the LIV's view, there needs to be consideration of the compatibility of the enforcement powers under subdiv 100-C in light of such rights.

The LIV notes, with particular interest, the approach taken by the European Court of Human Rights (**ECtHR**) to interpreting similar rights within the *European Convention on Human Rights (ECHR)*, as described by Christopher McCrudden in his article 'Multiculturalism, Freedom of Religion, Equality and the British Constitution: The JFS Case Considered':

'...the ECtHR has refused to permit states to interfere in the choice of leaders of particular churches. In a series of cases, the Court has held that the state must ensure that religious organizations retain their autonomy in relation to the selection of their own leaders...In [Hasan and Chaush v. Bulgaria (2002) 34 Eur Court HR (ser A) 55], Article 9 [of the ECHR, concerning freedom of religion] was violated because of "an interference with the internal organization of the Muslim community".'¹⁵

The LIV acknowledges that under s 100-5(3) of the ACNC Act, the Commissioner cannot suspend or remove a responsible entity, and therefore appoint an acting responsible entity, in respect of a 'basic religious charity'. However, having regard to the very restrictive definition of basic religious charity under section 205-35, it is apparent that, in most circumstances, the Act confers on the Commissioner the ability to remove and

¹⁴ See Australian Charities and Not-for-profits Commission, *Regulatory Approach Statement* <https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx>

¹⁵ Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered' (2011) 9(1) *International Journal of Constitutional Law* 200, 218.

replace religious leaders in their capacity of responsible entity, and any person appointed to such a position must perform all the functions and duties of the removed or suspended person.

In fact, the ability for the Commissioner to remove and replace responsible entities raises potential freedom of association issues for all charities, not just religious entities.

Further, as discussed earlier in this submission there is no ability to challenge the decision of the Commissioner to appoint such a person under the ACNC Act. That is, whilst a decision can be objected to by the subject of the decision (i.e. the person being removed), subdiv 100-C does not contain a provision enabling the charity itself (i.e. the remaining board members or the members of the organisation via derivative action) to object or request for a review of a decision. The LIV is concerned that the Act may, therefore, be inadvertently facilitating breaches of the rights to freedom of religion and freedom of association, and recommends the introduction of review mechanisms for subdiv 100-C decisions and that, careful consideration be given to compatibility issues with fundamental rights under the ICCPR.

More broadly, the LIV suggests that the power to remove and replace responsible entities should rest with the courts, on application by the Commissioner, rather than by the Commissioner in his or her own right. The LIV notes that the Australian Securities & Investments Commission (**ASIC**) is empowered to seek a range of orders from a court and recommends the adoption of a similar model by the ACNC.

Governance Standard 5: Duties of Responsible Persons

With respect to Governance Standard 5: Duties of Responsible Persons (**GS5**), the LIV would like to draw attention to 'Registered Charities and Governance Standard 5: An Evaluation' by Prof. Ian Ramsay and Miranda Webster.¹⁶ The LIV agrees with and endorses the analysis of GS5 provided in that article.

Question 8: Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?

The LIV endorses the LCA's response to question 8.¹⁷

Question 9: Has the ACNC legislation and efforts of the ACNC over the first five years struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct?

Generally, the LIV supports the ACNC's current risk-based approach as it is proportionate, consistent, supportive of charities and understanding of their specific culture. It also endorses the LCA's views in this regard.¹⁸

The LIV notes that the ACNC cannot comment on compliance investigations unless the charity has volunteered something for clarification, which will be made available in the public domain. In the LIV's view, this strikes an appropriate balance between supporting charities to do the right thing and deterring or dealing with misconduct. The register which is publicly accessible (see above question 5) promotes effective regulation in the public interest by providing transparency and accountability.

¹⁶ Ian Ramsay and Miranda Webster, above n 3.

¹⁷ Law Council of Australia, above n 6, 15-17.

¹⁸ Law Council of Australia, above n 6, 6-7.

Further, the LIV considers that the ACNC's ability to make appropriate comments about matters under investigation (for example public statements about the reason of revocations) may have positive effects on compliance by registered entities.

Other issues

Interaction with the Corporations Act

Set out below are the LIV's suggestions on amendments that ought to be made to legislation to address technical problems that have arisen in the interaction between the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ACNC Act.

Notification of company changes

The LIV recommends that the requirement for charities to notify ASIC of a change of name is removed. The ASIC register is not maintained as up-to-date. Full responsibility for the register of companies which are charities should be transferred to the ACNC.

Clarify ASIC and ACNC regulatory powers

The LIV recommends consideration and seeks clarification of the following:

- where a company is registered with the ACNC, within 12 months of registering as a company with ASIC, its reporting requirements to ASIC should cease;
- ASIC is the regulator and has powers for criminal breaches but, currently, neither the ACNC nor ASIC are required to obtain up-to-date addresses for directors for service; this should be rectified by requiring the regulators to obtain up-to-date information;
- whether the ACNC should have the powers in ss 250PAA and 250PAB of the Corporations Act, given that ACNC-registered charities are not required to hold annual general meetings; and
- the overlap of regulatory powers when a charity becomes insolvent.

Provisions not applicable to body corporates

Where a charitable trust is registered with the ACNC as a charity, s 111L of the Corporations Act – which provides for the 'switching off' of various Corporations Act obligations of a body corporate that is a registered charity – does not apply to a company that is the trustee of that charitable trust unless the company itself is also a registered charity.

In most cases, the company will carry out no functions other than as trustee of the charitable trust and, therefore, only the trust will be registered as a charity. As a trust, the charity will have no Corporations Act obligations to comply with, but the trustee company will.

As a result, the company will have duplicate compliance obligations to both ASIC and the ACNC. The obligations to comply with the Corporations Act arise because it is a company and the obligations to the ACNC arise because each of the directors of the corporate trustee of the charity is a responsible person for the charity. The company is also the legal entity that carries out the legal functions for the charitable trust.

In the LIV's view, this duplication could (and should) be avoided where the company conducts no activities other than as trustee of a registered charity, if the switching off provisions pursuant to s 111L of the Corporations Act extended to bodies corporate acting as trustee of a charitable trust registered under the ACNC Act.

Reliance on the register

The LIV recommends that the ACNC be conferred with the same ability to rely on the information in the register as ASIC can under ss 128 and 129 of the Corporations Act.

Related party transactions

The LIV recommends consideration and seeks clarification of the following:

- reproducing the requirements under ch 2E of the Corporations Act in the ACNC Act would alleviate uncertainties around related party transactions as they apply to registered charities;
- related party transactions cover more than directors' fees. The LIV queries the policy intent of exempting registered charities from including 'Limited' in their names under ss 150 and 151 of the Corporations Act; and
- if the exemption from related party transaction provisions for companies who do not include 'Limited' in their name under ss 150 and 151 of the Corporations Act is retained, then there should be clarification as to whether companies who are eligible to do so, but who have not in fact omitted 'Limited' from their name, are also exempted from the related party transaction provisions.

The LIV recommends that ss 150 and 151 are removed from the Corporations Act and instead adapted for the ACNC Act. It is also suggested that Annual Information Statements incorporate disclosure of fees paid to directors and related-party transactions.

Addresses for service

The LIV recommends that the Corporations Act requirements for a registered address for service are duplicated in the ACNC Act.

Membership registers

The Corporations Act requires that company registers are kept at the registered office or principal place of business. However, these expressions are not used in the ACNC Act or by the ACNC itself. ASIC remains the regulator for membership registers. The LIV queries as to whether this responsibility should be transferred to the ACNC as part of its regulatory functions under Governance Standard 2: Accountability to Members.

Registered offices

S 188 of the Corporations Act requires a company secretary to ensure compliance with registered office requirements. This requirement does not exist under the ACNC Act. The LIV recommends that this requirement be switched off for ACNC-registered charities.

Company secretaries

ASIC still has regulatory powers over company secretaries but no regulator keeps names and addresses for a company secretary. The LIV recommends that this gap is addressed.

Special resolutions

The LIV notes that the definition of 'special resolution' in the Corporations Act refers to a provision which has been switched off for ACNC-registered charities. It is recommended that a definition of special resolution is included in the ACNC Act to provide clarity.

Prohibitions on insurance

S 199B of the Corporations Act prohibits a company from obtaining insurance for its officers for conduct arising out of a breach of ss 182 (directors' duty relating to misuse of position) and 183 (directors' duty relating to misuse of information). However, ss 182 and 183 are switched off for ACNC-registered charities. Accordingly, it would appear that the prohibition on obtaining insurance for improper use of information or position seem to no longer apply to registered charities. The LIV queries whether this is an unintended consequence, and if so, suggests that it is remedied.

Resolutions of sole member companies

S 249B of the Corporations Act provides that a company that has only one member may pass a resolution by the member recording it and signing the record. S 249B has been switched off for ACNC-registered charities. The LIV recommends that it is reinstated, or alternatively that an equivalent provision is inserted in the ACNC Act.

Minutes

S 251A of the Corporations Act imposes on companies certain obligations regarding the keeping of minutes of meetings and resolutions without meetings. That provision has been switched off for ACNC-registered charities. The LIV recommends that the requirements of s 251A are re-instated, or that an equivalent requirement is inserted in the ACNC Act under s 55-5(2).

Advocacy activities

The LIV acknowledges that advocacy is an area which is increasingly under scrutiny. In particular, the treatment of advocacy activities in the context of charitable activities or purposes requires further, legislative clarification.

Currently, in the LIV's view, the *Charities Act 2013* (Cth) (**Charities Act**) is not aligned with the High Court's decision in *Aid/Watch Incorporated v Commissioner of Taxation (Aid/Watch)*¹⁹ largely due to what appears to be a drafting error rather than any absence of intention of the Act to depart from the common law.

The LIV recommends changes to the Charities Act, as part of the broader remit of this Review, to better align with the decision in *Aid/Watch*, particularly with regards to the definition of 'disqualifying purpose' which refers to the purpose of engaging in or promoting activities (not purposes) that are unlawful or contrary to public policy. It is submitted that this change will provide much needed certainty to the charities sector.

¹⁹ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42