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Dear Mr Crowe,

Review of the Australian Charities and Not-For-Profits Commission legislation

Moores welcomes this opportunity to make submissions to the Terms of Reference for the Review of the Australian Charities and Not-For-Profit Commission (**ACNC**) legislation (the **Review**) announced on 20 December 2017.

Our submissions are set out in the attached document. For ease of reference, we have noted where our submissions relate to matters that are also raised in the ACNC Submissions to the Review.

Moores assists registered charities and not-for-profits from across the sector, providing advice on establishment, tax concessions, governance and day to day operations. In the course of this work, Moores regularly liaises with the ACNC. Additionally, many Moores lawyers serve on the Boards of registered charities and not-for-profits.

In all our dealings with the ACNC, Moores has found it to be an effective model regulator that enjoys the well-deserved confidence of the sector.

Yours faithfully
MOORES

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Yours faithfully
MOORES

Enclosure

Submissions to the ACNC Review

1. Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits? (ACNC Recommendation 3)

The ACNC Acts were intended to establish a Commonwealth regulator and new regulatory framework for the not-for-profit (NFP) sector as a whole. However, registration with the ACNC was initially limited to charities, with an expectation that it would be expanded over time to include all NFPs¹. This has not yet occurred.

Registered charities (numbering around 55,000)² make up only a small proportion of the NFP sector (comprising approximately 600,000 entities)³. Those NFPs that do not have the requisite charitable purpose to be registered as a charity are placed at a disadvantage to registered charities. For example: a NFP company limited by guarantee (CLG) must pay certain ASIC fees from which registered charities are exempt⁴; its directors are subject to civil penalty provisions for breaches of certain duties whereas the directors of a registered charity are exempt from penalties (the ACNC can only disqualify them from acting as directors); and it is generally subject to more onerous reporting requirements.

The introduction of the ACNC Registered Charity Tick is of particular concern to many NFPs that are not registered charities⁵. The ACNC has said that the Tick enables donors to 'instantly be confident' that they are giving to a registered (and regulated) charity. This creates the impression that those NFPs that do not have the option of becoming registered or submitting to the regulation of the ACNC are somehow less worthy of public support.

We recognise that many NFPs organisations (particularly those that are unincorporated and/or are able to self-assess their access to income tax concessions) are not regulated by any agency. However, large classes of NFPs that are not able to be registered charities are regulated and easily identifiable, including companies limited by guarantee and incorporated associations. Given the option, other less readily identifiable NFPs may choose to submit themselves to the regulation of the ACNC in order to obtain this mark of good governance and give confidence to their donors.

2. Introducing a requirement for registered charities (other than trusts and Basic Religious Charities) to have a minimum number of three responsible persons, including at least two who ordinarily reside in Australia and an exemption power (ACNC Recommendation 7)

The term 'responsible person' refers to those individuals responsible for governing a charity including directors, committee members and trustees. In our experience, the risk of poor governance of NFPs increases significantly when an organisation has only one or two responsible persons. Moores supports the introduction of a

¹ Explanatory Memorandum, *Australian Charities and Not-For-Profits Commission Bill 2012* (Cth) 1.48 <<https://www.legislation.gov.au/Details/C2012B00142/Explanatory%20Memorandum/Text>>

² Australian Charities and Not--profits Commission, Annual Report 2016-17 <https://www.acnc.gov.au/ACNC/About_ACNC/Corporate_info/Annual_Reports/ACNC/Publications/ARlanding.aspx?hkey=e97a86cb-6218-4be1-8951-233f4f8f911b>

³ Above n 1, 23.

⁴ These include annual review fees, fees for extension applications and late fees.

⁵ Dennis Moriarty, 'Charity versus Charity: when a stamp of approval is simply not fair', *Our Community Matters*, December 2016, 4 <<https://www.ourcommunity.com.au/files/ocmatters/OCMatters-Edition6-16.pdf>>

requirement for organisations to have a minimum of three responsible persons. The Australian residence requirement will ensure that at least two of the responsible persons are subject to Australian laws.

The proposed requirement is consistent with the current requirements for CLGs, which must have a minimum of three directors, two of whom must reside in Australia⁶. By contrast, a Victorian incorporated association, while required to have five members⁷, has no minimum number of Committee members under the *Associations Incorporation Reform Act 2012*⁸. There are currently more than 38,000 incorporated associations in Victoria⁹. In at least one respect (the risk of funds being used to finance terrorist activity), the ACNC and AUSTRAC have assessed incorporated associations as being organisations with a higher risk of poor governance¹⁰. Increasing the minimum number of responsible persons to three is one way in which to improve the governance of incorporated associations.

From 1 July 2019, all non-government DGRs will be registered with the ACNC. As part of this process the government proposes to abolish the public fund requirements for DGRs. This will remove the requirement for public funds (whether or not operated by a registered charity) to be administered by three persons who have a degree of responsibility to the community as a whole. Decisions in relation to the use of funds previously held in a 'public fund' will instead be made by the responsible person or persons for the entity. Arguably, abolishing this safeguard increases the need for a requirement to have a minimum of three responsible persons governing DGRs.

3. Are the objects of the ACNC Act still contemporary? (ACNC Recommendation 2).

Moore considers that the objects of the ACNC Act are contemporary and appropriate for the sector.

Moore notes that the ACNC has proposed that the following additional objects be considered:

(a) To promote the effective use of the resources of not-for-profit entities; and

(b) To enhance the accountability of not-for-profit entities to donors.

We have significant reservations regarding these proposals, which we consider could involve a significant change to the character of the ACNC and a departure from the basis on which it was established. The ACNC's remarkable work in attaining the confidence of Australia's not-for-profit sector has been facilitated, in part, by its supportive and collaborative approach. Now that the ACNC has been established, introducing new objects (particularly objects that appear to have quite a different emphasis) feels like a 'bait-and-switch'.

⁶ *Corporations Act 2001* (Cth) s 201A (b).

⁷ *Associations Incorporations Reform Act 2012*, Definitions.

⁸ A minimum number of committee members are required under the *Associations Incorporation Act 2009* (NSW) s 28, *Associations Incorporation Act 1981* (Qld) s 61 and *Associations Incorporation Act 2015* (WA) s 4.

⁹ Consumer Affairs Victoria, *What is an incorporated association?* 2018 <<https://www.consumer.vic.gov.au/clubs-and-fundraising/incorporated-associations/become-an-incorporated-association/what-is-an-incorporated-association>>.

¹⁰ Joint report by ACNC and the Australian Transaction Reports and Analysis Centre, *National Risk Assessment 2017* <<http://www.austrac.gov.au/sites/default/files/npo-risk-assessment-FINAL-web.pdf>>

In particular, we note that:

- (a) The ACNC is already mandated to promote the effective use of resources and enhance accountability through the current object 'to maintain, protect and enhance public trust and confidence'.
- (b) An express object of promoting the 'effective' use of resources necessarily involves a value judgment about what is an 'effective' and what is an 'ineffective' use of resources. The work of registered charities is typically aspirational – they may never fully achieve their purpose. If an organisation with a purpose of preventing homelessness provides temporary shelter, but has no permanent impact on the rate of homelessness in its target city, is it 'effective'? If a religious organisation has a purpose of advancing the gospel, but does not win a convert to faith, is it 'effective'? How should 'effectiveness' be measured: by the number of individuals helped; whether a lasting impact is made; the depth of the impact; or some other criteria?

These value judgments are arguably best left to the responsible persons for an entity, who have a detailed understanding about the unique context in which an entity operates, the challenges it faces and the impact it seeks to make. Responsible persons are, of course, already obliged by the Governance Standards to ensure that the organisation pursues its charitable purpose with reasonable care and diligence and in a financially responsible manner – a duty that surely requires the effective use of resources.

- (c) There is a real risk that an express object of promoting the 'effective' use of resources will lead to standards being set for or charities being required to report on matters such as administration or fundraising costs. The ACNC itself has confirmed that administration costs and fundraising costs are unreliable indicators of the impact of a particular entity¹¹.
- (d) Most NFP organisations operate with limited funding which must necessarily be used effectively. If they are cannot demonstrate that they are working effectively, they will not attract government grants or donor support.
- (e) NFP organisations already provide more public information and are more accountable than the commercial sector. The desire for information and to promote accountability must be balanced against the reporting burden this places on registered charities, a significant proportion of which are staffed by volunteers¹².

We also note that the ACNC Advisory Board has commented in detail on the current objects in its submissions, but has not offered its support for the proposed new objects.

11 ACNC, Charities and administration costs

https://www.acnc.gov.au/ACNC/Pblctns/Factsheets/ACNC/FTS/Fact_administration.aspx; FAQs: Charities and administration http://www.acnc.gov.au/ACNC/FAQs/FAQ_Charity_and_administration_costs.aspx ACNC; FAQs: Charities and fundraising http://www.acnc.gov.au/ACNC/FAQs/FAQ_Fundraising.aspx.

¹² 430,000 volunteers, see above, n 2.

4. Improve the transparency of internal ACNC decisions (ACNC Recommendations 10, 11 and 12)

The ACNC has recommended that the ACNC Act be amended to allow the Commissioner to: publish reasons for its decisions on an application for registration; include grounds for revocation decisions in the ACNC Register; and disclose protected ACNC information when it is in the public interest to do so. Moores broadly supports these recommendations.

Division 150 of the ACNC Act addresses the secrecy regime of the ACNC. The objects of this Division are to protect confidential and personal information, which in turn encourages people to provide correct information to the Commissioner.¹³ Currently the ACNC is unable to disclose information provided to it under the ACNC Act which relates to the affairs of an entity and could be reasonably capable of identifying the entity to which it relates¹⁴ (there are some limited exceptions¹⁵). In practice, Division 150 prevents the ACNC from publishing the reasons for registration or revocation of an entity and from commenting about compliance investigations or activities.

Currently the principal source of detailed information about the ACNC's interpretation of the law that applies to charities is the ACNC Commissioner's Interpretation Statements (of which there are seven to date¹⁶). Including a database of the Commissioner's Reasons for Decisions (edited for privacy – a requirement that we recommend be added to the ACNC recommendation) on selected applications would take some of the uncertainty out of applications for registration, inform the sector and enable professional advisors to better assist their clients. This would be similar to the Australian Taxation Office practice of publishing edited private binding rulings, which helps to inform the sector (and professional advisors) of the Australian Taxation Office's position on niche areas of the law. Similarly, requiring the ACNC to publish reasons for revocation will inform the sector about how the ACNC interprets and applies the Governance Standards and where the ACNC considers the boundaries of charitable purpose lie.

The boundaries of charity law are notoriously uncertain. Providing more information about the ACNC's decision making grounds will lead to both less uncertainty for potential applicants for registration and more confidence for registered charities that they are operating within those boundaries.

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

Extensive work has already been done to identify opportunities to reduce the regulatory burden on registered charities¹⁷. We do not propose to reproduce the findings of those reports here, save to note that:

¹³ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s150-5.

¹⁴ *Ibid* s105-15.

¹⁵ *Ibid* s105-30 – 105-50.

¹⁶ ACNC, Commissioner Interpretation Statements

[<http://acnc.gov.au/ACNC/Pblctns/Interp/ACNC/Publications/InterpStmnt.aspx?>](http://acnc.gov.au/ACNC/Pblctns/Interp/ACNC/Publications/InterpStmnt.aspx?>)

¹⁷ See, for example, ACNC Report *Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation* (23 February 2016); ACNC *Research into Commonwealth Regulatory and Reporting Burdens on the Charity Sector* (30 September 2014) [<http://acnc.gov.au/ACNC/Publications/Reports/CuttingRedTape.aspx>](http://acnc.gov.au/ACNC/Publications/Reports/CuttingRedTape.aspx>)

- (a) the regulatory burden and difficulty of achieving compliance when fundraising across all Australian jurisdictions is a significant concern for our clients and the sector generally. It has been rightly identified as a 'top priority for reform'¹⁸; and
- (b) incorporated associations in most jurisdictions in Australia remain subject to duplicated reporting and regulation. In particular, the committee members of incorporated associations are placed at a significant disadvantage compared to the directors of companies limited by guarantee. This is because they remain subject to duties of officeholders and associated penalties under State incorporated associations legislation, whereas there are no legislated penalties for directors who breach the duties of responsible persons under the ACNC Governance Standards. It seems extraordinary that the responsible persons of a vehicle designed to provide a 'simple and expensive means by which unincorporated not-for-profit organisations could obtain corporate status'¹⁹ could be subject to more onerous duties than the directors of a company limited by guarantee. Incorporated associations should not have to incur the significant cost and administrative disruption of migration in order to ensure that their committee members are placed on an equal footing with the directors of a company limited by guarantee.

Moore recommends that the ACNC be appropriately resourced to continue to pursue its object of promoting the reduction of unnecessary regulatory obligations on the sector.

6. The risks of misconduct by charities and not-for-profits (or their responsible persons)

Three of the proposed focusing questions for submissions in the Terms of Reference relate to the risks of misconduct by charities and not-for-profits. A recent report commissioned by the ACNC indicates that 86% of Australians trust charities, and 91% of Australians have donated to charities²⁰. This represents a decline on previous results which is similar to the experience of other countries that have recently introduced charity regulators. Australian charities are the fifth highest trusted sector compared to other organisations and institutions²¹.

We consider that this high level of trust is, on the whole, well deserved by the sector. Although misconduct can and does occur within the charitable sector, there is no evidence to indicate that it is a systemic issue. Only 28 registered charities had their registration revoked following ACNC investigations in 2015 and 2016²². This is a minute proportion (.05%) of the 54,000 registered charities in Australia. It is also a very small proportion (1.5%) of the 1872 compliance concerns received from the public and reviewed by the ACNC over the same period²³.

¹⁸ ACNC Report, *Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation* (23 February 2016) 44

¹⁹ Victoria, *Parliamentary Debates*, 'Associations Incorporation Reform Bill 2011', Legislative Council, 29 March 2012, Mr Guy <http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca2570ce0018ac6dca25795f0004c0bf!OpenDocument>

²⁰ ACNC Report, *Public Trust and Confidence in Australian Charities*, 2017, 41 <http://www.acnc.gov.au/ACNC/Publications/Reports/Public_Trust_2017.aspx><http://www.acnc.gov.au/ACNC/Publications/Reports/Public_Trust_2017.aspx>

²¹ *ibid*

²² ACNC Report, *Charity Compliance Report 2015 and 2016*, 5 <<http://www.acnc.gov.au/ACNC/Publications/Reports/ComplianceRpt2015-2016.aspx>>

²³ *Ibid*, 14

In addition to the oversight of the ACNC and the disclosure offered through the ACNC Register, registered charities are answerable to a much broader range of stakeholders than for-profits, including responsible persons, employees, volunteers, beneficiaries, donors, government departments (typically in the context of the provision of grants) and the general public. If misconduct is a significant issue in the sector, it is extraordinary (given the level of oversight and number of stakeholders) that there is not more evidence of misconduct. In the absence of that evidence, we consider that it is likely that the risk of misconduct is low and is best addressed by:

- (a) continuing to work to improve the governance of registered charities (including through educating and resourcing the sector and measures such as introducing a minimum of three responsible persons²⁴);
- (b) appropriately resourcing the ACNC to continue to carry out its existing investigative and regulatory role; and
- (c) greater transparency around enforcement actions²⁵ and use of the ACNC's power to disqualify individuals from acting as responsible persons (a power which we note that the ACNC is yet to exercise).

7. Include a notation on the ASIC record of registered charities indicating that current information about directors must be obtained from the ACNC Register

Registered charities that are companies limited by guarantee are exempt from the requirement to notify ASIC of changes in their responsible persons. However, ASIC retains the details of the founding responsible persons in its publicly accessible database. This can be misleading once the responsible persons for the organisation have changed. We recommend that a notation be placed on the record of registered charities indicating that current information about directors is only available from the ACNC Register.

8. Political advocacy

Much has been said recently about political advocacy in relation to the not-for-profit sector. We do not propose to reproduce that extensive discussion here, but note that:

- (a) a purpose of promoting or opposing a political party or candidate is a disqualifying purpose under the *Charities Act 2013 (Cth)*²⁶. We consider that it should still be permissible for a registered charity or applicant for registration as a charity to promote or oppose a political party or candidate, provided that promotion or opposition does not rise to the level of constituting a 'purpose' of the organisation;
- (b) the ACNC's guidance on advocacy is contradictory and confusing. For example:
 - (i) This statement on the ACNC website is consistent with subparagraph (a) above:

A charity can advance its charitable purposes in the following ways....supporting, opposing, endorsing and assisting a political party or candidate because this would

²⁴ See point 2 above

²⁵ See point 4 above

²⁶ *Charities Act 2013 (Cth)* s11

advance the purposes of the charity (for example, a human rights charity could endorse a party on the basis that the charity considers that the party's policies best promote human rights), and giving money to a political party or candidate because this would further the charity's purposes.

- (ii) This statement on the ACNC website directly contradicts the statement in subparagraph (b)(i) above:

Should a charity support (or oppose) a particular political party or candidate?

No, because the charity will run the risk of being found to have a disqualifying political purpose, and therefore not being a registered charity.

- (c) this lack of clarity is compounded by the ACNC secrecy provisions, which prevent the sector from developing a nuanced understanding of how the ACNC responds to political advocacy by registered charities.

In *Aid/Watch*²⁷, a majority of the High Court found that 'the generation by lawful means of public debate... itself is a purpose beneficial to the community within the fourth head in *Pemsel*.' There appears to be a significant disparity between the reasoning of the High Court in *Aid/Watch* and the approach of the ACNC. It is difficult to overstate the chilling effect that this uncertainty regarding the law, combined with recent proposals such as the proposals for the ACNC to publish charities' declarations of political expenditure²⁸ and to require charities to register as 'political campaigners'²⁹ will have on political advocacy by charities.

Research indicates that pressure brought to bear on the NFP sector by these reforms and by the fear of loss of government funding is already causing entities to 'self-silence'³⁰. This is to the significant detriment of not only the sector but of all of Australian society. The quality of Australian democracy relies on robust public debate and advocacy. The NFP sector is particularly well placed to participate in and promote this public debate and to engage in advocacy. Moreover, the NFP sector by its nature speaks for those who are marginalised and vulnerable – those whose voices are least likely to be heard.

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²⁷ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 (1 December 2010) para 47

²⁸ The Hon Kelly O'Dwyer MP, 'Reforming administration of tax deductible gift recipients' (media release, 5 December 2017) <<http://kmo.ministers.treasury.gov.au/media-release/114-2017/>>

²⁹ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, S, (7 December 2017) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1117>

³⁰ Associate Professor Sara Maddison and Dr Andrea Carson, *Civil Voices: Researching not-for-profit advocacy in Australia* (2017) < <https://civilvoices.com.au/>>