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BY THE NOT-FOR-PROFIT PROJECT, UNIVERSITY OF MELBOURNE LAW SCHOOL

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Melbourne Law School

The University of Melbourne Victoria 3010 Australia

T: +61 3 8344 6164 F: +61 3 9347 2392 E: post@law.unimelb.edu.au W: www.law.unimelb.edu.au

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INTRODUCTION

Note: For the convenience of the reader, we have inserted hyperlinks to relevant material throughout this submission, which are indicated by light grey text.¹

The University of Melbourne Law School's Not-for-Profit Project is a three-year research project funded by the Australian Research Council that began in 2010. This project is the first comprehensive Australian analysis of the legal definition, taxation, and regulation of not-for-profit (NFP) organisations. Further information on the project and its members is attached to this submission as Appendix A.

We welcome this opportunity to comment on the Exposure Draft of the legislation establishing the Australian Charities and Not-for-Profits Commission (ACNC). The Project has made previous submissions in relation to NFP reform, including a submission to the Scoping Study on a Not-for-Profit Regulator, which was subsequently developed into a Working Paper on Regulating the Not-for-Profit Sector (Regulatory Working Paper).

We largely welcome the Exposure Draft (referred to hereafter as the Bill), which is mostly sound in principle. We welcome, in particular, the intention to adopt:

- a 'one-stop-shop' approach and the express references to minimising the regulatory burden;
- a phased approach to regulation, beginning with charities;
- a graduated approach to sanctions;
- an approach of minimising duplication through consultation with and agreements between regulators;
- a process of automatic transfer of endorsements from the Australian Taxation Office (ATO) and 'acceptance' by the ACNC, subject to further review upon the introduction of the statutory definition;
- a standard three-tier system of review, involving internal review, application to the Administrative Appeals Tribunal (AAT), followed by an appeal to the courts;
- a policy of not requiring fees for registration; and
- the power to substitute accounting periods.

¹ Hyperlinks to Australian legislation are to the Austlii website which, although not official, conveniently provides access to specific sections.

However, as detailed below, there are a number of improvements that we recommend should be made to the Bill. In coming to these recommendations, we have had regard to:

- the principles and research in our *Regulatory Working Paper*;
- comparable Commonwealth legislation establishing regulators, including:
 - the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and relevant provisions of the *Corporations Act 2001* (Cth) (Corporations Act);
 - the *Australian Prudential Regulatory Authority Act 1998* (Cth) (APRA Act) and relevant ancillary provisions in the *Banking Act 1959* (Cth);
 - the *Australian Communications and Media Authority Act 2005* (Cth) and relevant ancillary provisions in the *Telecommunications Act 1997* (Cth);
 - the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act);
 - the *National Vocational Education and Training Regulator Act 2011* (Cth) (National VET Regulator Act); and
 - the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (TEQSA Act);
- charities legislation from overseas jurisdictions, including:
 - the *Charities Act 2011* (UK);²
 - the *Charities Act 2008* (Northern Ireland);
 - the *Charities and Trustee Investment (Scotland) Act 2005* (Scotland);
 - the *Charities Act 2009* (Ireland);
 - the *Charities Act 2005* (NZ);
 - the *Charities Act 1994* (Singapore); and

² This recent Act, passed in December 2011, consolidates the provisions in the former *Charities Act 1993* (UK); *Charities Act 2006* (UK). The legislation applies wholly to England and Wales and only in part to the other jurisdictions of the United Kingdom, so is referred to as the 'legislation of England and Wales' in this submission. We note also that the legislation is currently being substantively reviewed pursuant to the statutory requirement of a review of the legislation within five years.

- applicable government policy and recommendations of various law reform agencies.

We have taken the liberty of commenting in detail with the intention of assisting the Treasury, and other stakeholders, during an intensive period of reform. Our comments are therefore quite detailed and range from the technical to the substantive. We have taken considerable trouble to identify relevant principles and legislative precedents in order to ensure that the legislation establishing the ACNC is indeed ‘best practice’. Given the length of this submission, we have included in Appendix B a summary list of our recommendations, which are also listed at the beginning of each section. As noted above, we have also provided hyperlinks to the material cited in the submission.

Our key recommendations for improvements to the Bill relate to:

- clarifying the scope of the Bill, including its effect on NFP entities outside the constitutional powers of the Commonwealth, and the ACNC’s interaction with other regulators;
- re-balancing the emphasis of the Bill away from its predominant focus on governance, transparency and accountability to focus on the facilitation of the sector;
- narrowing the scope of some of the regulatory powers; and
- improving the procedural safeguards in the legislation.

We address each of these issues separately below, before discussing some other provisions in the Bill, including: registration, reporting obligations, the role of the ACNC and Advisory Board, secrecy provisions, and the concept of ‘responsible individuals’. We also draw attention to other potentially useful provisions and some technical drafting issues, and conclude by briefly commenting on the undrafted provisions of the Bill.

CLARIFYING THE SCOPE OF THE ACT

1. The Bill should specify the scope of its application. This should include specific references to: the scope of its application upon commencement; other classes of entities that may be brought within the scope of the regulator in future; and the capacity for entities to register voluntarily.
2. The Bill should be grounded more clearly on the taxation and corporations power of the Commonwealth, both as a matter of principle and to ensure its constitutional legitimacy.
3. References to an “Australian law” should be replaced by references to a Commonwealth law, pending further agreement with States or Territories.
4. The Commissioner’s powers to suspend and remove trustees should be removed.

5. The Bill should include specific provisions for the ACNC to cooperate with other regulators, such as the ATO or the Australian Securities and Investments Commission (ASIC), where appropriate.
6. The Bill should include specific provisions to enable the ACNC to treat related entities as a single entity.

Current provisions

The Fact Sheets supplied with the Exposure Draft explain that the ACNC's functions will apply initially only to charities, with other NFP entities to be considered for inclusion at the earliest by 1 July 2014. We agree in principle with this 'phased' approach, which we recommended in our *Regulatory Working Paper*, and agree that charities are an appropriate place to begin.

We have, however, four concerns about the scope of the Bill as it is presently framed: the absence of any provision specifying the extent of the application of the Act; constitutional issues; the absence of any provisions in relation to the interaction between the ACNC and other regulators; and the absence of provisions enabling consideration of groups of related entities.

Specifying the extent of application

The first concern is that the Bill is expressed to apply to all NFP entities within the scope of the Commonwealth's constitutional power, and there is no specific reference to charities. We understand that the intention is to narrow the scope of the Bill through transitional provisions that have not yet been drafted.

However, given the significance of the scope of the Bill, we consider that it is preferable to specify clearly the scope of the application of the Bill within the legislation itself. Such a section could provide that the legislation applies, upon commencement, to all entities claiming charitable status for the purposes of obtaining Commonwealth tax concessions. It could then further provide that the legislation shall apply to other classes of NFP entities by regulation at the date specified in the regulation. This section could also clearly state that NFP entities may choose to register voluntarily.

Such a provision would clearly communicate the government's intention, reduce potential confusion in the sector, and establish a clear mechanism for 'switching on' the powers of the ACNC in relation to other parts of the NFP sector at a later date.

We also note that confining the Bill to charities at this stage will help resolve some other difficulties concerning the scope of the Bill. For example, clause 5-10, which lists in a table entities entitled to registration, includes non-charitable entities that are currently exempt

from income tax, which is likely to be confusing. The table itself is confusing because it does not exactly replicate the existing categories in the *Income Tax Assessment Act 1997* (Cth). For example, there is currently separate provision for public educational institutions and religious institutions under s 50.5 of the *Income Tax Assessment Act 1997* (Cth), which is not replicated in the table. This is presumably because it is assumed such institutions will now be charities under the ‘charitable purpose’ sub-types of advancement of religion and education. We also note that the table includes some sub-types of charitable purpose which have been recognised as charitable (such as prevention and relief of suffering of animals) by the common law,³ but to which there is no specific reference under current legislation. We note that such categories may be referred to in the proposed statutory definition of charity, so it may be appropriate to revisit these categories after the commencement of the definition.

Another difficulty with the present broad application of the Bill beyond charities is that only some parts of the Bill are applicable to non-charities, in particular membership-based associations. For example, there is repeated reference in the Bill to NFP entities “that provide public benefits” and the “promotion of public trust and confidence” (see, eg, clause 2-5) which are less readily applicable to member-based organisations. Further, much of the discussion in the accompanying Governance Consultation Paper fails to take into account the very different governance concerns relevant to member-based organisations.

While we understand that the intention is to ‘flag’ to the wider NFP sector the potential future application of the Bill, we consider that it is desirable to give the non-charitable part of the NFP sector an opportunity to consult at a later stage as to the applicability of the Bill to them. Further, it is inevitable that in any event legislative amendments will be required before 2014-2015, when it is anticipated that other parts of the sector may be regulated. We therefore recommend confining the scope of the Bill at this point clearly to charities.

We further note that there will be a definition of the key term ‘not-for-profit’, as developed in the “Restating the ‘in Australia’ Conditions” consultation process, to which we have already made a submission. We note that any such definition should be set out in the Bill in full, rather than as a legislative cross-reference.

Constitutional issues

Our second concern is the interaction between the Bill and constitutional law. We have previously analysed the constitutional issues in our *Regulatory Working Paper*. As noted in the Fact Sheet, the Act relies on a patchwork of constitutional powers, including the taxation power, the territories power, and the corporations power.

³ *Income Tax and Fringe Benefits Tax: Charities* (Taxation Ruling, No TR 2011/4, 12 October 2011) <<http://law.ato.gov.au/atolaw/view.htm?docid=TXR/TR20114/NAT/ATO/00001>>, [337].

Connection to heads of Commonwealth power

As discussed in our analysis, the breadth of the taxation power would appear to support Commonwealth regulation of the NFP sector on the basis that regulation is designed to ensure the legitimacy of tax concessions conferred on NFP entities. The taxation power is broad and is not affected by the motive or economic consequences of the use of the power. However, as currently framed, the Bill makes little reference to, for example, the need to ensure the legitimacy of tax concessions as the basis for regulation. The Bill as framed appears broad enough to potentially regulate NFP entities that do not access tax concessions. In this respect, it could well be challenged as exceeding the taxation power.

As we discuss in our analysis, it is difficult to justify the regulation of organisations that do not access tax concessions and which are not ‘trading’ corporations, either as a matter of regulatory principle or in terms of the federal compact. In our view, the Bill would be more securely framed, in both law and principle, if its scope were confined to those accessing Commonwealth tax benefits and constitutional corporations. This could be amended if and when State or Territory agreements are negotiated.

Another concern is that the meaning of ‘trading corporations’ in the Constitution remains somewhat unclear. The High Court’s guidance in this area refers to a holistic examination of features to ascertain whether there is a sufficiently substantial focus on trading activities. This is unlikely to provide sufficient certainty to NFP entities as to whether they fall within the scope of the Bill.⁴

Further, we note that there are presently some doubts about the width of the corporations power following comments by the High Court in the *WorkChoices* case.⁵ As Professor George Williams, a constitutional law expert, has submitted in respect of the national tertiary education regulator, there is an argument that the power in respect to ‘trading’ corporations should be confined to commercial corporations (as was probably originally intended) and not to, for example, “literary or charitable corporations”. In his view, it is arguable that not all universities are constitutional corporations, and this concern would only be stronger with respect to the smaller NFP entities that may be regulated under the Bill.⁶

In particular, we draw attention to the case of *Williams v Commonwealth of Australia* in the High Court (Case S307/2010), in which some parties argued for a narrower reading of the

⁴ Nicholas Gouliaditis, ‘The Meaning of Trading or Financial Corporations: Future Directions’ (2008) 19 *Public Law Review* 110.

⁵ *New South Wales v Commonwealth* (2006) 81 ALJR 34.

⁶ George Williams, *Tertiary Education Quality and Standards Agency Bill(s)* (Submission to the Senate Education, Employment and Workplace Relations Committee, 8 April 2011) <http://www.aph.gov.au/Senate/committee/eet_ctte/teqsa/index.htm>.

meaning of ‘trading corporations’.⁷ The case has been reserved for judgment and may well affect the scope of the current Bill.

In practical terms, access to tax concessions is likely to be the driving motivation for NFP entities to register. Further, registration may become a prerequisite for other types of benefits, such as government or philanthropic funding. In practice, therefore, the scope of the regulator is unlikely to be diminished if the purpose of the Bill is more securely connected to the taxation power, namely to ensuring the legitimacy of taxation benefits.

References to “an Australian law”

Another constitutional issue we have identified is the existence of provisions referring to a reasonable belief that there is a contravention of an “Australian law that relates to the object of this Act”. This phrase is used in the Bill to enliven the general power of investigation in clause 120-100, the power to issue a formal warning in clause 120-200, and the power to give directions in clause 140-10. The Commissioner is also empowered to direct an entity to comply with such a law in clause 140-15.

The term “Australian law” is defined to have the meaning given under the *Income Tax Assessment Act 1997* (Cth), which specifies that it refers to a law of the Commonwealth, State or Territory.⁸ These references appear to expand the regulatory power of the Commonwealth. Arguably, for example, it would enable regulation in relation to state or territory fundraising laws. Although the references do not directly empower the Commissioner to enforce the law, the Commissioner could arguably direct an entity to comply with a State or Territory Act, and failure to comply with that direction would be an offence under clause 140-120.

The constitutional validity of these provisions is questionable. We note that the general power of investigation appears to replicate s 13 of the ASIC Act. However, there is a crucial distinction in the language. The ASIC Act expressly confines the power of investigation to contraventions of a law of the Commonwealth, “or of a State or Territory in this jurisdiction” (namely, the jurisdiction referred by the States or Territories). The similar provision in the *National Consumer Credit Protection Act 2009* (Cth), s 247, also confines the power to laws of a “referring State or Territory”. Clearly, these provisions recognise the constitutional doubts cast on the ability of Commonwealth to enforce State or Territory laws in cases such as *R v Hughes* (2000) 202 CLR 535. While ultimately the power of the Commonwealth Director of Public Prosecutions to investigate offences was upheld in that case, that case involved a complex cooperative scheme involving State legislation, unlike the present case.

⁷ Argument was heard on 9–11 August 2011. The submissions and materials are available at <<http://www.hcourt.gov.au/cases/case-s307/2010>>.

⁸ *Income Tax Assessment Act 1997* (Cth) s 995.1.

We recommend therefore that the phrase be replaced by references to a “Commonwealth law”. This may be amended following further consultation with State or Territory governments in similar terms to that in the ASIC Act.

Suspension or removal of trustees

We also question the constitutionality of Subdivision 143-B, which empowers the Commissioner to suspend or remove trustees. We note that it is arguable that professional trustee corporations may be constitutional corporations, but individual trustees are clearly outside the corporations power, and, for the reasons discussed above, it is also arguable that trustee corporations that are not ‘trading’ corporations and are also outside the scope of the corporations power. We note that a similar proposal was put in relation to public ancillary funds,⁹ but not subsequently included.

In our view, the more appropriate path would be for the ACNC to refer matters to the appropriate regulator in the event it considers it desirable for a trustee to be removed.

Cooperation with other regulators

Another concern is that the Bill does not make provision for the interactions between the ACNC and other regulators, apart from broad information-sharing powers (which we discuss further below). Our understanding is that the Government’s intention is to follow the principles expressed in the *Final Report on the Scoping Study* by making the ACNC the primary regulator in respect of governance, and for activity-specific regulators to be responsible for activity-specific regulation, with some modicum of power in relation to prudential regulation. We also understand that the intention is to develop a model Memorandum of Understanding in relation to the proposed new Commonwealth housing regulator.

We welcome these intentions and principles. We recognise that the timetable for reform, and the need for detailed negotiations between agencies (some of which have not yet been fully established) means that these interactions are not yet fully fleshed out.

Nevertheless, the NFP sector is understandably anxious about the potential for the ACNC to duplicate regulation, notwithstanding the intended object of minimising such duplication. It may be helpful therefore to include some provisions expressly addressing the need for the ACNC to consult with other regulators when there is potential for duplication.

There are a number of useful legislative precedents. We prefer s 33 of the *Charities Act 2009* (Ireland), which specifically provides that the regulator “shall, in so far as is consistent with the proper performance of its functions, endeavour to secure administrative cooperation

⁹ Treasury, *Improving the Integrity of Public Ancillary Funds* (Discussion Paper, November 2010), [54]–[57].

between it and relevant regulators". The provision specifically enables the regulator to enter into arrangements with other regulators to facilitate administrative cooperation, avoid duplication of activities, and ensure consistency between decisions and measures of the regulators. Such arrangements are not binding, may be varied by the parties, and do not permit disclosures otherwise prohibited by law.

Other overseas legislation include comparable duties. Section 20 of the *Charities and Trustee Investment (Scotland) Act 2005* similarly requires the regulator to cooperate with other relevant regulators, although without the objects specified in the Irish legislation.¹⁰ Section 28 of the *Charities Act 2011* (UK) includes a duty on the Charity Commission of England and Wales to consult a principal regulator (in relation to exempt charities).¹¹

Similar provisions can be found in Australian legislation. For example, the Australian Communications and Media Authority is required to consult the Australian Competition and Consumer Authority (ACCC), the Telecommunications Industry Ombudsman, the Information Commissioner, and a range of other bodies in relation to specified types of decision.¹² The Australian Prudential Regulatory Authority (APRA) is exhorted to "have regard to the desirability of [it] cooperating with other financial supervisory agencies, and with other" prescribed agencies.¹³

Groups of entities

The Bill, as presently framed, relies on the common tax term 'entity', while the current legislation refers to 'institutions' and 'funds'. There are many bodies that may form groups of related charitable entities, such as a group of related trusts administered by the same trustee. (We note that the term 'entity' as defined in clause 210-5 defines entities to include trusts.)

In our submission on the statutory definition of charity, we suggested that there should be a general power to determine charitable status with regard to a related group of entities. We referred there to provisions in Northern Ireland that enable the regulator to direct that an institution established for special purposes of, or in connection with, a charity be treated as forming part of that charity, or to direct that two or more charities having the same trustees

¹⁰ The Scottish legislation provides that the regulator "must, so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators". It defines "relevant regulator", and provides that cooperation does not include information sharing where it overrides secrecy provisions.

¹¹ This provides: "Before exercising in relation to an exempt charity any specific power exercisable by it in relation to the charity, the Commission must consult the charity's principal regulator."

¹² *Telecommunications Act 1997* (Cth) ss 56A, 133–135A, 295M, 461; *Australian Communications and Media Authority Act 2005* (Cth) s 17.

¹³ *Australian Prudential Regulation Authority Act 1998* (Cth) s 10A.

should be treated as a single charity.¹⁴ A similar provision is present in the *Charities Act 2011* (UK).¹⁵ Such a direction may be “for all or any” purposes of the Act.

In addition, the New Zealand legislation includes several provisions that govern treatment of a group of related entities. Section 44 of the *Charities Act 2005* (NZ) allows the regulator, on request, to treat related entities as a single entity if the regulator is satisfied that:

(a) the other entity, or those other entities, are affiliated or closely related to the parent entity; and

(b) each of the entities qualifies for registration as a charitable entity; and

(c) it is fit and proper to treat the entities as forming part of a single entity.

Under s 44(2), the regulator is required to have regard to the extent to which the entities have similar purposes. Section 45 enables a parent entity to request that duties be either separately complied with by entities or complied with by the parent entity in relation to all related entities. Section 46 enables the regulator to impose and vary terms and conditions in relation to this group treatment, including conditions about the manner of registration, names, officers and rules of the entities; compliance with duties; required information or documents; and the exercise of rights or powers under the Act. Section 47 sets out the consequences of registration as a single entity (which includes group treatment for tax and reporting purposes). Section 48 enables revocation of single entity status by notice, and section 49 applies the rules of natural justice to such revocation.

We note that there may be concerns about which charities can be treated as ‘related’, especially in terms of governance and deductible gift recipient (DGR) status. However, as the New Zealand provisions clearly indicate, such concerns can be met through guiding the Commissioner’s discretion with statutory considerations and enabling the Commissioner to impose suitable terms and conditions. We agree, however, that a condition for allowing such grouping is that each entity qualifies for registration separately as a charitable entity, as the New Zealand provision does.

The power to treat related entities as single entities will be beneficial both in reducing the compliance burden imposed by registration on complex groups of entities, and in reducing administrative burdens on the ACNC itself. Such a power is, in our view, clearly needed to deal with complex groups of entities in the NFP sector.

¹⁴ *Charities Act (Northern Ireland) 2008* (NI) s 1(4), (5).

¹⁵ *Charities Act 2011* (UK) s 12. Cf s 96 of the *Charities Act 1993* (UK (as amended)).

We also note that there is an intention to facilitate group accounting, and we suggest as a useful legislative precedent Part 8, Chapter 2 of the *Charities Act 2011* (UK). That legislation also deals with auditing of group accounts.¹⁶

RE-BALANCING THE EMPHASIS OF THE BILL

7. The statutory object should be re-framed so that the primary objective is to facilitate NFP entities in achieving their diverse goals, by promoting: public trust and confidence; the loyalty of responsible individuals to the missions of NFP entities; and the effectiveness of NFP entities.
8. A provision should be inserted stating the other objects of the ACNC, which should include: ensuring transparency and accountability to donors, beneficiaries, other stakeholders, and the public; promoting compliance with legal obligations; and preventing abuse or misconduct.
9. The Bill should provide that the Commissioner has the following functions in relation to NFP entities providing public benefits:
 - (a) determining whether such entities are charities;
 - (b) maintaining a public register of such entities;
 - (c) educating and advising such entities in relation to compliance with their legal obligations, and in relation to matters of good governance and management;
 - (d) facilitating and simplifying the interactions of such entities with governments;
 - (e) collecting and analysing data concerning such entities;
 - (f) giving information and advice, and making proposals, to governments in relation to the ACNC's functions and objectives;
 - (g) identifying and investigating misconduct or mismanagement (if properly defined) and taking remedial or protective action;
 - (h) cooperating with other Australian government authorities to further the objects of this Act; and
 - (i) any other function conferred on the Commissioner by this or another Act or legislative instrument.

¹⁶ *Charities Act 2011* (UK) ss 151–153.

10. The Guide material in the Bill, and the statement of the purpose of Part 2.1, should also be re-framed to reflect the purpose of facilitating the entities to achieve public benefit.

Current tone of the Bill

Another major concern we have is that the tone of the Bill is weighted too heavily towards issues of governance, transparency, and accountability, and places undue emphasis on “public trust and confidence” as the primary object of the legislation.¹⁷ In particular, we refer to the objects of the Bill (clause 2-5), the functions of the Commissioner (clause 2-10), and the Guide to the Bill (clause 3-5). We also note that the Guide material for some of the other Divisions of the Bill have yet to be drafted, and our comments apply to this material as well.

The tone of the Bill as set out in these clauses, while not perhaps of great legal significance, is of significant symbolic importance to the sector. Setting the right tone communicates to the sector the Government’s objectives in its ambitious agenda for NFP reform. Further, the tone of the Bill is likely to influence the approach taken by the regulator to its role. Finally, striking the right balance in the Bill will help to counteract the impression, acknowledged in the Fact Sheets, that the Bill emphasises compliance and enforcement.

Objects

We discuss at some length in our *Regulatory Working Paper* the relevant regulatory aims and objectives in the context of the NFP sector. As we explain there, 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.

This hierarchy is critical because it enables us to evaluate how much transparency and accountability is required, and to what ultimate ends the promotion of trust and confidence (for example) is directed. We consider that the emphasis on the facilitation of the sector is important because it directs attention to the fact that, ultimately, the government’s role is facilitative, not punitive, and that the sector retains primary responsibility and considerable autonomy for achieving its goals of public benefit.

¹⁷ As Picarda has commented, the reference to “increasing public trust and confidence” in the legislation of England and Wales “perhaps unfairly presumes an absence of trust and confidence for which no proper scientific evidence exists let alone has been adduced”: Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, 2010) 767.

In line with our Regulatory Working Paper, therefore, we recommend that the objects be rephrased so that the ultimate object is to “facilitate not-for-profit entities in achieving their diverse goals”,¹⁸ which is furthered by promoting: public trust and confidence; the loyalty of responsible individuals to the missions of NFP entities; and the effectiveness of NFP entities.

We have also had regard to the comparable objects in other legislation. While there is often confusion in statutory objects between mechanical functions of the Act (for example, the function of registration) and objects of the Act, we note that there are precedents for the broader approach we advocate.

In Australia, a recent precedent is s 3 of the TEQSA Act. This includes reference to the object to protect and enhance, inter alia, “excellence, diversity and innovation in higher education in Australia”, and “to encourage and promote a higher education system that is appropriate to meet Australia’s social and economic needs for a highly educated and skilled population”. Section 1 of the ASIC Act also takes a broad approach, including for example the objects of:

maintain[ing], facilitat[ing] and improv[ing] the performance of the financial system and the entities within that system in the interests of commercial certainty, in order to reduce business costs and in order to ensure efficiency and development of the economy.

We note that the charities legislation of England and Wales and Northern Ireland state that there are five objectives of the regulator: increasing public confidence; promoting awareness and understanding of the public benefit requirement; promoting legal compliance with governance requirements; promoting the effective use of charitable resources; and enhancing the accountability of charities to donors, *beneficiaries* and the general public (emphasis added).¹⁹ Similar language is used in the *Charities Act 1994* (Singapore).²⁰

In our view, these are at best second-order objectives, and we discourage reference to the “public benefit requirement”, for reasons that were explained more fully in submission on

¹⁸ We note that we have not included here reference to the ‘public benefit’, because the scope of the regulator may extend to NFP organisations that primarily benefit their members. Although this is, in a broad sense, for the benefit of the public in the sense that it facilitates freedom of association and promotes a healthy civil society, the term ‘public benefit’ in the context of charity law connotes a narrower meaning that may not be appropriate in the longer term.

¹⁹ *Charities Act (Northern Ireland) 2008* (NI) s 7; *Charities Act 2011* (UK) s 14.

²⁰ Section 4 of the *Charities Act 1994* (Singapore) provides that the objectives of the Commissioner shall be: (a) to maintain public trust and confidence in charities; (b) to promote compliance by governing board members and key officers with their legal obligations in exercising control and management of the administration of their charities; (c) to promote the effective use of charitable resources; and (d) to enhance the accountability of charities to donors, beneficiaries and the general public.

the statutory definition of charity. New Zealand and Ireland include some objects within their lists of functions.²¹

We note that the legislation of England and Wales and Northern Ireland also require the regulator to act, so far as is reasonably practicable, “in a way which is compatible with the encouragement of (a) all forms of charitable giving, and (b) voluntary participation in charity work”.²²

Our Regulatory Working Paper also identified ‘third-tier objectives’, namely:

- ensuring appropriate transparency and accountability to donors, beneficiaries, other stakeholders, and the public;
- promoting compliance with legal obligations;
- promoting efficient and effective allocation of resources;
- preventing abuse, self-dealing or other misuse of NFP status;
- promoting the sustainability of community organisations;
- promoting capacity building within the sector; and
- promoting innovation within the sector.²³

We consider that it would be appropriate to include at least some of these as objects of the ACNC itself. We suggest that the objects relating to transparency and accountability, compliance, and preventing abuse are clearly at the heart of the ACNC’s functions. We note, however, that the broader powers of the Charity Commission of England and Wales in relation to, for example, scheme-making, common investment funds and mergers are not envisaged, and so the objects in relation to promotion of efficient and effective allocation of resources, sustainability, capacity building, and innovation appear less immediately relevant, although they may come within the scope of the ACNC’s advisory and educational function.

We note that the present objects clause already includes reference to accountability to donors, governments and the public. We note that this should also include reference to accountability to beneficiaries, members and perhaps a residual clause for other

²¹ *Charities Act 2005* (NZ) s 10; *Charities Act 2009* (Ireland) s 14.

²² *Charities Act (Northern Ireland) 2008* (NI) s 9(2); *Charities Act 2011* (UK) s 16(2).

²³ The regulators in some jurisdictions must perform their duties in such a way as to facilitate innovation, so far as is reasonably practicable: see *Charities Act (Northern Ireland) 2008* (NI) s 7; *Charities Act 2011* (UK) s 14.

stakeholders. The primary focus of an NFP entity is to serve the welfare of its beneficiaries or its members, rather than its funders, and this should be reflected in the legislation.

We also consider that the reference to education in the objects clause is more properly characterised as a function (where it is also repeated).

Regulatory principles

We also recommend the inclusion of reference to the principles of good regulation, which are discussed in our *Regulatory Working Paper* and which reflect the approach intended to be taken by the regulator, as set out in the ACNC Taskforce's *Discussion Paper on Implementation Design*. We consider that including reference to such principles in the Bill would help to reassure the sector of the Government's intentions, and counter the current emphasis of the Bill on compliance and enforcement.

We understand that such reference was not included as it is not usual Commonwealth drafting practice. However, we draw attention to the recently enacted TEQSA Act, which sets out in Part 2 'basic principles' of regulation. Section 13, in particular, requires the Tertiary Quality and Standards Agency (TEQSA) to comply with the following principles:

- (a) *the principle of regulatory necessity;*
- (b) *the principle of reflecting risk;*
- (c) *the principle of proportionate regulation.*

These principles are further defined in Part 2.²⁴ These principles are also included as part of TEQSA's statutory objects.²⁵

We note that, when the Senate Committee reported on this Bill, it drew comfort from the inclusion of these principles as a counter-weight to concerns about regulatory overkill.²⁶

²⁴ The principle of regulatory necessity is complied with if TEQSA's "exercise of the power does not burden the entity any more than is reasonably necessary"; the principle of reflecting risk is complied with if its exercise of the power has regard to (a) the entity's history ... (b) matters relating to the risk of the entity not complying with the [Standards or legislation] ...; and the principle of proportionate regulation is complied with if its exercise is "in proportion to (a) any non-compliance; or (b) risk of future non-compliance; by the entity with the [Standards or legislation]".

²⁵ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 3.

²⁶ Senate Education, Employment and Workplace Relations Legislation Committee, *Tertiary Education Quality and Standards Agency Bill 2011 and Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011* (May 2011) <http://www.aph.gov.au/Senate/committee/eet_ctte/teqsa/report/index.htm>, [2.72], [2.79].

We also draw attention to comparable overseas legislation that expressly refer to similar principles. The charities legislation of England and Wales, and that of Northern Ireland, require the regulators to “so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)”.²⁷

Functions

In general, we have no objection in principle to the functions listed in the present clause. However, we consider that other functions might usefully be included, having regard to overseas precedents. We also consider that there are some issues in the drafting of the functions clause.

Advice and Education

We agree that a function of the Commissioner should be to educate and advise NFP entities, the public and governments, including through the ACNC website. However, the drafting of this power seems awkward and unduly limited.

We prefer the more broadly drafted provisions in comparable overseas legislation. For example, the New Zealand legislation provides three specific types of education and advice functions, namely to:

- educate and assist charities in relation to matters of good governance and management, for example,—
 - (i) by issuing guidelines or recommendations on the best practice to be observed by charities and by persons concerned with the management or administration of charities;
 - (ii) by issuing model rules;
 - (iii) by providing information to charities about their rights, duties, and obligations under this Act and other enactments;
- make appropriate information available to assist persons to make registration applications under this Act; and
- stimulate and promote research into any matter relating to charities, for example,—
 - (i) by collecting and disseminating information or research about charities;

²⁷ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) s 1(9); *Charities Act (Northern Ireland) 2008* (NI) s 9(4); *Charities Act 2011* (UK) s 16(4).

(ii) by advising on areas where further research or information about charities should be undertaken or collected;

(iii) by entering into contracts or arrangements for research or information about charities to be undertaken or collected.²⁸

While the New Zealand approach is broader and clearer than the present clause in the Bill, we consider that this level of prescription is unnecessary. An alternative is the Irish legislation, which provides the regulator with functions to encourage and facilitate better administration and management of charitable organisations by the provision of information and advice (including guidelines, codes of conduct, and model constitutional documents, as well as a broad power to “carry on such activities or publish such information as it considers appropriate”.²⁹ The legislation of England and Wales, Northern Ireland and Singapore provide their regulators with a broad function of “obtaining, evaluating and disseminating information in connection with the performance of any of the Commission’s functions or meeting any of its objectives” which includes the maintenance of the register.³⁰

There are also Australian legislative precedents for such a function. For example, s 157 of the National VET Regulator Act includes functions of “collect[ing], analys[ing], interpret[ing] and disseminat[ing] information about vocational education and training”, and “conducting training programs relating to the regulation” of organisations and courses.

We have suggested a more concise version in the recommendation above, that combines the elements of “education, advice and assistance” regarding compliance with the Act and matters of good governance and management, as well as the element of collection and analysis of data on the sector.

Advice to governments

The present clause includes power to provide information about NFP entities to governments. However, it does not include the broader power, specified in most overseas legislation, to provide advice or information about the ACNC’s functions and objectives to governments. The legislation of the various jurisdictions of the United Kingdom state that a function of the Commission is to:

²⁸ *Charities Act 2005* (NZ) s 10(1)(c), (d), (m).

²⁹ *Charities Act 2009* (Ireland) s 14.

³⁰ *Charities Act 1994* (Singapore) s 4(2)(e); *Charities Act (Northern Ireland) 2008* (NI) s 8(2); *Charities Act 2011* (UK) s 15(1).

*Giv[e] information or advice, or mak[e] proposals, to any Minister of the Crown on matters relating to any of the Commission’s functions or meeting any of its objectives.*³¹

Similar provisions are included in the legislation of Ireland,³² New Zealand,³³ and Singapore.³⁴ The National VET Regulator also has power to advise and make recommendations, as requested by a Minister or on its own initiative, in relation to vocational education and training.³⁵

Function of determining charitable status

The present clause also makes no reference to the key function of the ACNC of determining charitable status. This is obviously a critical function and is specifically provided for in comparable overseas legislation.³⁶

We note in particular that there is no legislative provision requiring the ACNC to accept (at least initially) pre-existing endorsements from the ATO prior to the introduction of the statutory definition of charity. We expect that this may be covered in the undrafted transitional provisions, but we consider that it is important for there to be such a provision.

Drafting issues

As noted above, promoting governance, accountability and transparency is listed both as an object and function. We prefer this to be listed as an object of the ACNC, and that instead the function be described as “encouraging and facilitating the better administration of charities”, as is done in the legislation applicable in England and Wales, Northern Ireland and Ireland.³⁷

The separate specification of the elements of monitoring, compliance and enforcement is also a little awkward, and tends to give undue prominence to the compliance functions of the regulator. We prefer the formulation adopted in the legislation of the various jurisdictions of the United Kingdom and Singapore, namely that of “identifying and

³¹ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) s 1(5); *Charities Act (Northern Ireland) 2008* (NI) s 8; *Charities Act 2011* (UK) s 15(1).

³² *Charities Act 2009* (Ireland) s 14(k).

³³ *Charities Act 2005* (NZ) s 10(1)(l).

³⁴ *Charities Act 1994* (Singapore) s 4(f).

³⁵ *National Vocational Education and Training Regulator Act 2011* (Cth) s 157.

³⁶ *Charities Act 2005* (NZ) s 10(l); *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) s 1(5); *Charities Act 2011* (UK) s 15(1).

³⁷ *Charities Act (Northern Ireland) 2008* (NI) s 8; *Charities Act 2009* (Ireland) s 14; *Charities Act 2011* (UK) s 15(1).

investigating misconduct or mismanagement and taking remedial or protective action”.³⁸ However, we note that the term “mismanagement” needs to be properly defined so that it does not allow the ACNC simply to prefer its own views as to appropriate management.

Guide to the Act

Our general discussion above should also be reflected in the Guide material, including clause 3-5 of the Bill. In the background paragraph, we suggest that the purpose of the Bill should be re-framed to incorporate both a stronger connection to the taxation power, namely with ensuring legitimacy of tax benefits, as discussed above, and also a statement of the need to facilitate the sector in achieving its diverse goals for the public benefit.

For example, the background in the Guide could be rephrased as follows:

A strong, vibrant and innovative not-for-profit sector is essential to achieving a productive and inclusive Australia. The sector plays a central role in enriching communities through its social, cultural and environmental contribution and in providing support to the most vulnerable in our community.³⁹ For these reasons, the sector receives tax concessions, grants and other support from Australian governments as well as funding from the public.

The object of this Act is to facilitate the not-for-profit sector to achieve its diverse goals for the public benefit by: promoting public trust and confidence in the sector; ensuring that those administering not-for-profit entities pursue the public benefit; and enhancing the effectiveness of the not-for-profit sector. Such objects will ensure that tax concessions and government and other public funding are used appropriately and effectively for the public benefit.

A similar re-phrasing of the purpose of Part 2.1, which unduly emphasises governance, accountability and transparency, is also appropriate. For example, this could provide that the purpose of the Part is to ensure that government benefits, including tax concessions, are used appropriately and effectively for the public benefit. To that end, the Part provides for the registration of NFP entities and the Commissioner’s power to revoke registration.

We also recommend that the description of the Commissioner’s functions follow the re-framed functions section recommended above.

³⁸ *Charities Act 1994* (Singapore) s 4(a); *Charities Act 2005* (NZ) s 10(e); *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) s 1(5); *Charities Act (Northern Ireland) 2008* (NI) s 8; *Charities Act 2011* (UK) s 15(1).

³⁹ These words are taken from the National Compact website: <<http://www.nationalcompact.gov.au/about-not-profit-sector>>.

SCOPE OF REGULATORY POWERS

11. The grounds for removing or suspending trustees should be (i) misconduct or mismanagement (if properly defined), and (ii) the necessity or desirability of protecting the property of a charity.
12. The grounds for revoking the registration of an entity on the basis of misconduct or mismanagement (if properly defined), and on the basis of non-compliance with the Act, should include a threshold level of gravity.
13. There should be no ground for revoking the registration of an entity on the basis that the entity is insolvent, or provided false or misleading information to the ACNC.
14. The ACNC should have the power to remove from the register entities that have ceased to exist or operate, or which request voluntary deregistration.
15. There should be no automatic provision for the winding up of an entity that has been deregistered. Instead, provisions should be included in the Bill to impose a continuing duty on a deregistered entity to apply the property of the entity towards the purposes for which it was registered, and provide for a mechanism to protect existing assets. Consequently, the condition of registration that the entity has not been previously registered should also be removed from the Bill.
16. The regulator should not have power to issue directions in order to advance the purpose of the charity, or if it considers that financial management is improper or unsound. Rather, the power to issue directions should only be exercised where it is necessary to protect: the property of an entity from being applied other than for the purposes for which the entity was registered; or the interests of the members of the entity or those intended to benefit from the entity's activities.
17. The regulator should not have power to issue directions merely to "promote" or "advance" the object of the Act.
18. The regulator should not have power to prevent an entity from entering into a financial transaction where that will affect the legal rights of third parties. The regulator should instead have power to apply to a court for an injunction on the grounds that such a direction is necessary to protect the property of the charity or the interests of its members or beneficiaries.
19. The condition for eligibility for registration referring to criminal or terrorist entities should be removed. If clarification is thought necessary, a condition requiring that the entity's purposes are not to engage in criminal activity should be sufficient. If any reference is made to terrorist organisations, it should be based on existing lists of

terrorist organisations under Commonwealth regulations. Other sanctions, both criminal and regulatory, are more appropriate where an entity engages in criminal activity.

20. The provision empowering the ACNC to require information should be based on the precedents in the TEQSA Act, which comply with the recommendations of government policy and law reform bodies.
21. The Bill should include the further procedural safeguards in the TEQSA Act relating to search and entry powers.

Current scope of regulatory powers

We have reviewed the scope of regulatory powers against equivalent provisions in comparable Australian and overseas legislation, as well as against the principles stated in government policy and by law reform bodies. We are concerned about the way in which such powers are framed in the Bill, especially the number and breadth of the grounds for exercising such regulatory powers.

Threshold of “undermining of public trust and confidence”

Three clauses in the Bill refer to the ground that an entity “may cause harm to, or jeopardise, the public trust and confidence mentioned” in the objects of the legislation. Clause 10-55(1)(e) makes this a ground for revoking a registration (which is reflected in clause 4-1(2)(b), which sets out the purpose of the Part dealing with registration), and clause 143-125 makes this a general ground for suspending or removing trustees. Presumably this ground will be replicated in the clauses, yet to be drafted, relating to the suspension and removal of corporate responsible individuals as well.

In our view, this ground is extremely broadly drafted and sets a very low threshold for triggering forms of regulatory action that have very significant consequences and may practically destroy a charity. The ground fails to clearly identify objective acts, particular interests, or an appropriate level of gravity to trigger regulatory action. As such, it gives almost no guidance to those affected by the legislation as to which acts or omissions may trigger regulatory intervention.

The ground is also likely to be more difficult to prove than more objective thresholds. The breadth of this provision raises particular concerns given that the suspension or removal powers are likely to have significant effects on a person’s reputation and possibly livelihood. This is compounded (as discussed below) by the relative absence of procedural safeguards in the Bill.

We also believe that there is a distinction to be made between the power to suspend or remove responsible individuals and the deregistration of an entity. The deregistration of an

entity may result in the punishment of the entity for the misconduct of its responsible individuals, which may ultimately be to the detriment of the beneficiaries or members of the entity. We appreciate that this power is provided partly because deregistration may be the only constitutionally possible sanction in relation to some entities, but in our view it should only be exercised in serious cases and that the legislation should clearly specify this.

We also understand that there is concern that the introduction of thresholds of seriousness will encourage litigation and dispute over whether the threshold for regulatory intervention is met. We do not, however, see this as a serious objection. Courts are frequently required to determine thresholds of gravity in all manner of contexts. Indeed, we draw attention to clause 55-70, which includes a threshold of a “significant contravention” in relation to auditors, and a list of relevant considerations in determining whether a contravention is significant, which replicates s 311 of the *Corporations Act*.

The low and broad threshold in the Bill compares badly with the more specific grounds for deregistration and disqualification of comparable individuals in comparable Commonwealth and overseas legislation.

For example, s 9A of the *Banking Act 1959* (Cth) provides APRA with power to revoke a body corporate’s authority to carry on a banking business. The grounds for such revocation are clear and objective and include: provision of false or misleading information; failure to comply with the legislation, directions or conditions thereunder; failure to pay levies or penalties; insolvency; and cessation of business. Even the broader, more subjective grounds (such as that it would be “contrary to the national interest”, “contrary to financial system stability in Australia” or “contrary to the interests of depositors of the body corporate” for the authority to remain in force) include a threshold level of gravity and clearly identify the interests involved.

Section 21 of the *Banking Act 1959* (Cth) confers power on a court to disqualify a director or senior manager on the basis that he or she is not a “fit and proper person”, and the court may consider in this regard matters set out in the Regulations or criteria in prudential standards. APRA is given power only to disqualify in respect of those who are otherwise disqualified or who do not meet criteria in the prudential standards. Further, notice and an opportunity to comment is required. Similar requirements apply in respect of disqualification under Part 2D.6 of the *Corporations Act*.

In comparable overseas legislation, the power to deregister and remove or suspend trustees of a charity is much more confined than in the Bill. The legislation of the various jurisdictions of the United Kingdom do not provide any power to deregister merely on the basis of

misconduct, only on the grounds of ineligibility (which would include instances of misconduct that alter the character of the charity), or cessation of existence or operation.⁴⁰

This legislation also specifies that, in order to exercise the power to suspend trustees, officers, agents or employees, the Commission must be satisfied:

(a) that there is or has been any misconduct or mismanagement in the administration of the charity, or

(b) that it is necessary or desirable to act for the purpose of—

(i) protecting the property of the charity, or

(ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity.⁴¹

The legislation further requires that a person can only be removed where the person has “been responsible for or privy to the misconduct or mismanagement”, or his or her “conduct contributed to it or facilitated it”.

New Zealand provides for deregistration on the basis of mere misconduct, as well as ineligibility. However, in New Zealand, misconduct is much more narrowly framed than in the present Bill, requiring either a “significant or persistent failure” by the entity, its officers or its collectors to meet obligations under the Act, or that the entity or connected persons “has engaged in serious wrongdoing”.⁴² Serious wrongdoing is defined as including:

(a) an unlawful or a corrupt use of the funds or resources of the entity; or

(b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or

(c) an act, omission, or course of conduct that constitutes an offence; or

(d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.⁴³

⁴⁰ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) s 30; *Charities Act (Northern Ireland) 2008* (NI) s 8; *Charities Act 2011* (UK) s 34.

⁴¹ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 31; *Charities Act 2011* (UK) s 76. This is largely replicated in *Charities Act 1994* (Singapore) s 25. However, in Singapore, consent of the Attorney-General is required as well.

⁴² *Charities Act 2005* (NZ) s 32.

⁴³ *Charities Act 2005* (NZ) s 4(1).

In Ireland, the power to remove or suspend trustees is conferred on the High Court, which must be satisfied that: an offence has been committed; there has been non-compliance with the Act; there has been misapplication of the property or management “in a manner that endangers the property”; or “other misconduct or management”.⁴⁴ In relation to deregistration, the Irish provisions are broader than most, allowing, for example, deregistration on the basis of non-compliance with a direction of the regulator.⁴⁵ However, the other grounds relate to convictions or specified contraventions,⁴⁶ and if it wishes to deregister on the ground of ineligibility, the regulator must apply to the High Court for a declaration.⁴⁷

We recommend removing references to undermining public trust and confidence as a ground for the deregistration of an entity or suspension or removal of trustees. Instead, we suggest that the suspension or removal of trustees be based on grounds of (i) misconduct or mismanagement (as in clause 120-200(1)(b)), provided mismanagement is properly defined, and (ii) the necessity or desirability of protecting the property of a charity, as in the United Kingdom. In addition, we recommend that the ground of deregistration of an entity should require a “significant or persistent” failure or “serious wrongdoing”, as in New Zealand, or reference to some threshold of gravity.

We observe that the Bill includes no provisions disqualifying trustees or responsible individuals on the basis of (for example) bankruptcy, as is common. We assume that this is because current legislation already provides for such disqualification and that such matters may more readily be considered to be part of the parallel governance review.

Grounds for revocation of registration

Ground of non-compliance

We have similar concerns about clause 10-55(c), which enables revocation of registration on the ground of failure to comply with the Act or regulations or a direction given under Division 140. This gives the regulator legal power to deregister an entity for minor, and even inadvertent, breaches. While this is clearly not the intended approach, the very low level of the threshold cannot be justified given the ramifications of deregistration. We recommend instead the *New Zealand* provision, discussed above, which requires a “significant or persistent” failure by the entity to meet its legal obligations.⁴⁸

⁴⁴ *Charities Act 2009* (Ireland) s 74(1).

⁴⁵ *Charities Act 2009* (Ireland) s 43(5).

⁴⁶ *Charities Act (Northern Ireland) 2008* (NI) s 43(2)–(4).

⁴⁷ *Charities Act 2009* (Ireland) s 43(6).

⁴⁸ *Charities Act 2005* (NZ) s 32.

Ground of insolvency

We also consider that it is not appropriate to revoke the registration of an entity upon insolvency. For example, an entity may decide it is insolvent and enter voluntary administration. The ACNC might decide therefore to deregister it. The voluntary administrator may, however, decide not to wind up the entity, but it would have lost its registration and its access to tax concessions and possibly access to philanthropic funding, which would only imperil the organisation further. If, as proposed, deregistration would also lead to winding up, this would upset the carefully crafted insolvency regime applicable to such entities and potentially harm the beneficiaries and other stakeholders of an NFP entity. It may also have the perverse result of discouraging responsible individuals from appointing administrators, which is the very purpose of the voluntary administration regime. We note that no comparable legislation provides a power to revoke registration on the basis of insolvency.

These reservations are, of course, strengthened in the case where deregistration is threatened on the basis that the entity is “likely to become insolvent at some future time”. We note that this phrase is used in ss 436A-436B of the *Corporations Act*, but in the very different context of enabling the appointment of administrators.

Ground of false or misleading information

Clause 10-55(1)(b) provides that the Commissioner may revoke registration if the entity provided false or misleading information in relation to a material particular in connection with its application for registration. To the extent that false or misleading information is “material” to registration, it would appear that this would mean that the entity is “not entitled to be registered” under clause 10-55(1)(a). It is difficult to see how the information would be “material” if, nevertheless, the entity would still be entitled to be registered. We note that the provision of false and misleading information is already a criminal offence under the *Criminal Code (Cth)*, and this is the appropriate penalty for breaches that do not affect entitlement to registration.

Ground of ceasing to exist, and voluntary removal

The Bill does not include provisions to allow the Commissioner to revoke a registration where charities have ceased to exist or operate, nor to enable an entity to voluntarily remove itself from the register.

Many small charities or other NFP entities cease to exist or operate for a variety of practical reasons, and fail to inform authorities of this. In these circumstances, the Commission should have a power to ‘clean up’ the register by removing defunct entities, including those

that have been wound up. This power is provided in the legislation of England and Wales⁴⁹, Northern Ireland,⁵⁰ and Singapore.⁵¹

There may also be good practical reasons for the voluntary deregistration of an entity, including that the entity is about to cease to exist, or that the entity realises that there are insufficient benefits of registration (for example, if it no longer needs to accept donations). This may particularly be so where the entity is not otherwise subject to the constitutional powers of the Commonwealth (for example, incorporated associations) and initially chooses to voluntarily register. A power to request deregistration, as provided in the legislation of England and Wales and Scotland,⁵² as well as New Zealand,⁵³ seems sensible.

Automatic deregistration upon winding up

We understand that the omission of the power to request voluntary deregistration may be deliberate, because there is an intention that deregistration will ultimately result in the winding up of an entity through the governance rules that have not yet been drafted. Our understanding is that this also accounts for the condition for registration that an entity “has not previously been a registered entity”.

The policy concern appears to be that organisations that benefit from tax concessions or other benefits should not retain that benefit and be able to use them for non-tax-exempt purposes. While we appreciate this policy concern, there is a real danger that an inflexible rule that mandates automatic winding-up upon deregistration will create real injustice. For example, the ACNC may lose contact with an entity due to the failure of a contact officer to inform it of a change in address. This may result in deregistration and dissolution of a charity which will harm the beneficiaries or members of a charity. We caution strongly against the introduction of any such rule that would limit the flexibility of the Commission’s powers and, inevitably, fail to envisage the variety of practical circumstances that will confront the regulator. We are also unsure as to how this approach would apply in relation to trusts.

We note that no overseas jurisdictions have a comparable provision. However, overseas regulators address the underlying policy concern by use of their power to direct a deregistered charity to apply property in order to secure a proper application of that property for the purposes of the charity.⁵⁴ In particular, the Scottish legislation provides that a body removed from the Register:

⁴⁹ *Charities Act 2011* (UK) s 34(1)(b).

⁵⁰ *Charities Act (Northern Ireland) 2008* (NI) s 16(5).

⁵¹ *Charities Act 1994* (Singapore) s 5(3).

⁵² *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 18; *Charities Act 2011* (UK) s 34(3).

⁵³ *Charities Act 2005* (NZ) s 32(1)(f).

⁵⁴ *Charities Act 1994* (Singapore) s 26A; *Charities Act 2011* (UK) s 85.

continues to be under a duty to apply—

(a) any property previously acquired, or any property representing property previously acquired,

(b) any property representing income which has previously accrued, and

(c) the income from any such property,

in accordance with its purposes as set out in its entry in the Register immediately before its removal.⁵⁵

The section also expressly applies other sections of the Act to deregistered bodies, and enables the regulator to apply for a scheme for the transfer of property from such a body. Singapore also has a specific provision enabling the Commissioner to direct the application of property of institutions that have ceased to be a charity or ceased to exist or operate, where the Commissioner is satisfied those in possession or control are unwilling to apply the property properly and it is necessary or desirable to make an order to secure the proper application of the property.⁵⁶ In our view, the policy concern identified could be better met by a similar provision in the Bill. In any event, we consider that there needs to be some legislative clarification in relation to the protection of existing assets in the event of deregistration.

Grounds for issuing directions

We are also concerned that some of the grounds for issuing directions may be unduly broad. Although the regulator should have full power to investigate, some of these provisions appear to stray into the province of allowing the regulator to impose its own views of how an organisation ought to be run. As already noted, we are also concerned that the use of the term “mismanagement” may similarly stray into such territory unless it is properly confined by a statutory definition.

In particular, we are concerned that the grounds in clause 140-10(1)(b) (“direction is necessary to advance the purpose” of the entity) and (c) (“registered entity is conducting its affairs in an improper or financially unsound way”) are too broad. In relation to the first, we are concerned that this appears to suggest that the regulator can impose its own views about how the purposes of the entity should be pursued. We suggest, instead, that the clause be re-framed more narrowly to focus on the interests that the regulator should be

⁵⁵ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 19(1).

⁵⁶ *Charities Act 1994* (Singapore) s 26B.

trying to protect, as in similar clauses in Commonwealth legislation.⁵⁷ For example, the regulator could be empowered to give a direction if it is “necessary to protect the property of an entity from being applied other than for the purposes for which the entity was registered”, or if it is necessary to “protect the interests of the members of the entity or those intended to benefit from the entity’s activities”.

We note that the language of “conducting its affairs in an improper or financially unsound way” has been adopted from provisions relating to APRA’s power to regulate financial institutions.⁵⁸ In our view, the role of APRA in ensuring the financial integrity of such institutions is quite different from the interests of the ACNC in ensuring financial probity. We note that no similar provision is included in the *Corporations Act* or the *CATSI Act*. In our view, the regulator should not be empowered to direct financial management, where such management falls short of “misconduct or mismanagement”.

We also note that the residual clause (d), that the “direction is otherwise necessary to promote the object of the Act”, is excessively broad given the very wide objects of the Act. We consider that the power to give a direction to rectify any “misconduct or mismanagement” is sufficiently broad to cover the kinds of conduct that should be subject to a direction. This equally applies to the power to give directions “as to the way in which the affairs of the registered entity are to be conducted or not conducted, that is necessary to advance the object of the Act” (in clause 140-15(1)(f)).

We also express concern about the power to direct an entity not to enter into a financial transaction, which also suggests that the regulator may trespass into the area of financial management beyond that of misconduct. Such a power may affect significant financial interests and cause real prejudice to third parties, and indeed to the NFP entity itself. In our view, regulation of financial affairs should be limited to cases where it is necessary to protect the property or interests of members, or in cases of misconduct or mismanagement. If such regulation will affect the rights of third parties, however, we consider that the regulator should apply to a court for appropriate directions under a specific provision in clause 142-10 (injunctions).

Ineligibility for registration

Not a previously registered entity

This condition was discussed earlier in the context of the suggestion that an entity would be automatically wound up upon removal from the register. As was discussed there, we

⁵⁷ See, eg, *Gene Technology Act 2006* (Cth) s 146; *Insurance Act 1973* (Cth) s 104; *Banking Act 1959* (Cth) s 11CA.

⁵⁸ See, eg, *Banking Act 1959* (Cth) s 11CA.

suggest that this would be too inflexible. As a result, this condition should be removed from the conditions of registration.

Terrorist or criminal entities

We also note that clause 5-10 requires that an entity is not “a terrorist entity, criminal entity, outlaw entity or similar entity” which is prescribed in the regulations. The Explanatory Material explains that further refinement of this provision is intended in the regulations.

While supporting the exclusion of terrorist and criminal organisations, we consider that such entities would be excluded in any event by the requirement that the organisation be for specified purposes. An organisation that has terrorist or criminal purposes is not in truth an organisation with ‘charitable’ or other tax-exempt purposes. It would also not satisfy the ‘public benefit’ requirement under charity law. We discuss the issue of illegality in greater detail in our submission on the statutory definition of charity.

We suggest, therefore, that such entities would be implicitly excluded by the current Bill. However, if further clarification is considered necessary, a more appropriate provision would be to specify that the entity’s purposes are not to engage in criminal activity. This broadly reflects the approach taken in current charity law. This is clearly preferable, in our view, to proscribing organisations through a novel definition in the regulations.

Such a provision would clearly capture terrorist organisations, and we do not consider it necessary to separately specify them. However, if separate specification is adopted, it is preferable that, rather than prescribing these organisations in regulations, the legislation should cross-refer to the existing listings of terrorist organisations under Pt 2 of the *Criminal Code Regulations 2002 (Cth)* and the *Charter of the United Nations (Dealing with Assets) Regulations 2008*. In our view, any exclusion of terrorist organisations should refer to these provisions. This enhances consistency, ensures that the listing is regularly updated, and ensures that the listing of an organisation is subject to appropriate checks and safeguards.

Power to require information

The power to require information set out in clause 120-10 is, in principle, unobjectionable. However, several aspects of the power as currently set out do not comply with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide)*.

In particular, clause 120-20 should be amended to:

- include a threshold of “reasonable grounds to believe” the person has custody or control of the documents, or information or knowledge which will assist the effective administration of the relevant legislative scheme;⁵⁹
- require that a notice should be issued to a “person” rather than entity, and similarly that the offence of non-compliance applies to a “person”;⁶⁰
- require the specified details as to the contents of the notice as set out in [9.3.3] of the *Guide*,⁶¹ including the consequences of non-compliance;⁶² and
- provide a time for compliance of at least 14 days.⁶³

We suggest as a possible precedent s 63 of the TEQSA Act.

We also consider that the offence of non-compliance should not be one of strict liability. The issue of strict liability in relation to similar offences of non-compliance was discussed in detail by the Australian Law Reform Commission (ALRC) recently, where it was noted that federal legislation governing bodies with coercive powers did not generally provide for strict liability.⁶⁴ For example, s 64 of the TEQSA Act, which creates a similar offence of non-compliance, does not make it a strict liability offence. We see no justification for departing from the general principles of criminal liability in this regard.

We also note that it may be necessary to provide the Commissioner with the power to retain documents and make copies,⁶⁵ and desirable to replicate ss 66-67 of the TEQSA Act

⁵⁹ Attorney General’s Department Australia, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers>, [9.1.1]. Compare, also, *Charities Act 2011* (UK) s 52.

⁶⁰ Attorney General’s Department Australia, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, above n 59, [9.3.2]. A ‘person’ includes a legal entity. In any event, it is unclear how an entity other than an individual can attend to give evidence.

⁶¹ This includes: the nature of the information or documents required to be produced, to whom the information or documents are to be provided, how the information or documents are to be provided, and the deadline for compliance. As well, the notice must state the time and place of the hearing, and whether third parties may attend the hearing.

⁶² Administrative Review Council, *The Coercive Information-gathering Powers of Government Agencies* (Report, No 48, May 2008) <http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No._48>, 33–38.

⁶³ Attorney General’s Department Australia, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, above n 59, [9.3.4].

⁶⁴ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* (ALRC Report, No 11, 10 February 2010) <<http://www.alrc.gov.au/report-111>>, [19.36]–[19.48].

⁶⁵ See, eg, *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 66.

which entitles a person to reasonable compensation for making copies and to return of the information.

Search and entry powers

In general, we agree that the search and entry powers are appropriately framed. However, we recommend inclusion of the additional procedural safeguards provided in the TEQSA Act, which govern:

- the occupier’s general entitlement to observe the execution of the warrant;⁶⁶
- the occupier’s right to request copies of things or information seized where practicable;⁶⁷
- the occupier’s entitlement to a receipt for things seized;⁶⁸
- the return, retention and disposal of seized things;⁶⁹
- the appointment and qualification of authorised officers;⁷⁰ and
- the provision and return of identity cards.⁷¹

We also note that, unlike other powers in the Bill, this power can only be exercised for ensuring compliance with the Bill itself, or for substantiating information provided under the Act. In contrast, the other investigatory powers (as discussed earlier) refer to “an Australian law”. We wonder if there is a reason for this distinction or whether it is a drafting oversight.

PROCEDURAL FAIRNESS

22. The notice requirements in the Bill should be amplified to require that notice include: all relevant details for compliance; reasons for the decisions; the manner and time of compliance; consequences of non-compliance; and the entitlement to review. Such notice requirements should apply to refusals of registration, the issue of warning notices or directions, the suspension or removal of responsible individuals, and the revocation of registration.

⁶⁶ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 83.

⁶⁷ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 85.

⁶⁸ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 86.

⁶⁹ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ss 87–89.

⁷⁰ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 94.

⁷¹ *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 95.

23. The Bill should require the Commissioner to provide affected persons with an opportunity to be heard prior to making a decision in respect of: refusals of registration, the issue of warning notices or directions, the suspension or removal of responsible individuals, and the revocation of registration. An affected person should have at least 14 days notice to prepare for such an opportunity, unless there are reasons that justify an urgent decision.
24. The issue of directions should first require notice advising of the intention to issue the direction and provide the person with an opportunity to take remedial action.
25. The opportunity to be heard in respect of the suspension or removal of responsible individuals should be more extensive and should involve an application to a court.
26. There should be a requirement of notice and an opportunity to be heard in relation to all grounds for revoking registration, not merely on the basis of ineligibility. The clause enabling the Commissioner to revoke without issuing a show cause notice should be removed. The opportunity to respond should be extended to at least 14 days.
27. The Bill should include an express power to publish an investigation report, together with a power to direct non-publication of part of a report, and a power to distribute the report to law enforcement agencies and other stakeholders where appropriate. The Bill should require the report to set out evidence or other material upon which the findings are based, a requirement to give upon request (and a discretion to give upon its own motion) a copy of the report to those whose conduct is examined in the report, and a requirement to include any responses to adverse findings, or a fair summary of them.
28. Consideration should be given to enlarging the period of 60 days before a decision may be treated as being made during the transitional period, or providing some limited flexibility for the ACNC to extend the period.
29. The power to issue warning notices should extend to circumstances in which the entity may no longer be entitled to registration.
30. The requirement to review directions after 12 months should be replaced by a shorter period of validity followed by a power to extend upon application to a court.
31. The power to accept enforceable undertakings should be limited, either by legislation or in guidelines, to circumstances in which such undertakings bear a clear or direct relationship with the alleged breach; are proportionate to the breach; do not require payment other than in compensation for those affected or to recover costs otherwise recoverable at law; and stipulate a time period for compliance.

Role of procedural fairness

Another major concern throughout the Bill is the absence of appropriate procedures to ensure fairness. The functions of fair procedures include:

- an instrumental function in contributing to the accuracy of the decision;
- ensuring affected individuals are aware of the basis upon which they are being treated in a particular way;
- enabling individuals to participate in the decision-making process;
- increasing public confidence in administrators and their decisions, and thereby helping individuals to accept adverse decisions; and
- assisting in the public acceptance of a regulatory scheme, and thereby reducing actual and threatened non-compliance with it.⁷²

The balance to be struck between speed and fairness depends largely on the context of the decision and, in particular, the interests involved in the decision. In the present case, the balance is tilted towards fairness because registration of an entity can have significant practical implications on the resourcing of an organisation (including not only access to tax concessions but also potentially access to philanthropic funding), and deregistration and other severe sanctions such as removal of trustees can destroy reputations, livelihoods and entities.

Key aspects of fairness include:

- providing individuals with sufficient notice and reasons for adverse decisions;
- providing individuals with notice and an opportunity to be heard before an adverse decision is made;
- fair time periods for compliance; and
- fair procedures concerning publication of regulatory action.

We identify below the deficiencies relating to these procedures in respect of various regulatory powers in the Bill. We note that the legislation of England and Wales,⁷³ and the Scottish legislation⁷⁴ provide general provisions regulating the provision of notice of

⁷² Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report, No 95, 13 March 2003) <<http://www.alrc.gov.au/report-95>>, [14.5]–[14.7], [15.5].

⁷³ *Charities Act 2011* (UK) s 86.

⁷⁴ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 72.

adverse decisions. This appears to us to be a convenient method, although most Australian precedents include the requirements within each provision. We note, however, that s 36 of the National VET Regulator Act applies specific natural justice requirements to a range of sanctions (including written notice of intention to make a decision, the giving of reasons, invitations for written response, requirements to consider responses, and written notice of decisions).

We then identify specific procedural concerns relating to particular powers, including search and entry powers and enforceable undertakings.

Notice and reasons

Fundamental to the rules of natural justice is the right to notice of the decision. Although the Bill currently provides generally for a written notice, it does not comply with the best practice principles stated in the *Guide* (as discussed above) and in the reports of law reform agencies.

As noted above, these principles generally require that the notice include all details relevant to enable compliance, and the consequences of non-compliance. Further, such notices should provide the reasons for the action, or potential action, of the regulator. Notice of such reasons are essential for enabling a person to understand and respond to the action. A requirement to provide reasons is generally included in equivalent overseas legislation and also in Australian legislation.⁷⁵ Finally, best practice principles also require the notice include a statement of the review rights available.⁷⁶

The Bill should amplify the requirements as to notice according to these principles, and require also the provision of reasons in relation to the following decisions:

- refusals of registration under Subdivision 10-B;
- the issue of warning notices or directions;
- the suspension or removal of responsible individuals; and
- the revocation of registration.

In particular, we note that the following amendments should be made:

⁷⁵ *Charities Act 2005* (NZ) ss 19, 35; *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 72; *Charities Act 2009* (Ireland) s 39(10); *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 22(ii); *Charities Act 2011* (UK) s 86.

⁷⁶ *Charities Act 2005* (NZ) s 35; *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 72; *Charities Act 2009* (Ireland) s 39(10).

- the notice of a decision to refuse registration should be required to include reasons for the decision and a statement as to the entitlement to review;
- a warning notice should include, in addition to the circumstances giving rise to the notice:
 - reasons for the ACNC's belief in the existence of the circumstances;
 - a statement of action proposed by the regulator;
 - a statement of the action that should be taken to remedy the situation and the date by which such action should be taken; and
 - the possible consequences of a failure to remedy the situation;⁷⁷
- the issue of a direction should be required to include the reasons for the direction,⁷⁸ and the possible consequences of non-compliance; and
- the notice suspending or removing a trustee should include a statement as to the entitlement to review.

Opportunity to be heard

In general, the principles of natural justice require that a person affected by a decision should have an opportunity to be heard before the decision is made. However, the current Bill appears to restrict the opportunity to be heard only to the more serious sanctions of suspension or removal of responsible individuals and (in limited circumstances)⁷⁷ revocation of registration.

We note that this may be because it is assumed that the envisaged objection process will enable internal review of decisions. As we note later, the objections process in the taxation legislation appears to us to be unduly complicated for the much smaller class of decisions to be made by the ACNC. Rather, we consider that including in the Bill provisions for a general opportunity to be heard prior to a decision being made is fairer, more flexible, and more likely to produce accurate decisions.

It is fairer because it permits an entity to respond to a claim before an administrative decision is made, which may have significant practical consequences. For example, the issue of a warning notice may be published and significantly impair an entity's reputation in ways that cannot be remedied by a consequent successful objection. It is more flexible because, once a decision is made, the relatively formal process of objection is required.

⁷⁷ These matters are specified in *Charities Act 2005* (NZ) s 54.

⁷⁸ Compare, eg, *Corporations Act 2001* (Cth) s 798J.

Administratively, there may be benefits in allowing organisations to clarify concerns held by the regulator without triggering the objections process. Finally, it promotes accurate decision making because decisions will be made after appropriate information is laid before the regulator.

We therefore suggest that the Bill follow the precedents in other legislation which provide a reasonable opportunity to respond to notices in relation to:

- refusals of registration;
- issue of warning notices;
- issue of directions;
- suspension or removal of trustees; and
- revocation of registration.

There should be a period of at least 14 business days to respond, in line with the recommendation in the *Guide* discussed above. However, as we note below, there may be cases where urgency is required, such as where actions may affect vulnerable third parties, and this can be dealt with through a suitable qualification to the general requirement.

Issue of directions

We note that, unlike in other jurisdictions, the Bill does not require that there be a prior investigation before the Commissioner may issue directions. This which strengthens the need for fair procedures. We recommend that a provision similar to s 798J of the *Corporations Act* be included, which requires:

- written notice of the opinion that it is necessary to give a direction, and the reasons for it;
- opportunity to take adequate action to remedy the situation; and
- if remedial action is not taken, the direction must be accompanied by reasons.

Suspension or removal of responsible individuals

We noted earlier that the provision in relation to trustees, read literally, at least partly exceeds federal legislative powers, and should be removed. In the event that this recommendation is not accepted, we consider that, in addition to notice, there should be specific opportunity to be heard before a decision is made to suspend or remove trustees. Such a decision requires a higher degree of procedural fairness, given its effect on legal rights and liabilities, financial interests and, most likely, reputation. Comparable Australian provisions require an opportunity to be heard in such cases. For example, s 1294 of the

Corporations Act requires that, prior to cancelling or suspending the registration of auditors or liquidators, the Board must give an opportunity for a person to appear at a hearing, make submissions and adduce evidence before the Board. ASIC and APRA must also be given an opportunity to appear at the hearing, make submissions and bring evidence before the Board.⁷⁹

We observe that the legislation of England and Wales and Singapore require that, before the Commission may appoint, discharge or remove a trustee, it must generally give public notice, including at least a month's notice and an invitation to make representations to it in the case of removal without consent.⁸⁰

We also note that, usually, the power to remove a trustee is conferred on a court. The jurisdiction of the Charity Commission of England and Wales in this regard is concurrent with the High Court's jurisdiction.⁸¹ The Irish legislation similarly empowers the regulator to apply to the court for removal. Similarly, while ASIC has some powers to disqualify directors, these co-exist with more expansive powers conferred on courts to disqualify directors.⁸² In our view, this is a preferable course and could be helpful in harmonising procedures between Commonwealth and State trusts law.

Show cause provisions

In relation to the last, we note that clause 10-62 of the Bill empowers the ACNC to issue a show cause notice in cases where a registered entity may not be entitled to be registered. We consider that this clause is too limited in light of the very serious consequences of revocation of registration. We note, although deregistration may be seen as the 'final step' in a graduated approach to sanctions, this may not apply to entities outside the Commonwealth's jurisdiction (the exact scope of which, as discussed earlier, is unclear). In such a case, the regulator's only constitutionally valid power may be to revoke registration,

⁷⁹ *Corporations Act 2001* (Cth) ss 797C, 826C.

⁸⁰ *Charities Act 1994* (Singapore) s 29; *Charities Act 2011* (UK) s 89.

⁸¹ We note that this may suggest a constitutional issue relating to the possible 'judicial power' exercised by the Commissioner in the context of suspending and removing trustees, but that this argument is unlikely to be successful in light of the decision of the High Court in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* 81 ALJR 1155 (HCA, 2007). In that case, the High Court held that the cancellation of the registration of a liquidator was not an exercise in judicial power, bearing in mind inter alia the historical assignment of the function, the absence of any determination of guilt or punishment, the absence of a determination as to existing legal rights or obligations, and the protective nature of the licensing regime. Although the present case is closer to the line, there are sufficient analogies with that case in the present context.

⁸² There is, of course, a clear difference between disqualification, which is more clearly protective, than removal.

without any intermediate steps being taken. In these cases, the need for an adequate show cause procedure is even clearer.

First, it is unclear why this power should be confined only to circumstances where the entity is not entitled to be registered, rather than full range of grounds upon which registration may be revoked. The benefits of an opportunity to be heard are equally relevant to the other grounds for revocation, such as misconduct or mismanagement.

Second, the protective effect of this clause is virtually negated by clause 10-55(6), which empowers the Commission to revoke registration without either issuing a show cause notice, or waiting for a response to a show cause notice. As we discuss above, the revocation of registration has drastic consequences for an NFP entity, and could potentially destroy its business.

This is clearly out of step with comparable legislation, which generally requires the regulator to give written notice and wait for a response. For example, s 487.10 of the CATSI Act requires the provision of a show cause notice and consideration of representations made within the specified period.⁸³ If the policy intention is to enable urgent action, we consider that s 487.10(2) of the CATSI Act, which empowers urgent action in specified circumstances, is a more appropriate legislative precedent.

We also note that the show cause notice procedure provides a timeframe for responding of 10 business days, which is shorter than the recommendation in the *Guide*, noted above, of at least 14 business days. If anything, we consider that this time frame may be too short for small, volunteer-run entities, particularly if it must obtain professional advice. We note that s 33 of the New Zealand legislation provides a time frame of at least 20 working days.

Publication

Clause 120-100 requires the Commissioner to prepare a written report and give a copy of the report to the registered entity following an investigation. A note also provides that the Commissioner may publish the report. Similarly, clause 120-200 suggests that warning notices may also be published.

As the ALRC has commented in relation to public inquiries generally, “the publicity that often accompanies an inquiry means that an adverse finding can cause significant damage to a person’s reputation. This is even more important in an age where such findings are readily accessible and stored for a long time on the internet.”⁸⁴ While this comment related to Royal Commissions and other public inquiries, it is pertinent also to investigations of

⁸³ See also *Charities Act 2005* (NZ) ss 33–36; *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 101; *National Vocational Education and Training Regulator Act 2011* (Cth) ss 36–37.

⁸⁴ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, above n 64, [15.112].

charities and other NFP entities, which are likely to be reported widely. The reputation of the NFP entity, as well as the reputation of those involved with the NFP entity, may be significantly damaged by an investigative report, and in the case of an entity this can destroy its funding base.

In light of the potential practical consequences of publication, the brief legislative notices are inadequate, especially in comparison with the fuller provisions in comparable legislation. In relation to the issue of warning notices, we recommend an equivalent to section 55 of the New Zealand legislation. This provides that, if the entity or person has failed to remedy the matters causing the issue of the warning notice, the Commission may, “in any manner that it thinks fit”, publish a notice containing: the name of the entity or person; a statement of the Commission’s opinion as to the contravention, ineligibility or misconduct; a statement of the action which has been or may be taken; and a summary of the grounds for that opinion. The section also requires the Commission to give notice of a decision to publish, including its reasons for publication and notice of the right to appeal the decision, before it publishes, and provides that publication cannot take place earlier than 20 working days after the issue of the notice.

In relation to the power to publish an investigation report, we have examined equivalent provisions and recommend that there should be:

- an express power to publish a report;⁸⁵
- a requirement to set out evidence or other material upon which the findings are based;⁸⁶
- an express power to direct non-publication of part of a report, consistent with the power to direct non-publication of information on the register;⁸⁷
- an express power to distribute the report to law enforcement agencies in appropriate circumstances;⁸⁸
- a requirement to give, upon request, or a discretion to give upon its own motion, a copy of the report to a person whose conduct is examined in the report;⁸⁹

⁸⁵ In all of the legislation considered here, the power to publish is conferred by statute, not by legislative note.

⁸⁶ *Australian Securities and Investments Commission Act 2001* (Cth) s 17(3).

⁸⁷ See *Charities Act 2009* (Ireland) s 66. The Scottish legislation prevents publication of identifying details of persons other than those whose conduct is being examined, unless it is necessary to do so: *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 33.

⁸⁸ *Australian Securities and Investments Commission Act 2001* (Cth) s 18.

⁸⁹ *Australian Securities and Investments Commission Act 2001* (Cth) s 18(3); *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 33.

- a power to give copies to other stakeholders;⁹⁰ and
- a requirement to publish any responses to adverse findings, or a fair summary of them.⁹¹

Other issues

Deemed refusal of registration

We also note that clause 10-20 of the Bill contains a provision that enables an entity to treat an application for registration as having been refused if the Commissioner does not make a decision within 60 days. While in general this is likely to be a sufficient period for the Commissioner to make a decision about registration, there may be some difficulty in meeting this target in a transitional period, especially after the introduction of a statutory definition. It may be appropriate to enlarge this period of time at this point, or to empower the ACNC with the capacity to extend the time where the decision cannot be made for reasons beyond its control, in a manner similar to that provided for in the TEQSA Act.⁹²

Issue of warning notices

We note that the power to issue warning notices does not extend to circumstances in which the entity may no longer be entitled to registration. There may be circumstances, for example, where an entity engages in activities to the extent that it is no longer charitable, but does not contravene the current Bill, and which should trigger a warning notice. We note that the comparable provision in New Zealand, section 54, applies if the Commission “considers that ... (b) a charitable entity is, or may be, no longer qualified to be registered as a charitable entity”.

Issue of directions

We consider that the period of 12 months before the Commissioner is required to reconsider a direction that he or she has issued is too long. In contrast, the directions of ASIC have effect for up to 21 days, after which non-compliance is adjudicated by the Court.⁹³ The Scottish legislation also places an upper limit of 6 months on directions not to

⁹⁰ For example, the Irish legislation empowers the regulator to provide copies to auditors and others whose financial interests may be affected by the conduct examined: *Charities Act 2009* (Ireland) s 66.

⁹¹ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, above n 64, [15.103]–[15.104].

⁹² *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 21(2). This enables an extension for a maximum of up to 9 months, but the extension must be determined at least 6 weeks before the expiry of the initial 9 months, and notice must be given of the decision to extend and reasons for it.

⁹³ *Corporations Act 2001* (Cth) s 798J.

undertake certain activities.⁹⁴ We consider that, as with ASIC, if a direction is required for a lengthy period, then the matter should be adjudicated by a court.

Enforceable undertakings

In principle, we do not disagree with the option of using enforceable undertakings as an intermediate sanction. However, we draw attention to the ALRC's discussion of some of the concerns surrounding the use of enforceable undertakings by other regulators in Australia.⁹⁵ These concerns included: the risk of disproportionate undertakings; the risk of over-extensive undertakings; concerns that regulators may use their power to extract monetary penalties; and open-ended undertakings. The ALRC recommended that legislation should provide that the terms of an enforceable undertaking must:

- (a) bear a clear or direct relationship with the alleged breach;*
- (b) be proportionate to the breach;*
- (c) not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator's costs (if these are otherwise recoverable at law); and*
- (d) stipulate a time period within which compliance with undertakings is required and not be otherwise open-ended.*⁹⁶

We suggest that these principles either be included in the Bill, or that the ACNC be required to produce guidelines, along the lines of those already produced by the ACCC, addressing its use of the power to require enforceable undertakings.

REGISTRATION

32. The contents of the register should also include: the purposes or objects of the entity; the addresses of premises in which the entity operates; the application for registration; and notices of changes to information lodged (or links to such notices). The inclusion of details of warnings should include also responses by the entity to the warning, and subsequent responses by the regulator, including any directions and other regulatory action.

33. Clause 100-10 should be redrafted to avoid repetition in relation to entities and former entities.

⁹⁴ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 28(4).

⁹⁵ Australian Law Reform Commission, *Principled Regulation*, above n 72, [16.60]–[16.86].

⁹⁶ *Ibid* Rec 16–2.

34. Clause 100-10 should conclude with a provision setting out the purpose of the register. Clause 100-20 should be redrafted by, first, providing for publication on the Internet, followed by the power to omit or remove information if the public interest in the register is outweighed by: the risk of harm to individuals; the risk of harm to the entity; interests in the confidentiality of the information; risk of confusing or misleading the public; or other compelling reason. The clause should include an entitlement to request such non-publication.

Contents of the register

Clause 100-10 includes a long list of what must be maintained in the register. In principle, we have no objection to the public listing of these details, with the possible exception of the “qualifications” of the responsible individual, which is somewhat unclear.

We have reviewed the equivalent provisions in other legislation in this regard. In general, the legislation of the various jurisdictions of the United Kingdom and Ireland are less prescriptive. We suggest, however, the following additions might be considered:

- the purposes or objects of the entity, as in Scotland and Ireland;⁹⁷
- the address of each premises in which the entity operates, as in Ireland;⁹⁸
- the application for registration, as in New Zealand;⁹⁹ and
- notices of any changes to information lodged, as in New Zealand (or links to such notices).¹⁰⁰

We also note that the details of warnings are to be included, but that there is no requirement to include any subsequent information, which may prejudice an entity’s reputation unfairly. For example, a warning may turn out to be unfounded, explained adequately, or remedied by subsequent action. We recommend therefore that the detail of the warnings include details of any response to such warnings by the entity and any subsequent responses by the ACNC, including any directions or further regulatory action (which is not currently required).

We suggest, however, that the drafting be reconsidered to avoid the repetition in relation to former entities. For example, the introductory paragraph could read that the Commission is

⁹⁷ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 3(c); *Charities Act 2009* (Ireland) s 39(7)(f).

⁹⁸ *Charities Act 2009* (Ireland) s 39(7)(c).

⁹⁹ *Charities Act 2005* (NZ) s 24(1)(f).

¹⁰⁰ *Charities Act 2005* (NZ) s 24(h).

to maintain a Register which includes the following information in relation to registered entities or former registered entities.

Publication of information on the register

We have no objection to the principles underpinning clause 100-20, and indeed prefer it to comparable overseas legislation that generally provide broad power to allow non-publication, either without any guidance (as in England and Wales, or Northern Ireland); or in “the public interest” as in New Zealand.¹⁰¹ We agree that, since a key purpose of the regulator is to improve transparency, the power should be more restricted.

However, we consider that the clause could be usefully clarified and restructured. Our suggestion is that an equivalent to the New Zealand provision setting out the purposes of a register be included at the end of clause 100-10. This provision lists two purposes: first, to enable a person to (i) determine whether an entity is registered as a charitable entity; (ii) obtain information concerning the nature, activities and purposes of charitable entities; and (iii) know how to contact a charitable entity; and secondly, to assist any person in exercising powers under legislation or performing functions under legislation.¹⁰² This seems to us a useful provision in communicating the public dimension of the register.

Importantly, the inclusion of such a section helps guide the determination of when the public interest in the publication of information may outweigh private interests in confidentiality. We suggest that subclause 100-10(3), providing for publication on the Internet (which should be redrafted to specify that the Register should be publicly available on the Internet, rather than the rather awkward current drafting), be moved to the beginning of clause 100-20. Subsequently, the provision should empower the Commissioner to exclude publication of, or remove, information if the public interest in the register, as set out in new subclause 100-20(3) is outweighed by the: (i) risk of harm to individuals; (ii) risk of harm to the entity; (iii) interests in the confidentiality of the information; (iv) risk of confusing or misleading the public; or (v) other compelling reason.

This encompasses all of the grounds currently specified, except that of “likely to offend a reasonable person” (which we consider an insufficient reason in itself to justify non-publication) and includes a residual provision to capture other possible interests.

¹⁰¹ *Charities Act 2005* (NZ) s 25; *Charities Act (Northern Ireland) 2008* (NI) s 16(9); *Charities Act 2011* (UK) s 38(3). The Scottish regulator is required to exclude information relating to the office of the charity where it is likely to jeopardize the safety or security of any person or premises: *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 3(4).

¹⁰² *Charities Act 2005* (NZ) s 22.

Although in general the presumption should be in favour of transparency, we note that there may be good reasons to keep some information confidential. For example, some major donors might prefer not to disclose their identity for legitimate reasons of privacy or fear of publicity. We suggest that there should be a statutory entitlement to request non-publication of some information on the register. An entity would need to show cause why the information should not be made publicly available.

In other jurisdictions, this concern does not arise in relation to the register since financial accounts are not expressly required to be included on the register. The greater transparency requirements in the Bill may well force such disclosure against the interests of a charity or its donors. This consideration should be included within the Commissioner's power to withhold publication of certain information.

REPORTING OBLIGATIONS

35. The duty to keep records correctly recording and explaining the operation and acts of the entity should be more narrowly framed. It should be confined to requiring a duty to keep records of its contact details, governance rules, members and officers, meetings, and possibly a summary of its activities. The duty should also be framed to provide a translation into English upon request.
36. The penalty for failing to keep records should be reduced to 25 penalty units or less.
37. A transitional provision should be included to enable the ACNC to accept the reports provided by incorporated associations under the relevant State or Territory legislation.
38. The three-tiered structure should be based on size alone.
39. The three-tiered structure should be made more flexible by empowering the ACNC to modify reporting obligations for particular entities. The grounds for modifying such obligations should be developed by the ACNC in consultation with the sector.
40. The Bill should provide that, where the entity is subject to reporting obligations under State or Territory legislation that exceed those provided in the Bill, the entity must provide a report to the ACNC that complies with the higher standard.
41. The Bill should provide for a period of 6 months for lodgement of financial reports, consistently with the majority of State and Territory associations legislation. Entities should be able to nominate their financial year upon registration, and be given limited discretion to change the dates or upon the approval of the Commissioner.

Duty to keep records

Duty to keep records of operations and acts

Clause 50-5(2) requires, in addition to the usual provisions for keeping financial records, that an entity keep records that “correctly record and explain its operations and acts” and “would enable the Commissioner to assess properly the entity’s entitlement to be, or to remain, registered”. Such a provision appears to have no legislative precedent¹⁰³ and is, in our view, too vague and potentially broad in scope, therefore increasing the compliance burden on NFP entities.

We recommend that the content of this obligation be clarified in the legislation. For example, we consider that the obligation may be to keep records in relation to:

- the internal governance rules of the organisation;
- the entity’s contact details;
- a list of members;¹⁰⁴
- a list of officers and responsible individuals;
- minutes of committee and general meetings;¹⁰⁵ and possibly
- a summary of activities conducted by the entity.

English language requirement

We also recommend replacing clause 50-5(3), which requires that the records be in English, or “readily accessible and easily convertible into English”, with the language used in s 287(1) of the *Corporations Act*. This allows the records to be kept in any language, but requires that an English translation must be available within a reasonable time to a person who is entitled to inspect the records and asks for the English translation. In our view, this is less prescriptive and clearer than the current clause.

Penalties

We recommend revision of the penalty in relation to record-keeping, which is currently 30 penalty units. This is higher than the maximum (25 penalty units) currently imposed on

¹⁰³ No such requirement is imposed, for example, under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) Div 322. See also *Corporations Act 2001* (Cth), Ch 2M.

¹⁰⁴ These elements are required under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 322.5, Pt 4–5.

¹⁰⁵ This is required under the *Associations Incorporation Act 2009* (NSW) s 50.

corporations or Aboriginal or Torres Strait Islander corporations for the equivalent offence (which is confined to financial records).¹⁰⁶

We observe that the penalty is also much higher than those in most State or Territory associations legislation, which ranges from either no penalty (WA),¹⁰⁷ 5 penalty units (NSW, Victoria and Tasmania),¹⁰⁸ up to 20 penalty units in ACT,¹⁰⁹ and \$1,250-\$2,500 (SA).¹¹⁰ Queensland does not have a general duty to keep records, although the penalty for failing to prepare and present financial records at a general meeting is 10 penalty units. The Northern Territory is a clear outlier, imposing a maximum of 100 penalty units (equivalent to \$13,700).

We recommend therefore that this penalty be revised to 25 penalty units, consistent with corporations legislation at the Commonwealth level, and that consideration be given to a tiered level of penalty consistent with the tiered reporting obligations, as is done in South Australia.

Tiered reporting

We welcome the tiered nature of the reporting requirements in clause 210-10 and note that these replicate the existing tiers applicable to companies by guarantee. We also agree that there should be power to change the amounts to reflect (for example) inflation.

We agree that, in principle, there is greater regulatory interest in organisations that fundraise from the public. However, we note that DGR status is not a good proxy for such a distinction, as many organisations obtain such status to receive philanthropic or government funding, which often impose their own reporting requirements. Other organisations may fundraise from the public in different ways (such as holding functions) that do not require DGR status. We suggest that this interest may also be more properly considered in the context of the proposed national or harmonised fundraising legislation, and that a tiered reporting system based on size alone would be simpler to administer.

¹⁰⁶ *Corporations Act 2001* (Cth) s 286; *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 322.10. Note that the CATSI Act does not make it an offence to fail to comply with the duty to keep administrative records under s 322.5.

¹⁰⁷ See *Associations Incorporation Act 1987* (WA) s 25.

¹⁰⁸ *Associations Incorporation Act 1981* (Vic) s 30A; *Associations Incorporation Act 1991* (ACT) s 23A; *Associations Incorporation Act 2009* (NSW) s 50.

¹⁰⁹ *Associations Incorporation Act 1991* (ACT) s 71.

¹¹⁰ *Associations Incorporation Act 1985* (SA) s 39C. The penalty varies depending on whether the person is a 'prescribed person', meaning an association with gross receipts of \$200,000 or more, or otherwise prescribed in the regulations.

Further, a tiered system based on size alone is more consonant with State and Territory associations legislation, which also (with the exception of Western Australia) imposes tiered reporting requirements. Given that the ultimate intention is to harmonise obligations across NFP entities, it is worth considering aligning thresholds and requirements to the greatest extent possible. This is complicated by the fact that some jurisdictions use two-tier systems and others three-tier systems, although the three-tier system is more common. For convenience, we have set out the current requirements in the tables below.

Table 1: Two-tier schemes

Jurisdiction	Division		Notes
	Receipts	Assets	
NSW	\$250,000	\$500,000	Audit for highest tier; financial summary otherwise ¹¹¹
South Australia	\$500,000	n/a	Audited accounts only for highest tier. ¹¹²
Tasmania	\$40,000	\$40,000 ¹¹³	Lowest tier only available by exemption, ¹¹⁴ and also requires special resolution in favour of exemption and rule allowing special general meeting to be requested by members ¹¹⁵ Otherwise audit required by registered company auditor or approved person.
Victoria (current)	\$200,000	\$500,000	Highest tier to submit audited accounts, audited by registered company auditor or member of a professional accountants' body or approved person.

Table 2: Three-tier schemes

¹¹¹ *Associations Incorporation Act 2009* (NSW) ss 42, 46.

¹¹² *Associations Incorporation Act 1985* (SA) ss 3, 35, 36; *Associations Incorporation Regulations 2008* (SA) reg 4. It is also possible to prescribe associations based on other criteria, but none is so prescribed.

¹¹³ Not including real property.

¹¹⁴ *Associations Incorporation Regulations 2007* (Tas) s 24.

¹¹⁵ See <http://www.consumer.tas.gov.au/business_affairs/incorporated_associations/audit_requirements>.

Jurisdiction	Small	Medium	Large	Notes
ACT	Receipts/assets >\$150,000	Receipts/assets >\$150,000, >1000 members or liquor licence	Receipts >\$500,000	
	Accounts to be audited by person not an officer and not involved in preparing accounts ¹¹⁶	Audit by registered company auditor or member of accountants' body	Audited by registered company auditor ¹¹⁷	
Northern Territory	Receipts <\$25,000; assets <\$50,000	Receipts >\$25,000 <\$250,000; assets >\$50,000 <\$500,000; gaming machine license	Receipts >\$250,000; assets >\$500,000; trading association; performs local government functions ¹¹⁸	
	Audit by independent person	Audit by member of accountants' body, prescribed or approved	Audit by registered company auditor, accountant with public practising certificate, or approved ¹¹⁹	
Queensland	Revenue/assets <\$20,000	Neither small nor large	Revenue >\$100,000 Assets >\$1 million ¹²⁰	
	President/treasurer's declaration of accurate record-keeping	Auditor's declaration of adequate bookkeeping ¹²¹	Audited by company auditor, members of accountants' body	Audit may be required of small or medium association under fundraising or gaming law, but may be by approved person ¹²²

¹¹⁶ *Associations Incorporation Act 1991* (ACT) s 74; *Associations Incorporation Regulation 1991* (ACT) reg 12.

¹¹⁷ *Associations Incorporation Act 1991* (ACT) s 76; *Associations Incorporation Regulation 1991* (ACT), reg 13.

¹¹⁸ *Associations Act* (NT) ss 46–48.

¹¹⁹ See *Associations Incorporation Act 1991* (ACT) s 74.

¹²⁰ *Associations Incorporation Act 1985* (SA) s 58.

¹²¹ *Associations Incorporation Act 1981* (Qld) ss 59A, 59B.

¹²² *Associations Incorporation Act 1981* (Qld) s 59.

Victoria (from 1 July 2012)	Revenue <\$250,000	Revenue >\$250,000 <\$1 million	Revenue >\$1 million
	No obligation to submit accounts	Review by members of accountants' body	Audited by company members of auditor, accountants' body Registrar may declare association to be in a particular tier. Members may vote for, or Registrar may direct, increased accounting requirements.

We note that the Commonwealth scheme sets higher revenue limits for the tiers than comparable State or Territory associations legislation. In light of this, the evidence of the wide divergence between current State and Territory requirements, the increased compliance burden that will inevitably accompany the introduction of the ACNC, and the limited capacity of the ACNC upon commencement to monitor financial reporting, we recommend that strong consideration be given to transitional provisions that enable the ACNC to accept reports that comply with existing State or Territory requirements. We also suggest that the Commonwealth should encourage the States or Territories to amend their legislation to harmonise the reporting thresholds in the future.

We also consider that, in the future, alignment with associations legislation could be enhanced in several ways.

First, some associations legislation empower modification of the basic scheme by the regulator. We consider that there is a good argument for enabling the ACNC to declare an entity to be subject to more, or less, stringent financial requirements, on the basis of other risk factors that the ACNC could identify over time and in consultation with the sector. In our *Regulatory Working Paper*, we discussed several factors that influenced the degree of internal and external accountability of NFPs, such as the capacity of members, beneficiaries or donors to hold responsible individuals to account, or the existing regulatory framework. We also considered the possibility of coupling self-regulatory and accreditation schemes with state regulation as a method of promoting the internalisation of good governance.

The ACNC could develop, in consultation with the sector, a more flexible framework for reporting that more accurately reflected the principles of risk management. A general power to modify reporting obligations could assist in this regard. For example, grounds for increasing financial accountability could include: past financial misconduct; the absence of,

or relative diffusion of, members; the relative inability of beneficiaries to protect their interests; and disproportionate risk posed to beneficiaries of poor financial management. Grounds for lessening such reporting requirements could include participation in approved self-regulatory schemes.

We note that s 169 of the *Charities Act 2011* (UK) provides a general power for the Commission to dispense with the requirements of annual returns by registered charities in relation to particular charities, particular classes, or particular financial years.

In addition, if State or Territory legislation imposes more onerous obligations on the entity (as is typical under current legislation), the benefits of such obligations should flow through to the ACNC. For example, if State or Territory legislation requires an audited report in circumstances where that is not required under the Commonwealth legislation, such a report should nevertheless be submitted to the ACNC. Some consideration also should be given to remove duplication of penalties for failing to file or filing late, where such penalties would also be imposed in a parallel regime.

Third, we note that, in most jurisdictions, an alternative test of assets is included (excepting South Australia and, in 2012, Victoria). There may be a good argument for including an alternative test of assets, since one of the concerns of regulation is to protect the property of the charity. Some charities may manage large endowments but have relatively little revenue, or their revenue may fluctuate considerably from year to year. We recognise, however, that the revenue-only test is simpler to administer and consistent with both the existing Commonwealth scheme and has been adopted by Victoria in its latest reform.

To some extent, the divergence may be dealt with by the suggestion that the ACNC should have the benefit of any stricter requirements imposed on entities under State or Territory legislation. The ACNC may also wish to consider modifying reporting requirements in relation to a class of entities on the basis of assets, under our other proposal for regulatory flexibility.

Time for lodgement

Clause 55-10 requires that the financial report must be filed by 31 October in the following financial year. Clause 55-5 requires the annual information statement to be filed by the same date.

We have reviewed the associations legislation to identify a common lodgment period. Most jurisdictions require lodgment within 6 months of the end of the association's financial year,

which is usually a month after the AGM is required to be held.¹²³ The exceptions are Queensland, which gives 7 months (with 6 months for holding an AGM),¹²⁴ and Western Australia, which does not require lodgment. Some jurisdictions also allow the first annual general meeting to be held within the first 18 months of incorporation. We therefore recommend that the time for reporting, for both information statements and financial reports, be amended to 6 months within the association's financial year. We note also that it is impracticable for a date to be specified, rather than a period of months.

Substitution of accounting periods

The associations legislation also allows lodgment depending on the end of the association's financial year. We note that flexibility in financial years is a practical concern, especially in a context where there is competition for auditors in a concentrated period.

We agree in principle with the intention behind clause 55-90, which enables the Commissioner to approve a request for substituting accounting periods. However, we draw attention to the New Zealand provision, which appears to provide a more flexible and convenient administrative regime.

Section 41(3) of the *Charities Act 2005* (NZ) enables an entity to nominate a balance date in its application for registration or otherwise have a default balance date of 31 March. The entity may change the balance date without approval if the period between any 2 balance dates does not exceed 15 months and the entity continues to have a balance date in each calendar year, or with approval by the Commission.

This appears a more flexible and administratively more convenient regime than the present proposal, which would require each entity to request approval for any variations to 30 June and for the Commissioner to approve each one. It would also enable greater harmony with existing associations legislation.

THE ACNC AND ADVISORY BOARD

42. A general qualifications clause should be introduced for the Commissioner.

43. Clause 160-10 should be redrafted to establish the ACNC as comprising only of the Commissioner and any Deputy Commissioners that may be appointed.

¹²³ *Associations Incorporation Act 1964* (Tas) s 24B; *Associations Incorporation Act 1981* (Vic) s 30(4); *Associations Incorporation Act 1991* (ACT) s 79; *Associations Incorporation Regulations 2008* (SA), reg 8; *Associations Incorporation Act 2009* (NSW) ss 45, 49; *Associations Act* (NT) ss 36, 45.

¹²⁴ *Associations Incorporation Act 1981* (Qld) ss 55, 59, 59A, 59B.

44. The Commissioner of Taxation should be required to consult the Commissioner in relation to the appointment and discharge of ACNC staff.
45. The Advisory Board should have the power to give advice and make recommendations upon its own initiative.
46. There should be grounds for termination of an appointment to the Advisory Board.
47. The Advisory Board should be able to convene meetings as is expedient, and to control the procedure of such meetings.
48. Members of the Advisory Board should be required to disclose non-pecuniary conflicts of interest.
49. Clause 161-5, empowering the Commissioner to disregard the advice of the Advisory Board, should be removed.
50. The Commissioner should be able to attend meetings of the Advisory Board only upon invitation.

Qualifications of the Commissioner

In contrast to clause 170-10 of the Bill, the Division dealing with the appointment of the Commissioner does not provide for the qualifications of the Commissioner. We understand that is because, as a statutory officer, the Commissioner will be subject to the merit-based selection process established for such officers under Australian Government policy.¹²⁵

While we are confident that the process of selection will be appropriately managed under this process, this is a matter of policy that may change from time to time. We also note that, for the sector, confidence in the regulator depends critically on the experience and qualifications of the Commissioner, and that a qualifications clause will be helpful in bolstering that confidence.

We note that general qualifications clauses are provided in comparable Australian legislation, including s 138(4) of the TEQSA Act.¹²⁶ A similar broad qualifications clause is

¹²⁵ See <<http://www.apsc.gov.au/publications08/meritandtransparency.htm>>.

¹²⁶ See also *Australian Prudential Regulation Authority Act 1998* (Cth) s 17; *Australian Securities and Investments Commission Act 2001* (Cth) s 9; *National Vocational Education and Training Regulator Act 2011* (Cth) s 162.

included in the Scottish legislation.¹²⁷ The legislation of England and Wales and Ireland are more specific, requiring also legal members.¹²⁸

Establishment of ACNC

Clause 160-10 provides that the ACNC consists of the Commissioner and any staff assisting the Commissioner. All the establishment clauses in comparable legislation do not refer to staff, only to Commissioners or their equivalent, and the clause should be redrafted accordingly.¹²⁹ Further, if as appears to be intended, Deputy Commissioners will be appointed, these should be included in the provision.¹³⁰

Staffing of the ACNC

Clause 163-5 provides that the staff of the ACNC will be “made available for the purpose by the Commissioner of Taxation”. It further provides that such staff are subject to the directions of the Commissioner while performing services for the Commissioner.

We understand that this is the usual provision and reflects the policy decision to retain the ACNC as a special unit within the ATO. A key concern with this arrangement is the independence of the regulator from the ATO. While we accept that it is the intention to preserve such independence, we consider that a key aspect of independence is the ability for the Commissioner to appoint and remove employees of the ACNC. While such a statutory power may not be possible under the current arrangement, we suggest that it would be possible at least to require that the Commissioner of Taxation consult the Commissioner on staffing issues.

Advisory Board

We welcome the establishment of an Advisory Board, and agree generally with the clauses governing the Advisory Board. However, we have several reservations about the detail of these clauses.

¹²⁷ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, Sch 1, para 1(2).

¹²⁸ The legislation of England and Wales requires that, together, the members must have knowledge and experience in the law relating to charities, charity accounts and the financing of charities, and the operation and regulation of charities of different sizes and descriptions: *Charities Act 2011* (UK), Sch 1 cl 1(2). It also requires at least two legally qualified members of at least 7 years’ standing, and a member with experience in Wales. The Irish legislation requires three legally qualified members, either former superior judges or lawyers of at least 10 years’ standing: *Charities Act 2009* (Ireland), Sch 1 para 2.

¹²⁹ *Australian Securities and Investments Commission Act 2001* (Cth) ss 9–10; *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 133.

¹³⁰ It is usual to include reference, for example, to Deputy Commissioners in legislation: see, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 10.

Power to give advice on own motion

First, clause 170-15 empowers the Advisory Board to give advice and make recommendations only at the request of the Commissioner. There is no good reason for so confining the scope of advice, and similar bodies are generally given power to advise on their own initiative.¹³¹ It would be relatively easy for a Commissioner simply to bypass any critical scrutiny of his or her performance by simply failing to make such a request. Further, confining the Board to advising only on request means that there is no effective avenue for the NFP sector to raise issues about the practice and administration of the ACNC through the Advisory Board.

Capacity to ignore advice

We express deep concern about clause 161-15, which empowers the Commissioner to disregard the advice and recommendations of the Board, even where requested.¹³² We understand that the concern here is to avoid over-zealous judicial review. Nevertheless, such a provision clearly conflicts with basic principles of administrative law and cannot be justified by any of the principles identified by the Administrative Review Council as justifying exclusion from judicial review.¹³³

We consider that the fear of judicial review is overstated. All that is required is for the Commissioner to have regard to the advice of the Board. The Commissioner is not required to accept such advice, and given the extensive powers exercised by the Commission, we consider that this is not an onerous administrative requirement. Further, the symbolic effect of establishing an Advisory Board whose advice may be totally disregarded communicates entirely the wrong message to the sector.

We have been unable to find any legislative precedents for such a clause. In contrast, we have found express guarantees to the contrary. For example, s 32A of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) provides that the CEO “must have regard to the advice and recommendations given to him or her by the Advisory Board (whether or not the advice and recommendations were given in response to a request).” Further, the CEO must keep the Advisory Board informed of the performance of the regulator’s functions, and give the Board such reports, documents and information as required for the functions of the Board. Other examples include s 11 of the *Australian*

¹³¹ *Australian Securities and Investments Commission Act 2001* (Cth) s 148.

¹³² This seems odd because, as presently phrased, the Advisory Board can only give advice on request, as discussed above.

¹³³ Administrative Review Council, *The Scope of Judicial Review* (Report, No 47, April 2006) <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(96E02A3185906E56B3F27DE5BFCC1C80\)~Scope+of+judicial+review+-+editors+version.pdf/\\$file/Scope+of+judicial+review+-+editors+version.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(96E02A3185906E56B3F27DE5BFCC1C80)~Scope+of+judicial+review+-+editors+version.pdf/$file/Scope+of+judicial+review+-+editors+version.pdf)>.

Broadcasting Corporation Act 1983 (Cth) and s 52E(3) of the Therapeutic Goods Act 1989 (Cth).

Removal of member

Clause 171-40 empowers the Minister to terminate a member's appointment to the Advisory Board at any time, without requiring any grounds for removal. This unfettered power appears to allow for political interference with the Advisory Board. We contrast this provision with s 151 of the ASIC Act, which provides that the Minister may only terminate the appointment of a member of an advisory board on grounds of physical or mental incapacity or the usual grounds in relation to bankruptcy or insolvency. We recommend that this provision of the ASIC Act be replicated in the Bill.

Meetings

Clause 172-5 requires the Advisory Board to hold four meetings a year. This is different from the usual provision that empowers advisory boards to meet when it is considered expedient. While we agree that the Advisory Board should be encouraged to meet regularly, we note that if the current drafting remains, which empowers the Board only to give advice upon request, the Advisory Board could be required to meet even if there are no issues for discussion.

It is also unusual to provide for the Commissioner, rather than the Board, to control the procedure of the meetings of the Board. We recommend that this be changed.

The clause also contains the usual phrasing relating to disclosure of pecuniary interests by the Advisory Board. We appreciate that there is usually a distinction between the disclosure of pecuniary interests, and the wider requirements of disclosure by Commissioners and similar officers, or to the Minister (cf clause 171-20). Nevertheless, we note that in the particular context of NFP organisations, it is very likely that an Advisory Board member could have a non-pecuniary conflict of interest. For example, a member is likely to be involved with particular entities in a voluntary capacity, or have close relationships with others involved in such entities, where those entities may be the subject of investigation or inquiry. We consider that some thought be given to whether the disclosure of non-pecuniary interests might also be desirable.

Finally, the clause enables the Chair to invite the Commissioner to attend the meetings of the Advisory Board, although this appears to conflict with clause 165-15(2) which empowers the Commissioner to attend Board meetings. Since such meetings may need to include frank discussion of the performance of the Commissioner or the Commissioner's staff, or the policy directions adopted by the Commissioner, we consider that the Commissioner should only attend meetings of the Advisory Board at the invitation of the Chair.

INFORMATION SHARING AND SECRECY

51. The Bill should include a specific provision enabling disclosure between the ACNC, other regulators and law enforcement officials.
52. The secrecy provisions should apply to persons, not entities.
53. The secrecy provisions should not extend to use of the information.
54. The secrecy provisions should include an exception for disclosure in the course of the performance of duties rather than an exception for disclosures necessary to promote the object of the Act.
55. The secrecy provisions should not prohibit compulsion of disclosure by courts or tribunals.

We have considered the adequacy of the information-sharing regime in the Bill, and consider there is a significant omission in relation to provisions that enable disclosure between regulators. We have reviewed the secrecy provisions for compliance with the ALRC's recent report on secrecy laws,¹³⁴ which specifically considered the secrecy provisions of the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth), upon which the current provisions are based. We note that the ALRC considered there were good reasons for a specific secrecy regime in the context of taxation for reasons that are also relevant to the present regime. However, we note that there are several departures from the equivalent taxpayer secrecy provisions, and from the principles stated by the ALRC in the Bill.

Information-sharing with other regulators

Evidence of misconduct by NFP entities may well raise issues in other legal regimes. For example, the evidence may reveal contravention of fundraising laws, taxation laws, trust laws or criminal laws. Concerns about links to terrorist organisations, discussed earlier, is a prime example where inter-agency coordination would be required.

There is, however, no express provision permitting disclosure to other regulators or law enforcement officials. We suspect it is intended that information-sharing of this kind would be permissible under clause 180-30, which provides that an ACNC officer may disclose protected Commission information to an authority of the Commonwealth, State or Territory. However, this requires that the disclosure must be "for the purposes of this Act",

¹³⁴ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (ALRC Report, No 112, 11 March 2010) <<http://www.alrc.gov.au/publications/report-112>>.

which would not extend to (for example) the enforcement of taxation laws or fundraising laws.

We recommend specific provision be made for disclosure between regulators and also to and from law enforcement officials. This is especially important because of the inherently federal nature of the regulation of NFP entities. As noted in this submission, a cooperative arrangement between the ACNC and other regulators may also be necessary as a result of the constitutional limitations of the ACNC's enforcement powers.

Such information sharing provisions are included in comparable overseas¹³⁵ and Australian legislation. Section 189 of the TEQSA Act provides a useful precedent. It enables disclosure of specified kinds of information, relating to possible offences or contraventions, to statutory office-holders, federal or state police, and employees of Commonwealth or State authorities of a prescribed kind. Section 194 enables disclosure also to prescribed government authorities if the disclosure is "necessary to enable or assist" the authority to exercise its functions or powers, or to a Royal Commission.

We also note that while there is provision for the ACNC to disclose information to other entities, there are no reciprocal provisions enabling disclosure to the ACNC. Such provisions are common in other jurisdictions. For example, the Irish legislation enables disclosure by specific enforcement agencies and other prescribed persons of information relating to the commission of offences under the Act.¹³⁶ A broader provision is s 54 of the *Charities Act 2011* (UK), which empowers a public authority to disclose information for the purposes of enabling it to discharge its functions.¹³⁷ More specific requirements apply to Revenue and Customs information and disclosures to by principal regulators of exempt charities.¹³⁸ The Singaporean provision is similar in nature.¹³⁹ Even broader information sharing powers are conferred in Scotland, which also override other secrecy provisions in relation to designated bodies.¹⁴⁰

Application to persons

The secrecy offences are phrased so as to apply to 'entities'. Logically, the definition of ACNC officer means that the offence in clause 180-15 can only apply to natural persons. While, technically, an entity could commit the offence in clause 180-20, in our view the

¹³⁵ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 24; *Charities Act 2009* (Ireland) s 32.

¹³⁶ *Charities Act 2009* (Ireland) s 27. Section 28 provides for disclosure by the Authority to other specified enforcement bodies in relation to commissions of offences.

¹³⁷ See also *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 24.

¹³⁸ *Charities Act 2011* (UK) ss 55, 58.

¹³⁹ *Charities Act 1994* (Singapore) s 41C.

¹⁴⁰ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, ss 24–25.

penalty should be paid by the natural person committing such an offence. The offences should therefore be rephrased.

Use of information

The offences in clauses 180-15 and 180-20 extend beyond disclosure to “use” of the information. This is broader than the equivalent taxation secrecy provisions and conflicts with the ALRC’s recommendation that such offences should not extend beyond disclosure (and in the text referred specifically to the language of “use” of information) unless such conduct would cause, or is likely intended to cause, harm to an essential public interest.¹⁴¹ We recommend removal of the term “use”.

Performance of duties

Clause 180-15 does not include a general exception for disclosure in the course of the performance of duties as an ACNC officer. As discussed by the ALRC, such an exception allows a person to perform a range of functions which may extend beyond those permitted under an exception for disclosures “authorised by the Act” or “in compliance with a requirement under an Australian law”.¹⁴² For example, it may allow: disclosure of such information in response to equitable or common law obligations; production of information in response to certain court orders; and exchange of information for criminal prosecutions. It would extend to incidental administration of the Act that is not necessarily “authorised by the Act” itself. The ALRC therefore recommended that secrecy provisions “should generally include an exception for disclosures in the course of an officer’s functions or duties”.¹⁴³

The Bill contains a provision which excepts disclosures “necessary to promote the object of the Act”, and allows the Minister to specify requirements for compliance with that disclosure. The function of this provision is somewhat unclear, and the scope of the exception appears both broad and vague. This type of provision also appears to be without legislative precedent. In our view, this provision should be replaced by the more usual exception in relation to “performance of duties”, which is both clearer in scope and has been clarified to a certain extent by judicial guidance.

Compellability

Finally, the secrecy provisions in the Bill make protected information non-compellable by courts and tribunals other than where it is necessary for the purposes of the Act. This provision replicates taxpayer secrecy provisions.

¹⁴¹ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, above n 135, Rec 9–3.

¹⁴² *Ibid* [7.1.6]–[7.3.1].

¹⁴³ *Ibid* Rec 10–2.

However, a provision of this kind is difficult to justify in the very different context of this Bill. The present context is very different from the context in which the personal and financial information of Australian taxpayers is to be safeguarded for the purposes of administering the taxation laws.

The information provided under the Bill is either intended to be published on the register, or relates to evidence of misconduct or mismanagement which is also intended to be publicly disclosed, subject to the discretion of the ACNC not to publish such information. There may well be circumstances where individuals or other regulators may seek evidence of misconduct or mismanagement to enforce other types of laws (such as fundraising laws) in circumstances which would advance the purposes of the Act. In our view, clause 180-15(3) should be omitted.

In the event that this recommendation is not adopted, we note that there should be some definition of ‘court or tribunal’, along the lines of that commonly used to specify that tribunals include bodies with coercive information-gathering powers.¹⁴⁴ As discussed by the ALRC, there may be confusion otherwise as to whether particular bodies with coercive powers (such as Royal Commissions) constitute ‘courts or tribunals’ for the purposes of secrecy provisions.¹⁴⁵

CONCEPT OF ‘RESPONSIBLE INDIVIDUAL’

56. The clause defining responsible individuals should be redrafted to remove confusion between the definition of directors and officers, in line with the definitions in the Corporations Act.

57. The power to suspend or remove should be extended to agents, officers or employees of the entity.

58. The power to investigate fraud or dishonesty should be extended to that committed by agents, employees or officers.

Definition

We note that the definition of responsible individual in clause 210-5 combines several concepts defined in corporations law, namely “director”, “shadow director” and “officer”. However, the clause somewhat confusingly provides that a responsible individual includes a “director or officer” of the registered entity, and then includes virtually the whole of the

¹⁴⁴ *Australian Prudential Regulation Authority Act 1998* (Cth) s 56.

¹⁴⁵ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, above n 64, [18.16].

content of the definition of “officer” in s 9 of the Corporations Act within the definition of “responsible individual”.

We recommend that, for purposes of consistency and clarity, clause 210-15(1)(b) should be amended to read “an individual who is a director of the registered entity”, including in full the extended definition of “director” in s 9 of the Corporations Act (namely, including alternate, de facto and shadow directors); and that (c) be amended to refer to an “officer” (which should also include reference to the secretary, as in s 9 of the Corporations Act). Paragraph (d) should also refer to an “officer”.

The distinction may also be helpful in view of the different statutory duties that are imposed by the Corporations Act upon directors and officers, if as expected similar governance duties are included in the Bill.

Agents and employees

Two clauses might usefully be extended to embrace individuals apart from responsible individuals. Section 79 of the *Charities Act 2011* (UK) also empowers the Commission to remove (in addition to trustees) officers, agents or employees “responsible for or privy to the misconduct or mismanagement”, or “whose conduct contributed to it or facilitated it”. This extends beyond the power to remove in the Bill, which presently focuses on ‘responsible individuals’. Presumably, the present powers would enable the Commissioner to give directions or accept an enforceable undertaking that would require the removal of agents or employees. However, it may be worth considering a specific provision to cover this range of individuals.

Further, clause 120-100 conditions the power to investigate fraud or dishonesty on the fact that this is committed by a “responsible individual”. This is more restrictive than its legislative precedent in s 13 of the ASIC Act. It is not clear why fraud or dishonesty involving agents or employees should be outside the scope of this provision, and we recommend that the provision accordingly be extended.

OTHER USEFUL PROVISIONS

59. The ACNC should be given powers to delegate functions and to delegate an investigation.

60. The ACNC should be given the power to suspend or remove a person from membership of a charity where the person is suspended or removed as a responsible individual.

61. The ACNC should be given the power to inspect public records free of charge.

62. There should be provision for incidental powers.

63. There should be a statutory guarantee of the independence of the ACNC.

64. The staff of the ACNC should be protected from civil or criminal liability for acts or omissions made in good faith and in the exercise of its powers and functions under the Act.

Powers

Delegation powers

Most other charities legislation includes a power to appoint another person to conduct an examination.¹⁴⁶ New Zealand also empowers the Commission to supply an inquiry with information or documents for this purpose.¹⁴⁷ This could be a useful provision if an outside appointment was considered desirable for reasons of independence or administrative convenience.

The Bill also appears to be missing the usual powers to delegate functions and powers.¹⁴⁸ This could cause particular difficulties given that the functions are conferred on the Commissioner as an office-holder, since the decision has been made not to establish a statutory agency.

Powers to suspend or remove membership of a charity

The *Charities Act 2006* (UK) also includes the power to remove a trustee as a member of the charity.¹⁴⁹ This has been replicated in Singapore.¹⁵⁰ This appears to us a sensible power to include in the Bill.

Powers to search records

Section 53 of the *Charities Act 2011* (UK) also entitles staff of the Charity Commission to inspect, copy and take extracts from court or other public records for purposes connected with the discharge of the functions of the Commission, without payment. In the context of a federal system, this may well be a useful provision that would enhance the capacity of the Commission.

¹⁴⁶ *Charities Act 1994* (Singapore) s 8(2); *Charities Act 2005* (NZ) s 50; *Charities Act 2009* (Ireland) s 64; *Charities Act 2011* (UK) s 46.

¹⁴⁷ *Charities Act 2005* (NZ) s 53.

¹⁴⁸ Compare, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 102; *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 199.

¹⁴⁹ See now *Charities Act 2011* (UK) s 83.

¹⁵⁰ See also *Charities Act 1994* (Singapore) s 25A.

Incidental powers

It is usual to confer incidental powers on a regulator. For example, s 12A of the ASIC Act provides that ASIC “has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.”¹⁵¹ It is not clear if such an omission was intended, but such a provision may well be useful.

Statutory guarantee of independence

The issue of the independence of the regulator is a key concern for the sector. We note that the legislation of England and Wales states that the regulator is not subject to the direction of Minister and reports directly to Parliament.¹⁵²

We also draw attention to the recently enacted statutory guarantee of independence in s 135 of the TEQSA Act, which provides that TEQSA is “not subject to direction from anyone in relation to the performance of its functions or the exercise of its powers”, subject to the power of the Minister to give a direction necessary to protect the integrity of the higher education sector. The Minister cannot, however, give a direction about, or in relation to, a particular regulated entity.¹⁵³ We consider that a similar provision may be very useful.

Protection from civil or criminal liability

It is also usual to provide bodies with investigative powers with general protection from civil or criminal liability for good faith acts or omissions in the exercise of powers or functions under the Act.¹⁵⁴ We recommend that similar provision be made.

COMMENTS ON UNDRAFTED PROVISIONS

Review and appeal

We welcome the decision, in principle, to adopt the standard procedure of allowing for an internal review, followed by a review by the AAT and appeal to the relevant court. We note, however, that the provisions of Part IVC of the *Taxation Administration Act 1953* (Cth) are

¹⁵¹ See also *Australian Prudential Regulation Authority Act 1998* (Cth) s 11; *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 1(6); *Charities Act 2011* (UK) s 20.

¹⁵² *Charities Act 2011* (UK) s 13(4). This provision was the result of an uneasy compromise on the question of whether the Commission should remain part of the government, an issue which was left to be addressed in the required statutory review of the legislation: Picarda, *The Law and Practice Relating to Charities*, above n 17, 770. The Scottish legislation also disqualifies from appointment various legislative and executive officials: *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, Sch 1, para 1(3). The Irish legislation has a similar provision: *Charities Act 2009* (Ireland), Sch 1, para 8.

¹⁵³ *National Vocational Education and Training Regulator Act 2011* (Cth) ss 159–160.

¹⁵⁴ *Australian Prudential Regulation Authority Act 1998* (Cth) s 58; *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 202; *National Vocational Education and Training Regulator Act 2011* (Cth) s 233.

designed to embrace a high volume of objections from taxpayers and is perhaps unduly formalised. We suggest that the review provisions of more analogous regulators, such as those recently introduced under the TEQSA Act and National VET Regulator Act, may be more appropriate than importing the particular language of ‘objections’.¹⁵⁵

Transitional provisions

We note that the transitional provisions have yet to be drafted. Such provisions, of course, will be critical to ensuring that the process does not unduly increase the compliance burden caused by the introduction of the regulator.

Whistleblower protection

We note that comprehensive federal legislation for whistleblower protection is expected to be introduced in 2012, which may reduce the need for whistleblowing provisions in relation to ACNC officers. In respect of protection for whistleblowing to the regulator, we consider that the provisions in Part 10-5 of the CATSI Act provide an appropriate legislative precedent.

TECHNICAL ISSUES

65. The following provisions require technical corrections: clauses 55-30, 55-40, 55-65, 120-460, 162-30, 170-10, 180-10 (of which there are two provisions), and 196-5.

We have also identified some technical oversights in the drafting process that require rectification.

Clause 55-30 provides that a Commissioner, by notice published on a website, can exempt a requirement in relation to financial reporting in the regulations or a legislative instrument. We understand that this is a drafting error and that it will be remedied in the legislation.

Clause 55-40 includes a note that seeks to explain that a broader definition of registered company auditor applies for the purposes of a review. The note, however, is a little opaque at present and should set out, for purposes of clarity, the expansion to the scope of the definition in that section.

Clause 55-65, which relates to an auditor’s power to obtain information, is based on s 310 of the *Corporations Act*. However, unlike the equivalent provision which extends to “officers”, it does not enable the auditor to direct anyone but a “responsible individual” to assist. We assume that this is because there is no definition of “officer” of an entity in the Act. However, the clause should at least extend to employees of an entity.

¹⁵⁵ *National Vocational Education and Training Regulator Act 2011* (Cth) ss 199–203.

Clause 120-200, which empowers the Commissioner to issue warning notices, should be redrafted to require the regulator to “inform the registered entity of its **reasons to believe in the existence** of the circumstances in paragraph (1)(a) **or** (1)(b)” (emphasis added), since that paragraph does not presume the actual existence of those circumstances, and allows a warning notice to be given in either the circumstances of (1)(a) or (1)(b).

Clause 120-460, which empowers magistrates to issue search warrants, wrongly states in paragraph 3 that the “ACNC officer” must not issue the warrant unless the “magistrate or some other person” has given required information. Clearly this is a mistake and the two should be transposed.

Clause 162-30 requires the Commissioner to disclose any conflict of interests to the Minister. However, it does not include the second paragraph in the equivalent obligation in respect of the Advisory Board, which requires that the notice be given “as soon as practicable after the” member becomes aware of the potential for conflict of interest. We cannot see any policy reason for this omission and consider that this is a technical oversight.

Clause 170-10 establishes criteria for the appointment of the Advisory Board, but omits to include an indication of whether one or both criteria must be fulfilled. Our understanding is that an “or”, rather than an “and”, has been omitted, and we agree that this is appropriate.

There are at present two clause 180-10, one which states the application of the Division, and another which defines protected information and ACNC officer.

Clause 180-15(2)(c) needs to be prefaced by the phrase “the disclosure or use is” to make grammatical (and logical) sense.

Clause 180-20(b) contains an obvious error by its repetition of “first-mentioned entity”. This should read that the “information was acquired by the first-mentioned entity under” an exception or authorisation, as in the equivalent taxpayer secrecy provisions.

Clause 196-5 of the Bill is grammatically awkward. It should include the phrase “to ensure the integrity and efficiency of **the procedures for**” giving material to the Commissioner and other entities.

CONCLUSION

We thank the Treasury for the opportunity to comment on this Exposure Draft. We appreciate that this process has been conducted under significant time pressure and have therefore spent considerable time and energy in examining the draft in order to facilitate the process.

As always, if you have any questions or would like any further information, please do not hesitate to contact us.



THE UNIVERSITY OF
MELBOURNE

APPENDIX A: THE NOT-FOR-PROFIT PROJECT

The University of Melbourne Law School is undertaking the first comprehensive and comparative investigation of the definition, regulation, and taxation of the not-for-profit sector in Australia (the Not-for-Profit Project). The Australian Research Council is funding this project for three years, beginning in 2010. The project aims to identify and analyse opportunities to strengthen the sector and make proposals that seek to maximise the sector's capacity to contribute to the important work of social inclusion and to the economic life of the nation. In particular, the project aims to generate new proposals for the definition, regulation and taxation of the not-for-profit sector that reflect a proper understanding of the distinctions between the sector, government, and business.

The project investigators of the Not-for-Profit Project are:

Professor Ann O'Connell

+61 3 8344 6202 | a.o'connell@unimelb.edu.au

Ann teaches taxation and securities regulation at the University of Melbourne. She is also Special Counsel in the Tax department of Allens, Arthur Robinson and is a member of the Advisory Panel to the Board of Taxation.

Professor Miranda Stewart

+61 3 8344 6544 | m.stewart@unimelb.edu.au

Miranda is Co-Director of Taxation Studies at the Law School, and an International Fellow of the Centre of Business Taxation at Oxford University. She has previously worked at the Australian Taxation Office and Arthur Robinson & Hedderwicks (now Allens, Arthur Robinson).

Associate Professor Matthew Harding

+61 3 8344 1080 | m.harding@unimelb.edu.au

Matthew is an Associate Professor at the University of Melbourne. His published work deals with issues in moral philosophy, fiduciary law, equitable property, land title registration, and the law of charity. Matthew has also worked as a solicitor for Arthur Robinson & Hedderwicks (now Allens, Arthur Robinson).

Dr Joyce Chia

+61 3 9035 4418 | j.chia@unimelb.edu.au

Joyce is the Research Fellow on the Not-for-Profit Project. She has worked at the Australian Law Reform Commission, the Federal Court of Australia, and the Victorian Court of Appeal.

More information on the project can be found on the website at <http://tax.law.unimelb.edu.au/notforprofit>. For further details or to contact the Project members, email law-nfp@unimelb.edu.au.

Melbourne Law School

The University of Melbourne Victoria 3010 Australia

T: +61 3 8344 6164 **F:** +61 3 9347 2392 **E:** post@law.unimelb.edu.au **W:** www.law.unimelb.edu.au

APPENDIX B: LIST OF RECOMMENDATIONS

1. The Bill should specify the scope of its application. This should include specific references to: the scope of its application upon commencement; other classes of entities that may be brought within the scope of the regulator in future; and the capacity for entities to register voluntarily.
2. The Bill should be grounded more clearly on the taxation and corporations power of the Commonwealth, both as a matter of principle and to ensure its constitutional legitimacy.
3. References to an “Australian law” should be replaced by references to a Commonwealth law, pending further agreement with States or Territories.
4. The Commissioner’s powers to suspend and remove trustees should be removed.
5. The Bill should include specific legislative provisions for the ACNC to cooperate with other regulators such as the ATO or ASIC, where appropriate.
6. The Bill should include specific provisions to enable the ACNC to treat related entities as a single entity.
7. The statutory object should be re-framed so that the primary objective is to facilitate NFP entities in achieving their diverse goals, by promoting: public trust and confidence; the loyalty of responsible individuals to the missions of NFP entities; and the effectiveness of NFP entities.
8. A provision should be inserted stating the other objects of the ACNC, which should include: ensuring transparency and accountability to donors, beneficiaries, other stakeholders, and the public; promoting compliance with legal obligations; and preventing abuse or misconduct.
9. The Bill should provide that the Commissioner has the following functions in relation to NFP entities providing public benefits:
 - (a) determining whether such entities are charities;
 - (b) maintaining a public register of such entities;
 - (c) educating and advising such entities in relation to compliance with their legal obligations, and in relation to matters of good governance and management;
 - (d) facilitating and simplifying the interactions of such entities with governments;
 - (e) collecting and analysing data concerning such entities;
 - (f) giving information and advice, and making proposals, to governments in relation to the ACNC’s functions and objectives;

- (g) identifying and investigating misconduct or mismanagement (if properly defined) and taking remedial or protective action;
 - (h) cooperating with other Australian government authorities to further the objects of this Act; and
 - (i) any other function conferred on the Commissioner by this or another Act or legislative instrument.
10. The Guide material in the Bill, and the statement of the purpose of Part 2.1, should also be re-framed to reflect the purpose of facilitating the entities to achieve public benefit.
 11. The grounds for removing or suspending trustees should be (i) misconduct or (if properly defined) mismanagement, and (ii) the necessity or desirability of protecting the property of a charity.
 12. The grounds for revoking the registration of an entity on the basis of misconduct or (if properly defined) mismanagement, and on the basis of non-compliance with the Act, should include a threshold level of gravity.
 13. There should be no ground for revoking the registration of an entity on the basis that the entity is insolvent, or provided false or misleading information to the ACNC.
 14. The ACNC should have the power to remove from the register entities that have ceased to exist or operate, or which request voluntary deregistration.
 15. There should be no automatic provision winding up an entity that has been deregistered. Instead, provisions should be included in the Bill to impose a continuing duty on a deregistered entity to apply the property of the entity towards the purposes, and provide for a mechanism to protect existing assets. Consequently, the condition of registration that the entity has not been previously registered should also be removed from the Bill.
 16. The regulator should not have power to issue directions in order to advance the purpose of the charity, or if it considers that financial management is improper or unsound. Rather, the power to issue directions should only be exercised where it is necessary to protect: the property of an entity from being applied other than for the purposes for which the entity was registered; or the interests of its members of the entity or those intended to benefit from the entity's activities.
 17. The regulator should not have power to issue directions merely to "promote" or "advance" the object of the Act.
 18. The regulator should not have power to prevent an entity from entering into a financial transaction where that will affect the legal rights of third parties. The regulator should instead

have power to apply to a court for an injunction on the grounds that such a direction is necessary to protect the property of the charity or the interests of its members or beneficiaries.

19. The condition for eligibility for registration referring to criminal or terrorist entities should be removed. If clarification is thought necessary, a condition requiring that the entity's purposes are not to engage in criminal activity should be sufficient. If any reference is made to terrorist organisations, it should be based on existing lists of terrorist organisations under Commonwealth regulations.
20. The provision empowering the ACNC to require information should be based on the precedents in the TEQSA Act, which comply with the recommendations of government policy and law reform bodies.
21. The Bill should include the further procedural safeguards in the TEQSA Act relating to search and entry powers.
22. The notice requirements in the Bill should be amplified to require that notice include: all relevant details for compliance; reasons for the decisions; the manner and time of compliance' consequences of non-compliance; and the entitlement to review. Such notice requirements should apply to refusals of registration, the issue of warning notices or directions, the suspension or removal of responsible individuals, and the revocation of registration.
23. The Bill should require the Commissioner to provide affected persons with an opportunity to be heard prior to making a decision in respect of: refusals of registration, the issue of warning notices or directions, the suspension or removal of responsible individuals, and the revocation of registration. An affected person should have at least 14 days notice to prepare for such an opportunity, unless there are reasons that justify an urgent decision.
24. The issue of directions should first require notice advising of the intention to issue the direction and provide the person with an opportunity to take remedial action.
25. The opportunity to be heard in respect of the suspension or removal of responsible individuals should be more extensive and should involve an application to a court.
26. There should be a requirement of notice and an opportunity to be heard in relation to all grounds for revoking registration, not merely on the basis of ineligibility. The clause enabling the Commissioner to revoke without issuing a show cause notice should be removed. The opportunity to respond should be extended to at least 14 days.
27. The Bill should include an express power to publish an investigation report, together with a power to direct non-publication of part of a report, and a power to distribute the report to law enforcement agencies and other stakeholders where appropriate. The Bill should require the report to set out evidence or other material upon which the findings are based, a requirement

to give upon request (and a discretion to give upon its own motion) a copy of the report to those whose conduct is examined in the report, and a requirement to include any responses to adverse findings, or a fair summary of them.

28. Consideration should be given to enlarging the period of 60 days before a decision may be treated as being made during the transitional period, or providing some limited flexibility for the ACNC to extend the period.
29. The power to issue warning notices should extend to circumstances in which the entity may no longer be entitled to registration.
30. The requirement to review directions after 12 months should be replaced by a shorter period of validity followed by a power to extend upon application to a court.
31. The power to accept enforceable undertakings should be limited, either by legislation or in guidelines, to circumstances in which such undertakings bear a clear or direct relationship with the alleged breach; are proportionate to the breach; do not require payment other than in compensation for those affected or to recover costs otherwise recoverable at law; and stipulate a time period for compliance.
32. The contents of the register should also include: the purposes or objects of the entity; the addresses of premises in which the entity operates; the application for registration; and notices of changes to information lodged (or links to such notices). The inclusion of details of warnings should include also responses by the entity to the warning, and subsequent responses by the regulator, including any directions and other regulatory action.
33. Clause 100-10 should be redrafted to avoid repetition in relation to entities and former entities.
34. Clause 100-10 should conclude with a provision setting out the purpose of the register. Clause 100-20 should be redrafted by, first, providing for publication on the Internet, followed by the power to omit or remove information if the public interest in the register is outweighed by: the risk of harm to individuals; the risk of harm to the entity; interests in the confidentiality of the information; risk of confusing or misleading the public; or other compelling reason. The clause should include an entitlement to request such non-publication.
35. The duty to keep records correctly recording and explaining the operation and acts of the entity should be more narrowly framed. It should be confined to requiring a duty to keep records of its contact details, governance rules, members and officers, meetings, and possibly a summary of its activities. The duty should also be framed to provide a translation into English upon request.
36. The penalty for failing to keep records should be reduced to 25 penalty units or less.
37. A transitional provision should be included to enable the ACNC to accept the reports provided by incorporated associations under the relevant State or Territory legislation.

38. The three-tiered structure should be based on size alone.
39. The three-tiered structure should be made more flexible by empowering the ACNC to modify reporting obligations for particular entities. The grounds for modifying such obligations should be developed by the ACNC in consultation with the sector.
40. The Bill should provide that, where the entity is subject to reporting obligations under State or Territory legislation that exceed those provided in the Bill, the entity must provide a report to the ACNC that complies with the higher standard.
41. The Bill should provide for a period of 6 months for lodgment of financial reports, consistently with the majority of State and Territory associations legislation. Entities should be able to nominate their financial year upon registration, and be given limited discretion to change the dates or upon the approval of the Commissioner.
42. A general qualifications clause should be introduced for the Commissioner.
43. Clause 160-10 should be redrafted to establish the ACNC as comprising only of the Commissioner and any Deputy Commissioners that may be appointed.
44. The Commissioner of Taxation should be required to consult the Commissioner in relation to the appointment and discharge of ACNC staff.
45. The Advisory Board should have the power to give advice and make recommendations upon its own initiative.
46. There should be grounds for termination of an appointment to the Advisory Board.
47. The Advisory Board should be able to convene meetings as is expedient, and to control the procedure of such meetings.
48. Members of the Advisory Board should be required to disclose non-pecuniary conflicts of interest.
49. Clause 161-5, empowering the Commissioner to disregard the advice of the Advisory Board, should be removed.
50. The Commissioner should be able to attend meetings of the Advisory Board only upon invitation.
51. The Bill should include a specific provision enabling disclosure between the ACNC, other regulators and law enforcement officials.
52. The secrecy provisions should apply to persons, not entities.
53. The secrecy provisions should not extend to use of the information.

54. The secrecy provisions should include an exception for disclosure in the course of the performance of duties rather than an exception for disclosures necessary to promote the object of the Act.
55. The secrecy provisions should not prohibit compulsion of disclosure by courts or tribunals.
56. The clause defining responsible individuals should be redrafted to remove confusion between the definition of directors and officers, in line with the definitions in the Corporations Act.
57. The power to suspend or remove should be extended to agents, officers or employees of the entity.
58. The power to investigate fraud or dishonesty should be extended to that committed by agents, employees or officers.
59. The ACNC should be given powers to delegate functions and to delegate an investigation.
60. The ACNC should be given the power to suspend or remove a person from membership of a charity where the person is suspended or removed as a responsible individual.
61. The ACNC should be given the power to inspect public records free of charge.
62. There should be provision for incidental powers.
63. There should be a statutory guarantee of the independence of the ACNC.
64. The staff of the ACNC should be protection from civil or criminal liability acts or omissions made in good faith and in the exercise of its powers and functions under the Act.
65. The following provisions require technical corrections: clauses 55-30, 55-40, 55-65, 120-460, 162-30, 170-10, 180-10 (of which there are two provisions), and 196-5.