
EXPOSURE DRAFT: AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS
COMMISSION BILL 2012

EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ABN	Australian Business Number
ACNC	Australian Charities and Not-for-profits Commission
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
ABR	Australian Business Register
ACN Register	Australian Charities and Not-for-profits Register
Commissioner	Commissioner of the ACNC
COAG	Council of Australian Governments
DGR	Deductible gift recipient
FBT	Fringe benefit tax
ORIC	Office of the Registrar of Indigenous Corporations

General outline and financial impact

Australian Charities and Not-for-profits Commission

The exposure draft establishes a new independent statutory office, the Australian Charities and Not-for-profits Commission (ACNC) which will be a national regulator for the not-for-profit (NFP) sector. The exposure draft also establishes a national regulatory framework for the NFP sector.

Date of effect: The ACNC will commence operations on 1 July 2012.

Proposal announced: This reform was announced in a Joint Media Release by the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, and the Minister for Human Services and Social Inclusion, the Hon Tanya Plibersek MP, in Media Release No. 77 of 10 May 2011.

Financial impact: \$53.6 million over the forward estimates has been allocated for the establishment of the ACNC and the related structural changes required to the Australian Taxation Office. It comprises:

<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>	<i>2014-15</i>
\$8.6m	\$14.8m	\$10.0m	\$10.1m

Compliance cost impact: The establishment of the ACNC and related regulatory framework will result in a small increase in compliance costs in the short term. However, the ACNC and the introduction of a single NFP regulation framework and the introduction of new general reporting requirements is expected to reduce compliance costs over the medium to long term.

Summary of regulation impact statement

Regulation impact on not-for-profits

Impact: The exposure draft may involve some transitional compliance costs on the NFP sector in relation to setting up processes to comply with the new regulatory framework. However, over the long term, it is expected that the ACNC will reduce compliance costs and red tape faced by the sector.

Main points:

- A truly national NFP regulator would provide the greatest benefits in terms of reducing regulatory overlap, red tape and compliance costs for the sector.
- A balance needs to be struck between providing the sector with a fully separate and independent NFP regulator, with the cost of such a regulator, the need to avoid a new layer of bureaucracy and the need to avoid pre-empting any model to which the Council of Australian Governments (COAG) may agree.
- It is important for the Government to establish a robust and streamlined regulatory framework for the NFP sector; strengthen the sector's transparency, governance and accountability; and provide the public with information on the sector commensurate to the level of support provided to the sector by the public.

Chapter 1

Background

Outline of Chapter

- 1.1 This exposure draft establishes a national regulator, and a national regulatory framework for the not-for-profit (NFP) sector.
- 1.2 The exposure draft, among other things:
- establishes the Australian Charities and Not-for-profits Commission (ACNC);
 - provides for the objects and functions of the ACNC, including registering NFP entities, educating the sector and maintaining a register; and
 - provides for the monitoring, investigation and enforcement powers of the Commission for registered entities.

Context of reform

The not-for-profit sector

1.3 The NFP sector broadly consists of entities which seek to achieve a community, altruistic or philanthropic purpose, and who are involved in the supply of goods and services that have a social value greater than the price that a consumer could or would otherwise pay. The NFP sector can also be defined in broad terms, as encompassing all those in the economy who are not households, government or businesses that operate for profit.

1.4 The NFP sector is diverse, with entities ranging from micro-sized sporting and recreational clubs to large national and multinational charitable organisations.

1.5 Charities and NFP entities play a unique role in Australian society and as a result are funded by governments, both directly and through tax concessions, and by donations from members of the public. NFP entities are also exempted from a range of regulatory requirements.

1.6 The unique nature of NFPs means that unlike other entities, which may be accountable to their members or shareholders, charities and NFP entities need to also be accountable to donors, and to the public more broadly.

1.7 Public trust and confidence in the sector is essential to the ongoing sustainability of the sector and the services that it delivers to the public.

1.8 A national regulatory system which promotes the good governance, accountability and transparency of the NFP sector will assist to underpin public trust and confidence in the sector.

1.9 The ACNC will administer a system which will simplify NFPs regulatory interactions with government by minimising regulatory duplication and compliance costs for NFPs.

Outline of existing law

1.10 Currently, Commonwealth, State, Territory and local governments regulate different parts of the NFP sector for both different and overlapping purposes. For example, these laws provide tax and revenue concessions, exemptions from registration and permit requirements, exemptions or limitations on legal liability, and impose fundraising and lottery regulations.

1.11 At the Commonwealth level, regulation is undertaken in relation to access to taxation concessions, in relation to certain entity types such as companies limited by guarantee and indigenous corporations, and some corporate trustees.

1.12 The Australian Taxation Office (ATO) currently acts as the default regulator for the NFP sector. There are approximately 600,000 entities in the NFP sector, of which it is estimated that around 400,000 may access Commonwealth tax concessions, either through the ATO registration process for some NFP entities (endorsement) or by self assessment.

1.13 The tax concessions available to eligible NFP entities (and regulated by the ATO) include an income tax exemption; deductible gift recipient (DGR) status; refundable franking credits; and fringe benefits tax (FBT) and goods and services tax (GST) concessions.

1.14 Australian Securities and Investments Commission is currently responsible for the regulation of approximately 11,000 NFP entities

incorporated as companies limited by guarantee under the *Corporations Act 2001*. ASIC also has responsibility for registration of incorporated associations and cooperatives if they wish to operate outside of their home jurisdiction.

1.15 The Office of the Registrar of Indigenous Corporations (ORIC) is an independent statutory office holder which regulates some NFP Indigenous corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

1.16 The States and Territories regulate incorporated associations and charitable trusts (although public and private ancillary funds are regulated at the Commonwealth level,) as well as fundraising activities, and impose reporting and governance requirements on entities which receive State and Territory government funding.

1.17 Current reporting requirements across the sector are inconsistent as there is minimal reporting for some organisations and complex and burdensome reporting for others. There is also no single reference point for the NFP sector to access information, education or guidance.

1.18 There is limited easily accessible information available to the public on the activities of NFP entities. The current lack of information available to the public acts as a barrier to people making knowledgeable decisions about donating and volunteering, thus undermining philanthropic engagement and potentially the generosity of donors.

History

Reviews and Inquiries

1.19 There have been several reviews into the regulation and taxation of the NFP sector in Australia over the last 16 years.

1.20 A consistent theme has emerged from these reviews that the regulation of the NFP sector should be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements.

1.21 The 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations* recommended consideration of the establishment of a comprehensive national administrative framework for the charitable and related sector, and an independent administrative body for charities and related entities.

1.22 The 2008 Senate Economics Committee *Inquiry into Disclosure Regimes for Charities and Not for profit Organisations* recommended the establishment of a single independent national regulator for NFP organisations. The Inquiry recommended a broad role for the regulator, including registering NFP organisations, educating the sector and encouraging compliance and developing and maintaining an accessible, searchable public information portal.

1.23 The 2010 *Review into Australia's Future Tax System* recommended that a national charities commission should be established to monitor, regulate and provide advice to all NFP organisations.

1.24 The 2010 Productivity Commission *Report on the Contribution of the Not for profit Sector*, recommended the establishment of a 'one stop shop' for Commonwealth regulation by consolidating various regulatory functions into a new national registrar. The Report recommended that the regulator undertake a variety of functions, including assessing organisations for Commonwealth tax concession status, providing a single reporting portal for corporate and financial information, and investigating compliance with regulatory requirements.

1.25 The 2010 Senate Economic Legislation Committee *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010* recommended the establishment of a single independent national commission for NFP organisations.

Scoping study

1.26 The scoping study for a national NFP regulator was undertaken to determine the role, functions, feasibility and design options for a 'one-stop shop' NFP regulator.

1.27 The Government released a consultation paper to ascertain the views of the NFP sector on the goals of national regulation, the scope of national regulation and the functions and form of a national regulator. The consultation process demonstrated significant support for a national regulator and national regulation, and for NFP reform to be a priority.

1.28 The *Final Report on the Scoping Study for a National Not-for-profit Regulator* (Final Report) presented the findings of the scoping study and provided a blueprint to implement a national NFP regulator.

1.29 The Final Report recommended that a single regulator should be established for the purposes of governance, accountability and transparency of NFPs and that the regulator should, as far as possible, be responsible for regulating all NFPs.

1.30 The report also recommended that the regulator should administer a principles based regulatory framework to apply broadly across the NFP sector, although regulation should be proportional and tailored to address the specific needs and size of NFPs.

Budget announcement

1.31 As part of the 2011-12 Budget, the Government announced the first stage of an ambitious reform agenda for the NFP sector, including the establishment of the ACNC.

1.32 The ACNC will be headed by an independent statutory office holder, the Australian Charities and Not-for-profits Commissioner,

1.33 The ACNC will administer a regulatory framework to simplify the NFP sector's interactions with the Australian government.

1.34 The ACNC will initially be responsible for determining the legal status of entities seeking charitable and public benevolent institution (PBI) status on behalf of all Commonwealth agencies.

1.35 The ACNC will maintain a register of registered entities, and will, through its website, provide an information portal which will act as the central reference point for information on and for the NFP sector.

1.36 The register and public information portal for registered charities and NFP entities will strengthen accountability and transparency for the sector.

1.37 The ACNC website will provide NFPs, particularly small and newly established NFPs with a first point of call for accessing information and educational materials to answer questions and help promote registered entities.

1.38 The ACNC will administer a single Commonwealth governance and regulatory framework for NFPs. The governance framework will outline the practices and procedures in place to ensure that an entity operates in such a way that it achieves its objectives in an effective and transparent manner.

1.39 A 'report-once, use-often' reporting framework will be administered by the ACNC from 1 July 2013, to simplify reporting arrangements for registered entities.

1.40 An Advisory Board of legal and accounting experts in the NFP sector will be established to provide advice to the Commissioner.

Regulatory and taxation changes for the NFP sector

1.41 The establishment of the ACNC forms part of the Government's broader NFP reform agenda, which includes a range of tax and regulatory reforms.

1.42 The Government will reform the use of tax concessions by businesses run by NFP entities. The reforms will encourage charities to direct profits generated by unrelated commercial activities back to their charity's altruistic purpose. NFP entities will pay income tax on profits from their unrelated commercial activities that are not directed back to their altruistic purpose, that is, the earnings they retain in their commercial undertaking.

1.43 The Government will also introduce a statutory definition of 'charity' applicable across all Commonwealth agencies from 1 July 2013. The definition will be used for all Commonwealth laws, and will be based on the *2001 Report of the Inquiry into the Definition of Charities and Related Organisations*, taking account of the findings of recent judicial decisions.

1.44 Amendments are also being made to restate and standardise the special conditions for tax concession entities (including the 'in Australia' special conditions), restate and standardise the special conditions applying to tax concession entities, to ensure that Parliament retains the ability to fully scrutinise those organisations seeking to pass money to overseas charities and other entities in order to address possible abuse of NFP entities for the purposes of money laundering and terrorist financing.

1.45 Reforms are also being undertaken to improve the governance and accountability of public ancillary funds.

The ACNC

1.46 In the long term it is hoped the role of the ACNC will expand to include responsibility for the regulation of all NFP entities which access tax concessions or other Australian government benefits, regardless of their legal form.

1.47 The ACNC may also take additional roles in the future pending the outcome of the reviews into the NFP sector.

1.48 To take account of this planned expansion, this Bill, which establishes the ACNC, makes provision for additions to its regulatory responsibilities over time.

Objects of the Act

1.49 This Act establishes the ACNC with the object of promoting public trust and confidence in charities and NFP entities that provide public benefits.

1.50 This object will be pursued through the promotion of:

- the good governance of NFP entities;
- accountability of NFP entities, including accountability to donors and to governments that provide funding and support to these entities, and to the public in general;
- transparency of the NFP sector, including providing educational information to the sector and the provision of improved information about the sector to the public; and
- the simplification of NFP entities interactions with governments, including the minimisation of regulatory duplication.

1.51 The object of the Act will be advanced through the administration of a process for registering and regulating charities and NFP entities by the ACNC.

1.52 Other legislation may also confer benefits on charities and NFPs on the basis of their registration with the ACNC.

Functions of the Commissioner

1.53 The Commissioner will pursue the promotion of the objects of this Act by undertaking the following functions:

- registering NFP entities;
- promoting good governance, accountability and transparency;
- providing educational information to the NFP sector;
- providing information about the NFP sector to the public and to governments, this will include providing information through the ACNC website;
- providing a central point of contact to simplify NFPs interactions with governments;

- monitoring and investigating registered entities to further the object of the Act; and
- enforcing the Act and cooperating with other Australian government authorities in order to further the object of the Act.

1.54 The exposure draft is limited to those areas where the Commonwealth is able to make laws. Additional provisions will also be included to clarify the operation of parts of the exposure draft. These provisions will further elaborate on its application in relation to particular entities and circumstances.

Chapter 2

Registration

Outline of chapter

- 2.1 The exposure draft provides the Commissioner of the Australian Charities and Not-for-profits Commission (ACNC) with the power to register not-for-profit (NFP) entities under their specific NFP type or subtype.
- 2.2 The exposure draft outlines the registration processes and eligibility requirements for entities that wish to be registered by the Commissioner.
- 2.3 The exposure draft also sets out processes and grounds for the revocation of registration by the Commissioner.

Context of reform

- 2.4 Currently, there is no requirement under Commonwealth law to be registered as a NFP entity or specific type of NFP entity.
- 2.5 In the absence of a registration regime, the role of de facto regulator for the NFP sector at the Commonwealth level is generally shared between the Australian Taxation Office (ATO) and Australian Securities and Investments Commission (ASIC).
- 2.6 The ATO currently acts as a default regulator of charities and NFPs at the Commonwealth level through its role of endorsing charities as tax exempt, and administering NFP tax concessions.
- 2.7 Whereas, ASIC has a smaller role, and currently regulates and registers those NFP entities that are constituted as companies limited by guarantee.
- 2.8 In respect to the role that the ATO currently undertakes, the current law requires charities to be endorsed by the ATO as a charity to access tax concessions ear-marked for charities.
- 2.9 NFP entities more generally are able to self assess their access to income tax concessions are therefore, in effect, are not regulated by any agency to ensure public monies are used appropriately.

2.10 Currently, this endorsement process requires charities and sub-categories of charities to submit endorsement forms to the ATO to be eligible for tax concessions ear marked for charities.

2.11 Application forms require entities to provide information on eligibility for tax concessions, including operational and governance framework, and financial position.

Rationale for new registration rules

2.12 The *Final Report on the Scoping Study for a National Not-for-profit Regulator* for the NFP sector found that a government body should be given the responsibility to endorse and register NFP entities.

2.13 It also recommended that registration should be recognised by agencies at the Commonwealth, state and territory levels.

2.14 The Government announced in the 2011-12 Budget that it would establish the ACNC with the responsibility of registering NFP entities.

2.15 The responsibilities would include the power to collect relevant information on the financial and operational performance of NFP entities and use this information as a basis to register the entity, determine an entity's NFP status and monitor the entities ongoing eligibility to operate under a specific NFP status.

2.16 Registration would be voluntary, however entities will need to be registered to access government support.

Summary of new law

1.1 The exposure draft provides the Commissioner of the ACNC with the power to register NFP entities under their specific NFP type or subtype.

1.2 Registration by the ACNC would allow NFP entities to access support the Australian Government has earmarked for their specific charitable purpose, which includes access to Commonwealth exemptions, concessions and benefits (including generous tax concessions).

1.3 To obtain registration from the ACNC, charities would have to apply directly to the ACNC for registration, operate consistently with the definition of charity specified in Australian law, and comply with registration conditions and requirements which are specified in the ACNC exposure draft.

2.17 The Government decided to link registration and access to support earmarked for sector to ensure that scarce public monies are used appropriately and for the public benefit.

Detailed explanation of new law

Entitlement to registration

1.4 An entity would be entitled to be registered by the ACNC if it:

- is a not-for-profit entity;
 - as defined in the Government’s measure to restate and standardise the special conditions for tax concession entities.
- meets the governance requirements which will be set out in the governance section of the exposure draft;
 - This condition ensures that registered entities have appropriate governance arrangement including responsible individual that are not disqualified, and comply with specific duties.
- has current a Australian Business Number (ABN);
- has not previously been a registered entity;
- is not a terrorist, criminal, outlaw or similar entity. The actual definition will be prescribed in the regulations to this Act; and
- the entity has any of the following purposes:
 - a charitable purpose as defined by the common law definition of charity;
 - promotion of Australian industry;
 - encouragement of community entertainment;
 - scientific purposes;
 - advance and further the interest of employees or employers; and

- community service purposes (except political or lobbying purposes).

1.5 If the entity is of a type in column 2 or has a subtype in column 3, the entity is also entitled to registration as that entity type or subtype.

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

Entitlement to registration		
Item	Type of registered entity	Subtype of registered entity
14		Promotion of the development of agricultural resources
15		Promotion of the development of horticultural resources
16		Promotion of the development of industrial resources
17		Promotion of the development of manufacturing resources
18		Promotion of the development of pastoral resources
19		Promotion of the development of viticultural resources
20		Promotion of the development of aquacultural resources
21		Promotion of the development of fishing resources
22		Promotion of the development of Australian information and communications technology resource
23	Encouragement of community entertainment	Encouragement of animal racing
24		Encouragement of art
25		Encouragement of game or sport
26		Encouragement of literature
27		Encouragement of music or musical purposes
28	Scientific purposes	Not applicable

Entitlement to registration		
Item	Type of registered entity	Subtype of registered entity
29	Advance and further the interest of employees or employers	Trade union
30		Advance and further the interest of employees (registered or recognised under the <i>Fair Work (Registered Organisations) Act 2009</i>)
31		Advance and further the interest of employers (registered or recognised under the <i>Fair Work (Registered Organisations) Act 2009</i>)
32	Community service purposes (except political or lobbying purposes)	Not applicable

1.6 The NFP type and subtype are required as Government support which entities can obtain depends on the type and subtypes of registered entities. As a general rule more generous Government support is restricted to a smaller subset of NFP entities such as public benevolent institutions.

1.7 Registration as a type or subtype is voluntary, however it is necessary in order for an entity to access support provided by the Australian Government.

1.8 Entities are able to apply for registration for multiple type or subtype, within a purpose if they meet the necessary conditions for registration depending on the activities undertaken by the entity.

1.9 However, tax concessions may require entities to only be register for one type or subtype.

Registration process

1.10 The Commissioner must firstly assess whether the applicant meets the conditions to be entitled for registration including whether the entity is a NFP.

1.11 The requirement that an entity is a NFP is a characteristic that is common across all registered entities that operate under the ACNC regulatory framework.

1.12 At the very minimum, the Commissioner must be satisfied that an entity meets these requirements in order for the entity to be registered.

1.13 A entity will only meet the definition of a NFP if it:

- does not carry on its activities for the purposes of profit or gain for particular entities, including its owners or members, either while it is operating or upon winding up; and
- does not distribute its profits or assets to particular entities, including its owners or members, either while it is operating or upon winding up.

1.14 If the Commissioner is satisfied that the applicant meets the eligibility criteria, the Commissioner must then determine the applicant's specific type and subtype.

1.15 To be registered as a specific type and subtype, the Commissioner must be satisfied that the applicant:

- has applied to be registered under any one of the types or subtypes (where appropriate); and
- meets the definition and associated conditions for registration.

1.16 The NFP types and subtypes are comprised of income tax exempt entities currently listed in Division 50 of the *Income Tax Assessment Act 1997* (ITAA 1997).

1.17 However, the Commissioner will not register charitable like Government entities, which access tax concessions. These will continue to be assessed by the ATO

Applications for registration

1.18 Entities must apply to the Commissioner of the ACNC for registration.

1.19 An application for registration must be in the form approved by the Commissioner and accompanied by any documents that the Commissioner requires.

1.20 The Commissioner may require an applicant to provide additional information where those documents are required to decide whether the applicant is entitled to registration.

1.21 This additional information could include, for example, further information to clarify responses in applications, requesting certified governing documents of the entity and requesting further details of responsible individuals.

Requirement to register

1.22 If the Commissioner is satisfied that the applicant meets all of the requirements for registration, then the Commissioner must register an entity and where appropriate, specify the relevant type and subtype of the applicant.

1.23 Otherwise, the Commissioner must reject the application for registration.

1.24 Where the Commissioner has not made a decision on an application for registration within 60 days of receiving it, the Commissioner is taken to have decided to reject the application for registration.

1.25 If the Commissioner requests additional information, the application are taken to be refused on the later of:

- the end of the 28th day after the last day on which the applicant gives the Commissioner additional information required; or
- the end of the 60th day after the application was made.

Review rights

1.26 Both the Commissioner's decision to reject an application for registration and its deemed decision to reject an application as a result of its failure to determine an application within 60 days of receiving the application are reviewable decisions.

1.27 The entity has the right to object to the decisions in line with the review and appeals provisions outlined in Chapter 7 of the explanatory memorandum.

Revoking registration

1.28 The exposure draft provides the Commissioner with the power to revoke the registration of a registered entity if the Commissioner is satisfied that specific events have occurred.

1.29 This power helps to ensure that entities accessing public monies operate transparently, in line with the regulatory requirements specified in this exposure draft, and that public monies are used to promote public benefit.

1.30 In the exposure draft the Commissioner is able to revoke an entity's registration if the Commissioner is satisfied that any of the following conditions are satisfied:

- the registered entity is not entitled to be registered;
 - This addresses situations such as where an entity's activity, status and operational frameworks change and the entity no longer meets the general registration requirements.
- the registered entity provided, in connection with its application for registration, information that was false or misleading in a material particular;
- the registered entity has failed to comply with this Act or the regulation; or a direction given under Division 140;
 - The Commissioner would be able to use this condition in situations where an entity persistently fails to submit information statements and financial statements, or to comply with duty to notify notice requirements.
- the registered entity is insolvent, or is likely to become insolvent at some future time;
 - This condition is included to address situations where an entity is, or is likely to become, insolvent. The definition of insolvency is provided by section 459C of the *Corporations Act 2001*.
 - Having this condition in the exposure draft ensures that the Commissioner is able to act when charitable assets are in, or are likely to be in, jeopardy due to insolvency.

- the continuing registration of the registered entity may cause harm to, or jeopardise public trust and confidence.
 - This condition is included to address situations where an entity is not engaged in illegal activities or contravenes this Act, but the entity's actions have put at risk the public's trust and confidence in the sector.

1.31 The Commissioner must give the entity written notice of the decision to revoke registration which clearly specifies the day on which the revocation has taken effect.

1.32 Revocation can generally take effect on the day the Commissioner decides to revoke an entity's registration or on a later day as specified by the Commissioner.

1.33 If the reason the Commissioner revokes an entity's registration is that the entity is not entitled to be registered, or the registered entity provided, in connection with its application for registration, information that was false or misleading in a material particular, the Commissioner would be able to revoke registration on a retrospective basis.

1.34 Under these specific situations, the day in which the revocation takes effect would coincide with the day the entity first ceased to be entitled to ACNC registration.

1.35 The Commissioner may give the entity which it is intending to revoke its registration a show cause notice.

1.36 The notice would provide the entity the opportunity to provide the Commissioner, within 10 business days, a written statement showing cause why the Commissioner should not revoke its registration.

1.37 The statement should focus on areas where the entity feels the Commissioner's information is incorrect or the Commissioner's assessment of particulars related to the entity is incorrect.

Review rights

1.38 If the entity is dissatisfied with the Commissioner decision to revoke its registration, the entity has the right to object to the decisions in line with the review and appeals provisions outlined in chapter 7 of the explanatory memorandum.

1.39 The review and appeals provisions that apply to administrative decisions made by the Commissioner provide entities with a 60 day

period, starting from the day the administrative decision is communicated to the entity, to lodge review applications.

1.40 The Commissioner's decision to revoke a entity's registration would take effect 60 days after the revocation is made or immediately after the objection is resolved.

1.41 This ensures that in a situation where an entity's registration is revoked, and the entity has to wind-up, or undertake other activities as specified in governing documents, while it is preparing a review case, does not occur.

Chapter 3

Reporting and auditing

Outline of Chapter

- 1.42 This chapter outlines a new ‘report-once use-often’ general reporting framework for registered entities.
- 1.43 The information that registered entities will submit is intended to fulfill the totality of their general reporting obligations, initially across all Commonwealth agencies.
- 1.44 The new reporting framework will apply for registered charities from 1 July 2013, for information from the previous year.
- 1.45 The exposure draft includes:
- the reporting requirements and obligations that apply to registered entities;
 - auditing requirements and obligations that apply to registered entities; and
 - record keeping requirements for registered entities.

Context of reform

History

- 1.46 Reporting requirements of not-for-profit (NFP) entities are currently ad hoc, and duplicative.
- 1.47 Reporting requirements are currently determined by the tax concessions an entity accesses, the legal form of the entity, whether they fundraise, the grant funding received and any other relevant legislation according to the activities that they perform.
- 1.48 NFP entities may have a large, and in some instances, duplicative reporting burden. Other NFP entities that are unincorporated and receive no government funding have no reporting requirements.

1.49 Companies limited by guarantee are required to provide general financial reports to ASIC while incorporated associations need to provide general financial reports to different State and Territory agencies.

1.50 Additionally, Commonwealth, State and Territory agencies administering government grants usually impose grant specific reporting requirements.

1.51 Reporting requirements for incorporated associations generally vary between states and territories, adding to complexity and compliance costs faced by entities operating across multiple jurisdictions. Incorporated associations operate under a tiered reporting framework in the states and territories.

1.52 Reporting for companies limited by guarantee is also tiered, but with higher thresholds than those for incorporated associations.

1.53 NFP entities entering service delivery contracts with the government are required to provide information on financial health and performance, general capabilities and governance structures. This information is also required to be provided to regulatory agencies, such as ASIC.

1.54 Reporting requirements associated with funding arrangements for the delivery of government services generally involve complex reporting obligations and result in the duplication of reporting requirements. The sector has indicated that this is particularly evident with acquittal of grants.

1.55 A large proportion of the sector's reporting requirements both within and between Commonwealth and State and Territory government agencies can be duplicative.

1.56 Currently, income tax exempt NFP entities and endorsed charities are generally not required to file annual tax returns.

Summary of new law

Reporting requirements for registered entities

Record-keeping

1.57 Registered entities will be required to keep records that correctly record and explain the financial position and performance of the entity.

1.58 These records must be thorough enough to enable true and fair financial statements to be prepared, audited and reviewed.

1.59 Registered entities must also 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 and to remain registered.

1.60 This obligation ensures that registered entities have collected and maintained information that would form the base for the entity to meet its reporting obligations.

1.61 These records must be in English, or readily accessible and easily convertible into English. That is, if the records are not in written form (e.g., they are in an electronic medium such as a computer disc or USB), they must be in a form which is readily accessible and convertible into English by way of a computer program.

1.62 This allows registered entities to store their records electronically if required.

1.63 Entities should ensure the conversion of electronic records to a compatible format when upgrading or changing data-processing capabilities.

1.64 These records must be retained by the entity for 5 years after the transactions, operations or acts the records are covering are completed (unless the Commissioner notifies the entity that they do not need to retain their records).

1.65 Failure of the entity to maintain and keep adequate records constitutes an offence (of strict liability) by the entity, and carries a penalty of 30 penalty units.

1.66 The offences discussed in this chapter are all ones of strict liability. The use of strict liabilities for penalties is consistent with the Commonwealth guide for framing offences. Strict liability penalties provide a strong incentive to adopt measures to comply with the requirements. In this case, imposing strict liability is an effective way of ensuring compliance with minor regulatory obligation.

1.67 In addition, the penalty of 30 penalty units is comparatively low when compared to penalties imposed on for-profit entities for similar offences.

Proportional requirements

1.68 In order to minimise the compliance burden placed on registered entities, the general purpose reporting requirements will be proportional to the size of registered entities, based on a revenue threshold, whether the registered entity has deductible gift recipient status.

1.69 A small registered entity is defined as an entity which has annual revenue of less than \$250,000 and is not a deductible gift recipient (DGR) (at any time during the financial year).

1.70 A medium registered entity is an entity with annual revenue of less than \$1 million and is not a small registered entity.

1.71 A large registered entity is an entity with annual revenue of \$1 million or more.

1.72 Revenue should be calculated in accordance with the relevant accounting standards.

1.73 More information on the accounting standards can be found at www.aasb.gov.au.

Information statements

1.74 NFP entities generally operate for a broad public benefit, and are relied on by many Australians, often by those individuals who are the most vulnerable in our community.

1.75 It is therefore appropriate that registered entities provide some level of accountability to the public, and meet community expectations in relation to entities in receipt of public monies and support.

1.76 All registered entities will be required to provide the ACNC with an information statement in respect of each financial year.

1.77 The information provided to the Commissioner will be used to ensure entities remain entitled to be registered by the ACNC, and therefore to continue to access exemptions, concessions and other benefits for which registration is a pre-condition (for example, tax concessions).

1.78 Information statements must be in the approved form.

1.79 It is expected that this will include information relating to such things as governance, finances, activities, purposes, objects or beneficiaries of the registered entity. The approved form may also require

a statement as to whether the registered entity remains entitled to be registered under the ACNC.

1.80 The information statement will be proportional, with the Commissioner able to approve different forms for small, medium and large registered entities. The information to be included in each form is currently under consultation. Further information is available at the ACNC taskforce website, <http://acnctaskforce.treasury.gov.au>.

1.81 The information statement must be prepared and lodged for a financial year with the Commissioner no later than 31 October in the following financial year. The Commissioner may defer the lodgement date if the circumstances require it.

1.82 Failure to provide a financial report to the Commissioner by the due date may result in administrative penalties being applied to the entity.

1.83 The Commissioner may allow a registered entity to adopt an accounting period being the 12 months ending on some date other than the financial year, where the entity demonstrates a genuine need to adopt an alternate accounting period.

1.84 Information statements submitted by registered entities will be available to the public, the sector and the Government in full or in part. This will assist in increasing transparency over the sector's operations and activities.

1.85 The ACNC is not authorised to disclose any personal information except where consent is given by the responsible individual to whom the information relates or is otherwise specifically authorised by law.

1.86 To ensure the ACNC is able to fulfil its role to act as a 'one-stop shop' regulator and improve transparency and accountability for the NFP sector, disclosure of the protected information is permitted where the disclosure is specifically authorised in the legislation.

1.87 For further information on secrecy and disclosure of information, see Chapter 8.

1.88 If a registered entity identifies a material error in their information statement, the registered entity must supply the Commissioner with a corrected statement within 28 days of the error being identified.

1.89 Failure to re-lodge a financial report within the required time period may result in administrative penalties being applied to the entity.

1.90 This ensures that the public and the ACNC have access to the latest and most accurate information, and are not misled by the information prepared by and made public by the registered entity.

1.91 This will also promote public confidence and trust, and ensure that information within the public domain is up-to-date and accurate.

Financial reports

1.92 Medium and large registered entities must prepare and lodge a financial report with the Commissioner annually.

1.93 The ***financial report*** will be required to consist of the registered entity's:

- financial statements for the year;
- the notes to the financial statements; and
- the responsible individual's declaration about the statements and notes.

1.94 The financial report must also comply with any further requirements in the regulations, or any legislative instrument made by the Commissioner.

1.95 The ***financial statements*** for the financial year are the financial statements in relation to the registered entity required by the accounting standards.

1.96 The ***notes*** to the financial statements are any disclosures required by the regulations to this Act, accounting standards, and any other necessary information that is required in order to give a true and fair view of the entity's financial position.

1.97 The financial statements and notes must be prepared in accordance with Australian Accounting Standards.

1.98 The financial statements and notes are required to give a true and fair view of both the financial position and the performance of the entity.

1.99 This ensures that the information within the public domain is up-to-date and accurate, and reflects the true position of the entity. This will help promote public confidence and trust in sector.

1.100 It also allows the Commonwealth (and state and territory) regulators to ensure that registered entities are entitled to be and remain registered, and entitled to the exemptions, concessions and benefits that they are accessing as a result of being registered.

1.101 The responsible individual's declaration requires the responsible individual to declare whether, in their opinion, there are reasonable grounds to believe that the registered entity will be able to pay its debts as and when they become due. In addition, it requires the individual to declare whether, in their opinion, the financial statements and notes have been prepared in accordance with the requirements of the exposure draft.

1.102 The responsible individual's declaration must be signed by a responsible individual who is authorised to do so by the responsible individuals.

1.103 Financial reports must be prepared and lodged for a financial year with the Commissioner no later than 31 October in the following financial year.

1.104 However, the Commissioner may approve a substituted accounting period (in lieu of the financial year) for a registered entity where the entity demonstrates a genuine need to adopt an alternate accounting period.

1.105 Failure to lodge a financial report by the due date may result in administrative penalties being applied to the entity.

1.106 The Commissioner has the ability to waive these penalties in appropriate circumstances.

1.107 If a registered entity identifies a material error in their financial report, the registered entity must supply the Commissioner with a corrected statement within 28 days of the error being identified.

1.108 Failure to re-lodge a financial report within the required time period may result in administrative penalties being applied to the entity.

1.109 This ensures that the public and the ACNC have access to the latest and most accurate information, and are not misled by the information prepared by and made public by the registered entity.

Special purpose reporting

1.110 The Commissioner of the ACNC will have the authority to require a registered entity, or a class of registered entities to lodge a special purpose report.

1.111 Special purpose reports would be used by the ACNC to meet any information requirements that extend beyond information contained in general purpose reports. Special purpose reporting will only be used where necessary, not as a matter of course.

1.112 The Commissioner of the ACNC may require registered entities to lodge special purpose reports by giving them a written notice (or by publishing a notice on its website if the request for a special report applies to a class of registered entity).

1.113 The information requested may be in relation to past or future periods, but may not relate to a period more than 6 years ago.

1.114 The written notice must specify the information that needs to be included in the report.

1.115 In addition, the Commissioner of the ACNC may require a registered entity to provide additional information in their information statement or financial report.

Auditing rules

1.116 Large entities must have their financial report audited and obtain an auditor's report. The rules need to be consistent with the existing requirements under the *Corporations Act 2001*.

1.117 Medium entities can either have their financial report audited and obtain an auditor's report, or have their financial report reviewed, unless they are expressly directed by the Commissioner to have their financial report audited.

1.118 The Commissioner would only be expected to direct a medium entity to be required to audit their financial report in cases where there may have been previous problems or non-compliance of the entity.

1.119 A review, in contrast to an audit, is not designed to obtain reasonable assurance that the financial information reported by the entity is free from material misstatement. A review consists of making enquiries, primarily of individuals responsible for financial and accounting matters, and applying analytical and other review procedures. A review may bring significant matters affecting the financial information to the assurance individual's attention, but it does not provide all of the evidence that would be required in an audit.

1.120 The audit or review must be undertaken by a registered company auditor, within the meaning of the *Corporations Act 2001*.

1.121 However, reviewers are a wider class individuals. In addition to individuals who can undertake an audit, a member of a professional body who holds a practicing certificate as set out in the *Corporations Act 2001* may conduct the review.

1.122 The auditor or reviewer must be independent. Independence allows the auditor to act with integrity, and exercise objectivity and professional scepticism, and permits the expression of a conclusion without being affected by influences that compromise professional judgment.

1.123 This ensures the audit is prepared without bias, conflict of interest, or undue influence of others, and allows individuals to have faith that the audit is to a high objective standard.

1.124 The auditor or reviewer must provide either:

- a written, signed declaration to the responsible individuals' of the entity stating that, to the best of their knowledge, there have been no contraventions of the independence requirements of the auditor or reviewer, and that there have been no contraventions of any applicable code of professional conduct in relation to the audit or review; or
- a written, signed declaration to the responsible individuals' of the entity stating that, to the best of their knowledge, the only contraventions of the independence requirements of the auditor or reviewer, or contraventions of any applicable code of professional conduct in relation to the audit or review are those contraventions details of which are set out in the signed declaration.

1.125 The auditor or reviewer is not excused from giving the signed declaration on the basis that giving the declaration might incriminate the auditor or reviewer or expose them to a penalty.

1.126 Failure of the auditor or reviewer to comply with this section constitutes an offence (of strict liability) by the entity, and carries a penalty of 10 penalty units.

1.127 However, information included in the signed declaration, or information or thing obtained as a direct consequence of including information in the signed declaration is not admissible as evidence against the auditor or reviewer in any criminal proceedings, or in any proceedings that would expose the auditor or reviewer to a penalty, other than the penalty for failing to provide their declaration, or in relation to false or

misleading information of documents under section 137.1 or 137.2 of the *Criminal Code*.

1.128 The audit or review must be conducted in accordance with auditing standards. If an audit or review is conducted contrary to the required standards, this constitutes an offence of the auditor or reviewer, and carries a penalty of 50 penalty units.

1.129 Further information on auditing requirements can be found at the Auditing and Assurance Standard Board (AUASB) website.

1.130 The auditor or reviewer must consider and form an opinion about the following things in conducting their audit:

- whether the financial report is in accordance with the ACNC Act;
- whether the auditor has been given all information, explanation and assistance necessary for the conduct of the audit or review;
- whether the registered entity has kept financial records sufficient to enable a financial report to be prepared and audited or reviewed; and
- whether the registered entity has kept other records as required by the ACNC Act.

1.131 In the case of auditors only (and not reviewers), the auditor must report to the responsible individuals of the registered entity on whether the auditor thinks that the financial report is in accordance with the requirements in the ACNC Act.

1.132 An explanation must be given if the auditor does not believe that the financial report is in accordance with the requirements in the law. The auditor's report must quantify the effect that non-compliance has on the financial report. If quantifying the effect is not possible, the report must explain why.

1.133 The report must describe and defects or irregularities in the financial report, and any deficiencies, failures or shortcomings in respect of:

- whether the auditor has been given all information, explanation and assistance necessary for the conduct of the audit or review;

- whether the registered entity has kept financial records sufficient to enable a financial report to be prepared and audited or reviewed;
- whether the registered entity has kept other records as required by the ACNC Act.

1.134 The auditor commits an offence of strict liability if they do not comply. The penalty is 30 penalty units.

1.135 The auditor must retain all audit or review papers as set out by the requirements in the *Corporations Act 2001*, for seven years. The auditor commits an offence if this is not complied with.

1.136 Failure to do so results in an offence of the auditor, and carries a penalty of 50 penalty units.

1.137 The auditor or reviewer has a right of access at all reasonable times to the books of the registered entity, and may require any responsible individual of the registered entity to give the auditor information, explanations or other assistance for the purposes of the audit or review (provided the request is a reasonable one).

1.138 The auditor commits an offence if:

- the auditor is aware of circumstances that:
 - the auditor has reasonable grounds to suspect that there is a contravention of the ACNC Act,
 - amount to an attempt, in relation to the audit or review, by any person to unduly influence, coerce, manipulate or mislead the auditor or reviewer; or
 - amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit or review; and
- if they have reasonable grounds to suspect that there is a contravention of the ACNC Act, the contravention is a significant one; or
- the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the responsible individuals; and

- the auditor does not notify the Commissioner in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

1.139 In determining whether a contravention is a significant one, the auditor should have regard to such things as:

- the level of penalty provided for in relation to the contravention;
- the effect that the contravention has, or may have, on:
 - the overall financial position of the registered entity; or
 - the adequacy of the information available about the overall financial position of the registered entity; and
- any other relevant matter.

1.140 The auditor commits an offence of strict liability if they do not comply, and carries a penalty of 50 penalty units.

Chapter 4

Governance

Outline of Chapter

1.141 This chapter outlines the governance requirements for registered entities.

Context of reform

Governance requirements for registered entities

1.142 Governance refers to the practices and procedures in place to ensure that an entity operates in such a way that it achieves its objectives in an effective and transparent manner.

1.143 To ensure that not-for-profit (NFP) entities receiving public monies operate under appropriate and sound leadership, the Australian Charities and Not-For-Profits Commission Act (and its regulations) will specify core principles-based rules and regulations for registered entities.

1.144 The object of governance rules is to ensure compliance, transparency and accountability of NFP entities to their volunteers, donors, beneficiaries, the public at large, and members (where applicable). Further, the rules should create a framework to protect the entity and its mission or purpose from mismanagement, and ensure that the entity is focussed on its mission, and not the goals or interests of others.

1.145 NFPs play a unique role in Australia, and as a result are funded by governments, both directly and indirectly, and by donations from members of the public. This unique role means that governments often afford them special treatment by way of exemptions, concessions and benefits from a range of laws and fees.

1.146 NFP entities generally operate for the broad public benefit, and are relied on by many Australians, often by those individuals who are the most vulnerable in our community.

1.147 It is for these reasons that NFP entities must have appropriate governance requirements in place. Best practice should also be encouraged.

1.148 The Government announced in the 2011-12 Budget a number of further reviews of aspects of the regulation of the NFP sector, including a review of the governance obligations appropriate for NFP entities.

1.149 The Government is currently consulting on what the core organisational governance principles applying to registered NFPs should be.

1.150 Core governance principles will provide flexibility so that any requirements are proportional. What a large NFP must implement to satisfy the requirements will be different from what a small NFP must do to satisfy the requirements.

1.151 The proposed governance principles are grouped into the following areas:

- duties and minimum standards of responsible individuals, including rules for proper organisational management and running of the entity;
- disclosure requirements and managing conflicts of interest;
- risk management procedures, including external reviews and auditing requirements;
- the coverage of the minimum requirements of governing rules; and
- relationships with members (where applicable).

1.152 The governance paper can be found at www.treasury.gov.au. Submissions close on 20 January 2012.

1.153 The outcomes of the governance review will help form the governance requirements for registered entities in the ACNC legislation, starting from 1 July 2012.

Summary of new law

Responsible individuals

1.154 Responsible individuals of registered entities must have regard to fulfilling the duties required of a responsible individual.

1.155 Registered entities have responsibilities to donors, beneficiaries, volunteers and the public at large.

1.156 Responsible individuals must exercise the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others.

1.157 The governance requirements will likely apply to all responsible individuals.

1.158 A *responsible individual* is:

- a director or officer of the registered entity;
- a trustee of the registered NFP entity, or a director or officer of a trustee of a registered entity;
- an individual:
 - who makes, or participates in making, decisions that affect the whole or a substantial part, of the registered entity’s activities; or
 - who has the capacity to significantly affect the registered entity’s financial standing; or
 - who in accordance with whose instructions or wishes the responsible individuals of the registered entity are accustomed to act (excluding advice given by the individual in the proper performance of functions attaching to the individual’s professional capacity or their business relationship with the registered entity on its responsible individuals); and
- a receiver and manager, administrator, liquidator or trustee in bankruptcy of an incapacitated not-for-profit entity.

1.159 The definition has been written widely to take encompass different entity types, which may have different names for particular positions.

1.160 The definition is also broad enough to cover both express and implied individuals with responsibility. Implied responsibility positions may be described as either shadow (in the sense that the person exercises control over the decision-making from outside), or de facto (in the sense that the individual takes on the job without being lawfully appointed).

Chapter 5

Australian Charities and Not-for-profits register

Outline of chapter

1.161 The exposure draft establishes the Australian Charities and Not-for-profits (ACN) register.

1.162 The exposure draft also details the range and types of information which will be collected and placed on the ACN register.

1.163 The ACN Register will be made available to the public on the Australian Charities and Not-for-profits Commissions' (ACNC) website.

1.164 The exposure draft provides the Commissioner with the authority to remove or withhold any information on the ACN register from being publicly available if it is the public's interest to do so, or if its personal information that is not available for disclosure under the law.

Context of reform

1.165 Australia does not currently have a central information source where the public and government agencies can obtain information on the activities of not-for-profit (NFP) entities that have access to public monies.

1.166 The Government and the public provide considerable support to the NFP sector through donations, tax concessions and access to other benefits including Government contracts.

- For example, total quantifiable Commonwealth tax expenditures provided to the NFP sector in 2010-11 were estimated to be in the order of \$3.3 billion.
- Unquantifiable tax expenditures to the sector are likely to be of similar magnitude.
- The community also provides significant support to the sector. Total philanthropic donations to the sector reached \$7.2 billion in 2006-07.

1.167 Non-standardised public information is available on some NFP entities from a variety of different sources.

1.168 For example, charities endorsed by the Australian Taxation Office (ATO) have an entry on the Australian Business Register which specifies that the entity is endorsed and lists the range of tax concessions for which it is endorsed.

1.169 Additionally, financial reports for companies limited by guarantee that are NFPs or charities are available from the Australian Securities and Investments Commission (ASIC), and state and territory agencies collect financial reports for incorporated associations that are NFPs or charities.

1.170 The lack of a single source of information for the public and government agencies:

- reduces transparency of the sector and creates a barrier to public confidence in the sector;
- restricts informed choices about philanthropy and volunteering; and
- may hinder appropriate levels of sector accountability and governance.

1.171 The Australian Charities and Not-for-profits Register (ACN Register) would correct these shortcomings in the sector's regulatory framework by providing a single, easily accessible source of detailed information about NFP entities in Australia and will benefit the public, the NFP sector and governments.

1.172 Information which will be included on each registered entity on the ACN Register and the ACNC website will be based on information available on the websites of Charities Commissions in overseas jurisdictions.

Summary of new law

1.173 The exposure draft establishes the ACN register and details the range, and types of information which will be collected and placed on the ACN register.

1.174 The exposure draft requires that the ACNC establish and maintain the ACN Register, and that the ACN Register is made available to the public on the ACNC website.

1.175 The ACN Register will provide the public, the NFP sector and government agencies with basic information on each registered entity.

Detailed explanation of the new law

Commission to maintain ACN register

1.176 The ACN Register will include basic information on each of the entities registered by the ACNC. Making basic information available to the public increases the sector's transparency and accountability.

1.177 Information which will be available on the ACN Register will be sufficient for the public, the sector and government agencies to:

- contact registered entities;
- obtain information on the registered entities organisational structure and responsible individuals;
- assess registered entities financial and operational performance;
- understand and obtain details on the registered entities overarching purpose or purposes;
- understand where the entity derives its funding from; and
- obtain information on the registered entities future activities and plans.

1.178 The ACN Register will include warning notices issued by the Commissioner and may include fines issued by the courts for breaches to the ACNC Act. This would allow the public and government agencies to monitor how charitable funds are being used by registered entities.

1.179 The exposure draft establish the statutory requirement for the ACNC to include, on the ACN Register, the following list of information on each of the registered entities:

- the name of each registered entity;
- the name of each former registered entity;
- the contact details of each registered entity;

- the contact details of each former registered entity;
- the ABN of each registered entity;
- the ABN of each former registered entity;
- the types and subtypes under which each registered entity is registered;
- the types and subtypes under which each former registered entity was registered;
- the type of entity;
- the date of effect of the registration of each registered entity;
- the date of effect of the registration of each formerly registered entity;
- the following details in respect of each responsible individual for each registered entity:
 - the qualifications of the responsible individual in relation to the registered entity;
 - the position held by the responsible individual in relation to the registered entity;
 - the name of each responsible individual;
- the governing rules of each registered entity;
- the details of each warning (if any) issued to each registered entity by the Commissioner;
- financial reports;
- information statements; and
- any other information relating to each registered entity that the Commissioner considers reasonably necessary for the purposes of administering the Act.

Commissioner may withhold or remove information from Register

1.180 The exposure draft also provides the Commissioner with the authority to decline to include or remove information from the ACN Register under specific circumstances.

1.181 Providing the Commissioner with this authority gives the Commissioner the power to ensure that information on the ACN Register is factually correct; is not offensive; is to the best of the Commissioner's knowledge accurate; and does not mislead the public.

1.182 In coming to a view on whether to decline to include or remove information from the ACN Register, the Commissioner must consider whether the public interest from the disclosure outweighs any potential adverse effect associated with the release of the information under question.

1.183 For example, in considering whether to release information that may be commercially sensitive, the Commissioner must consider the implications of not releasing this information, including whether the public would be able to assess the entities performance; obtain information on the registered entities overarching purposes; and understand where the entity derives its funding from.

1.184 The Commissioner would also have to assess the implications of releasing the information on the registered entity. For example, whether releasing the information would disadvantage the entity leading to a loss in market share and revenue.

1.185 The specific circumstances under which the ACNC would be able to withhold or remove information from the ACN register are, if:

- the information:
 - is commercially sensitive; or
 - has the potential to cause detriment to the registered entity (or former registered entity) to which it relates, or to an individual; or
- the information is likely to cause confusion or mislead the public; or
- the information is inaccurate or likely to mislead; or
- the information is likely to offend a reasonable person; or

- the information raises public safety concerns; or
- if the regulations specify requirements for the purposes of this paragraph—those requirements are satisfied.

Chapter 6

Education, compliance and enforcement

Outline of chapter

1.186 The exposure draft provides the Commissioner and officers of the Australian Charities and Not-for-profits Commission (ACNC) with a range of powers to help meet the ACNC's overarching objective and to ensure that registered entities are complying with their obligations under this exposure draft.

1.187 The exposure draft provides the Commissioner of the ACNC with the authority to:

- investigate suspected breaches of the exposure draft;
- issue formal warnings;
- enter into enforceable undertakings;
- issue enforceable directions;
- order registered entities to suspend or remove trustees, and appoint acting trustees;
- order registered entities to suspend or remove corporate responsible individuals, and appoint acting corporate responsible individuals; and
- apply to the courts for injunctions.

1.188 The exposure draft specifies the statutory thresholds required to be met prior to the Commissioner using enforcement powers, the scope and range of the ACNC's enforcement powers, and the associated penalties for contravening enforceable directions and orders issued by the ACNC.

1.189 The exposure draft provides an ACNC officer with the powers to:

- give directions to a registered entity;
- enter any premises (with consent or with a warrant in certain circumstances); and

- gather information.

Context of reform

1.190 The ACNC's overarching objective is to promote public trust and confidence in the not-for-profit (NFP) sector.

1.191 To effectively achieve its overarching objective, the ACNC will provide entities with educational information on regulatory requirements. The ACNC will be able to answer questions and provide useful documentation to the sector.

1.192 The exposure draft contains a wide spectrum of monitoring, investigation and enforcement powers with only a few provisions relating to the ACNC's key role and responsibility of providing the sector with adequate education material.

1.193 The reason is that education will be an inherent role of the ACNC, as regulator of the NFP sector, whereas the ACNC will not have powers of investigation, monitoring and enforcement unless specifically provided for in the legislation.

1.194 The investigation and enforcement powers are expected to be exercised in a small number of serious cases where the circumstances require it, and like other Australian regulators, would enable the Commissioner to direct registered entities to comply with regulatory requirements and to move rapidly to protect public monies.

1.195 The strong preference of the ACNC will be to educate NFP entities so that the investigation and enforcement powers need not be invoked.

Current regulatory landscape

1.1 Currently, there is no single Government agency overseeing the totality of the activities undertaken by NFP entities, and ensuring that NFP entities are applying their assets and public monies in line with their governing documents and for the public benefit.

1.2 This has left significant gaps in the sector's regulatory landscape. For example, though there are multiple regulators at all levels of government, no single agency is able to investigate public complaints on the inappropriate use of charitable assets and public funds, and to direct entities to use these assets and funds in line with their governing documents.

1.3 At the Commonwealth level, the Australian Taxation Office (ATO) acts as the default regulator for the NFP sector. The ATO has the authority to monitor ongoing eligibility for tax concessions and to order the repayment of tax benefits entities have accessed outside of the law.

1.4 The ATO does not generally have the authority to direct NFP entities to use their assets in line with their altruistic purpose, and to move rapidly to protect altruistic assets and ensure their appropriate use.

1.5 This is particularly problematic in situations where a NFP entity has built up a significant capital base, in part by accessing tax concessions, applies for dis-endorsement from the ATO and changes its governing documents converting itself into a for-profit entity.

1.6 Agencies at all levels of government which issue grants and contracts to NFP entities are able to monitor and ensure that public monies provided under specific grants and contracts are used in line with the purposes they were provided. These entities are generally able to recoup funds that are used inappropriately.

New regulatory landscape

1.7 Establishing the ACNC and providing the Commissioner with investigation and enforcement powers will help to overcome gaps in the sector's regulatory landscape in so far as this is within Commonwealth Constitutional power.

1.8 The new system will improve the sector's governance, transparency and accountability by providing a single regulator which also removes duplication, reduces red tape and compliance costs.

Summary of new law

Monitoring and investigation powers

1.9 Under this exposure draft, the Commissioner has been given powers to investigate and inquire about matters relating to alleged or potential breaches of the provisions of the exposure draft.

1.10 These powers are intended to be used to allow the Commissioner to conduct regulatory oversight in an effective manner, and to actively monitor on-going eligibility for registration.

1.11 In particular, these powers allow the Commissioner to investigate a registered entity where there is a suspicion or there is a

reason to believe that the registered entity or responsible individuals have been behaving in an inappropriate manner such as misconduct or mismanagement.

1.12 These investigation powers may be utilised if the Commissioner is of the reasonable belief that a registered entity, or a responsible individual associated with a registered entity, has engaged in an activity or activities that may contravene this exposure draft or another Australian law.

1.13 The Commissioner may come to this belief by assessing information and data collected through audit, monitoring and compliance activities, following complaints made by the public, or any other Government departments or agencies or through any other means.

1.14 The Commissioner may make the decision to undertake an investigation under this exposure draft because of information provided by any other entity, or the Commissioner may decide to initiate an investigation of its own accord.

Enforcement powers

1.15 The exposure draft provides the Commissioner of the ACNC with a range of enforcement powers to help meet its overarching objective.

1.16 The enforcement powers are modelled on those given to other regulators such as the Australian Securities and Investments Commission (ASIC).

1.17 The Commissioner will focus on education in order to minimise cases of non-compliance by the sector. However, the ACNC will require powers to deal with deliberate wrong doing and must be capable of taking appropriate and targeted action against contraventions.

1.18 Enforcement powers provide the Commissioner with the tools to protect charitable assets, and to deter registered entities and/or responsible individuals associated with registered entities from acting in a manner which contravenes the law.

1.19 The enforcement powers of the Commissioner include the authority to:

- enter into enforceable undertakings;
- issue enforceable directions;

- order registered entities to suspend or remove trustees, and appoint acting trustees;
- order registered entities to suspend or remove corporate responsible individuals, and appoint acting corporate responsible individuals; and
- apply to the courts for injunctions.

1.20 The law will specify statutory thresholds required to be met prior to the Commissioner using enforcement powers; the scope and range of the Commissioner's enforcement powers; and the associated penalties for contravening enforceable directions and orders issues by the Commissioner.

1.21 The Commissioner would be able to exercise enforcement powers only over *registered* NFP entities. Enforcement powers would not apply to NFP entities (including charities) that have not been registered by the ACNC.

1.22 The Commissioner's enforcement powers are consistent with those available to other regulators under Commonwealth laws, and are similar to enforcement powers NFP and charities regulators in comparable jurisdictions, including for example the Charities Commission of England and Wales and the Office of the Scottish Charity Regulator.

1.23 The reviews and appeals provisions in chapter ## of the exposure draft will apply to the Commissioner's decision to issue:

- issue enforceable directions;
 - order registered entities to suspend or remove trustees, and appoint acting trustees; and
- order registered entities to suspend or remove corporate responsible individuals, and appoint acting corporate responsible individuals.

Detailed explanation of new law

Monitoring and investigation powers

The Commissioner's powers

1.24 The Commissioner will be provided with broad powers of monitoring and investigation. These powers will only be exercised when required.

1.25 A strong preference of the ACNC will be to assist NFPs to comply with the requirements through education, rather than to investigate entities for possible breaches.

1.26 The exposure draft allows the Commissioner to monitor compliance with the regulatory requirements and initiate investigations concerning breaches of the requirements in the exposure draft. These powers will be exercised before resorting to the enforcement powers provided under the exposure draft.

1.27 The exposure draft provides the Commissioner with general powers of investigation where he or she has reason to suspect that the requirements of this exposure draft, or another relevant Australian law, have been contravened.

1.28 The Commissioner is also provided with investigation powers for the purposes of the administration or application of the exposure draft.

1.29 Specifically, the Commissioner, may by notice in writing require a registered entity to do any or all of the following:

- provide any information that the Commissioner requires in relation to the entity, or any other entity;
- attend and give evidence before the Commissioner, or an individual authorised by the Commissioner. The evidence may apply to the registered entity itself, or any other entity; and
- produce documents under the entity's custody or control to the Commissioner. If the Commissioner consents, the entity may provide the Commissioner with a copy of the document if the copy has been certified in the same way as a statutory declaration is certified.

1.30 Failure to comply with the three directions outlined above will be an offence under the exposure draft. The penalty will be 30 penalty units. The offence will be one of strict liability.

1.31 This is consistent with the Commonwealth guide for framing offences. Strict liability penalties provide a strong incentive to adopt measures to comply with the requirements. In this case, imposing strict liability is an effective way of ensuring compliance with minor regulatory obligations. In addition, the penalty of 30 penalty units is comparatively low when compared to penalties imposed on for-profit entities for similar offences.

1.32 However, if an individual is not capable of complying with the three directions above, the individual will not be guilty of an offence. In this regard, the individual will bear the evidential burden to prove that they were not capable of complying with the direction.

1.33 The Commissioner may require the information or evidence discussed above to be provided in a number of ways. The Commissioner may require the information or evidence to be given on oath or affirmation; and for the information and evidence to be given orally or in writing. The Commissioner or the ACNC will be able to administer an oath or affirmation.

1.34 The exposure draft provides that the regulations may prescribe scales of expenses which will be provided to entities required to attend before the Commissioner or an officer. This will cover some of the entities' travel expenses or other costs associated appearing before the Commissioner if required to do so.

1.35 The exposure draft does not require the individual to give information in relation to the requirements discussed above if the information might tend to incriminate the individual or expose the individual to a penalty. That is, the individual will not be required to dispense with their right against self-incrimination.

Warnings

1.36 The Commissioner may issue formal warnings if the Commissioner has reasonable grounds to believe that a registered entity, or a responsible individual in respect of a registered entity, has contravened a provision of this exposure draft or another relevant Australian law.

1.37 The Commissioner may also issue a formal warning if the Commissioner has reasonable grounds to suspect there has been misconduct or mismanagement in the administration of a registered entity.

1.38 The Commissioner may provide written notice to the registered entity, and to each responsible individual, to inform them of the circumstances for the formal warning, and warn the registered entity of the action that may be taken under the exposure draft in response to a contravention of the exposure draft.

The ACNC's powers

Authority to enter premises

1.39 The exposure draft provides the Commissioner with the authority to enter premises, and the authority to inspect the premises in order to determine whether the requirements under the exposure draft are being complied with.

1.40 For the purpose of determining whether the requirements in the exposure draft are being complied with, or for substantiating information provided in accordance with the exposure draft, an ACNC officer may enter any premises and exercise the inspection powers discussed below.

1.41 The ACNC officer does not have authority to enter the premises unless the occupier of the premises has consented to the ACNC officer entering.

1.42 The ACNC officer must inform the occupier that the occupier may refuse consent to the ACNC officer entering the premises, and the occupier has permission to ask to see the ACNC officer's identity card.

1.43 The ACNC officer must leave the premises if the occupier removes their consent, or if the consent is provided for a particular period, and that period expires.

1.44 In the absence of consent, the ACNC officer may obtain an inspection warrant which authorises him or her to enter the premises.

1.45 The occupier of the premises must provide facilities and assistance which are reasonable in the circumstances, in order for the ACNC officer to exercise his or her powers effectively.

1.46 An ACNC officer has a number of inspection powers which may be exercised in relation to a premises entered under the exposure draft. These powers include the power to:

- search the premises and any object or article on the premises;
- examine any activity conducted on the premises;

- inspect, examine, take measurements of, take a sample of, or conduct tests on any object or article on the premises;
- take a photograph or make a recording of the premises or any object or article on the premises;
- inspect any document on the premises;
- take extracts from, or make copies of, any such document;
- take onto the premises such equipment and materials as the ACNC officer requires for the purpose of exercising powers in relation to the premises.

1.47 The inspection powers of the ACNC officer include the power to operate electronic equipment on the premises. This includes the power to inspect the contents of electronic storage devices to see whether these contain information that is relevant to determining whether the exposure draft requirements have been, or are being, complied with, or for the purposes of substantiating information provided under this exposure draft.

1.48 The inspection powers also include the power to use the electronic equipment to print documents and remove these documents from the premises. The ACNC officer may also remove information stored on an electronic device if the device was brought to the premises by the ACNC officer, or, if the device is owned by the occupier, with the occupier's written permission.

1.49 However, an ACNC officer must take care not to damage the equipment and may only operate electronic equipment in accordance with the previous two paragraphs if he or she believes on reasonable grounds that the operation of the equipment will not damage that equipment.

1.50 In certain circumstances, an ACNC officer may secure a thing for a period of 24 hours, or more if an extension is provided by a magistrate. This may be exercised when the ACNC officer believes on reasonable grounds that the thing provides evidence of the commission of an offence under this exposure draft or the *Crimes Act 1914* or the *Criminal Code* that relates to the exposure draft and it is necessary to secure the thing.

1.51 The 24 hour period must not be extended more than three times.

Warrants

1.52 An ACNC officer may apply to a magistrate for a warrant under the exposure draft, and the magistrate may issue the warrant if they are

satisfied that there are reasonable grounds for suspecting that there is, or may be within the next 72 hours, evidential material on the premises.

1.53 The warrant must contain certain information which is set out in the exposure draft, including the premises to which the warrant relates and the kinds of evidential material that are to be searched for under the warrant.

1.54 The magistrate exercises powers in this regard in a personal capacity and not as a member of a court; however they are afforded the same protection and immunity as a member of a court would have.

1.55 In relation to entry to premises under a warrant, the ACNC officer must announce that he or she is authorised to enter the premises, and show his or her identity card. However, the ACNC officer does not need to comply with these requirements if the ACNC officer reasonably believes that immediate entry is required. If this is the case, the ACNC officer must show their identity card as soon as practicable after entering the premises.

1.56 Where making use of an inspection warrant in accordance with this exposure draft, the ACNC officer must possess the warrant, or a copy of the warrant.

1.57 The ACNC officer must provide details of the inspection warrant to the occupier, or another individual who apparently represents the occupier, if they are present.

1.58 The ACNC officer has responsibilities in regard to making a copy of the warrant available to the occupier, and informing the occupier of his or her rights and responsibilities under this exposure draft.

Enforcement powers

1.59 The Commissioner will have broad monitoring and investigation powers which allow it to monitor compliance with regulatory requirements, initiate investigations concerning breaches to the ACNC Act, and where necessary, take enforceable action.

1.60 Enforcement powers are an important tool for regulators. Enforcement powers deter entities and responsible individuals from acting in a manner which contravenes the law, while providing regulators with the required tools to protect assets and ultimately ensure proper use.

1.61 The exposure draft provides the Commissioner with the authority to:

- enter into enforceable undertakings;
- issue enforceable directions;
- order registered entities to suspend or remove trustees, and appoint acting trustees;
- order registered entities to suspend or remove corporate responsible individuals, and appoint acting corporate responsible individuals; and
- apply to the courts for injunctions.

1.62 Enforcement powers given to Australian regulators, including the Australian Prudential Regulation Authority (APRA), the Australian Competition and Consumer Commission (ACCC) and ASIC, usually include the authority to issue enforceable directions; the authority to enter into enforceable undertakings; and the right to apply to the courts to have injunctions imposed.

1.63 The enforcement powers this exposure draft provides to the Commissioner are modelled on the powers given to these other Australian regulators.

1.64 The Commissioner will primarily focus on its educative function to ensure registered entities comply with requirements in the exposure draft and other relevant Australian laws.

1.65 In the rare cases where the ACNC's education fails to gain the required traction, the Commissioner will have the ability to use a range of enforcement powers.

1.66 The type of enforcement power used by the Commissioner will ultimately depend on the seriousness of the situation and the particular circumstance that the Commissioner is attempting to address.

1.67 Where possible the Commissioner will use its authority to enter into enforceable undertakings with registered entities. Enforceable undertakings represent a flexible tool which allows registered entities, in consultation with the Commissioner, to tailor solutions to meet specific regulatory concerns.

1.68 Directions would generally be used for situations where the Commissioner is required to act rapidly and there is merit in formulating solutions with a short-term horizon to address regulatory issues.

1.69 Finally, orders to suspend or remove trustees and corporate responsible individuals, and apply to the courts for injunctions would be used to formulate solutions to more serious contraventions. These situations include cases where a registered entity has engaged in fraud, or a registered entity is being used to channel funds to illegal activities.

Enforceable undertakings

1.70 Enforceable undertakings are court-enforceable agreements voluntarily entered into by the Commissioner and an entity to perform or not perform certain actions which would remedy a breach requirements in the exposure draft.

1.71 Enforceable undertakings have successfully been employed as an alternative to other enforcement actions by Australian regulators to influence behaviour.

1.72 The Commissioner would only accept enforceable undertakings in relation to a matter with which the Commissioner has a power or function under the exposure draft.

1.73 The entity which entered into the enforceable undertaking may withdraw or vary the undertaking at any time, but only with the consent of the Commissioner.

1.74 If the Commissioner considers that the entity that submitted the enforceable undertaking has breached any of its terms, the Commissioner may apply to the court for any of the orders outlined and described in the sections that follow.

1.75 Courts for this purpose include Commonwealth, State and Territory courts.

An order directing the entity to comply with the term(s) of the enforceable undertaking.

1.76 The courts would be able to use judicial powers to order an entity to comply with the terms agreed upon in enforceable undertakings. This is necessary to provide entities with the required incentive to comply with the undertaking.

1.77 Failure to comply with an order of the court would be a criminal offence.

An order directing the entity to pay to the Commonwealth an amount up to the amount of any financial benefit that the entity has obtained directly or indirectly and that is reasonably attributable to the breach.

1.78 This authority is required to limit the financial incentive of breaching enforceable undertakings. The courts would be able to order an entity to repay up to the amount of any financial benefit that the entity has obtained directly or indirectly due to the breach.

1.79 This would be used in situations where, for example, an entity maintains its registration as a result of entering into an enforceable undertaking, and accesses tax concessions.

1.80 In turn, tax concessions would generate a financial benefit for the entity. Under this authority, the court would be able to order the entity to repay the financial benefit gained as a result of the breach.

1.81 Additionally, if access to the tax concession allowed the entity to compete with other for-profit entities on favourable terms, and, as a result, increase its market share and revenue, the court would be able to order the registered entity to repay the financial benefit that it has indirectly obtained.

Directing the entity to compensate any other entity who has suffered loss or damage as a result of the breach.

1.82 This authority is required to ensure that third parties (including other entities and individuals) that suffer a financial or physical loss or damage as a result of the breach are adequately compensated.

1.83 This would be used in situations where, for example, if an entity maintains deductible gift recipient status as a result of registration individual donors claim an income tax deduction, and endorsement as a deductible gift recipient status is removed retrospectively, individual donors would be required to repay any income tax deductions claimed.

1.84 In this situation the registered entity may have to compensate an individual who has a liability with the tax office as a result of the breach.

Apply to a court for an order that the Court considers appropriate.

1.85 The court will be able to order the entity to do anything which is not covered by the other orders in this space, in order to undo or rectify the consequences of the breach.

1.86 For example, if an entity obtains a government grant earmarked for a registered entity, and the registration was revoked as a result of the

breach, the court may order the entity to repay the grant either in part or in full.

Enforceable directions

1.87 The Commissioner will have the power to issue enforceable directions to registered entities or responsible individuals associated with registered entities.

1.88 Enforceable directions provide the Commissioner with a short-term instrument to direct entities to reverse any contraventions of Australian law, and to gather and certify information required for investigations.

1.89 Enforceable directions issued must be given by notice in writing and must clearly specify the ground or grounds on which the direction was issued.

1.90 Registered entities issued with an enforceable direction are required to comply with the enforceable direction despite any clauses or provisions in governing rules or contracts the entity has entered into.

1.91 Third parties that have a legally binding contract with the registered entity receiving the direction from the Commissioner would generally be required to fulfil their contractual obligations.

1.92 However, if the direction prevents the registered entity from fulfilling its obligations under the contract, third parties are relieved from obligations owed to the registered entity under the contract.

1.93 The exposure draft allows any party to the contract to apply to the Federal Court for an order regarding the effect of the direction on the contract. The order may deal with matters including:

- requiring parties to fulfil requirements in the contract; or
- obliging a party to the contract to take some other action in view of obligations that were fulfilled under the contract before the direction was made.

Commissioner may give directions in certain circumstances

1.94 The exposure draft outlines a set of circumstances under which the Commissioner may issue enforceable directions. The circumstances are similar to the circumstances included in section 11CA ('APRA may give directions in certain circumstances') of the *Banking Act 1959*.

1.95 The circumstances provide a safeguard to the sector and ensure that enforceable directions will only be used when there are significant concerns. Circumstances are listed and explained in the sections that follow.

The registered entity has contravened, or is likely to contravene, a provision in the ACNC Act or any other Australian law that relates to the objects of this Act.

1.96 If the Commissioner has reason to believe that a registered entity has contravened, or is likely to contravene a provision in the exposure draft, or an Australian law that relates to the objects of the exposure draft, the Commissioner would be able to issue an enforceable direction.

1.97 This would include situations where a registered entity has not complied with regulatory requirements such as persistently failing to provide the Commissioner with information statements and financial statements, or where an entity persistently fails to have financial statements audited or independently reviewed.

1.98 A registered entity would likely contravene a provision in this exposure draft if it is proposing to change its activities or governing documents, or enter into arrangements that contravene provisions in the exposure draft.

1.99 For example, if an entity notifies the ACNC of its intention to change winding-up provisions in its governing documents, and the new provisions are inconsistent with requirements, the Commissioner would be able to direct an entity to not go through with the change.

The direction is necessary to advance the purpose (or a purpose) for which the registered entity is registered.

1.100 If the Commissioner has reason to believe that a registered entity is not acting in a manner which efficiently promotes altruistic purpose, the Commissioner would be able to issue an enforceable direction.

1.101 For example, if an entity is registered with a single charitable purpose and over the years becomes involved in activities that do not directly promote this purpose, the Commissioner would be in a position to direct the entity to refocus activities on its charitable purposes.

The registered entity is conducting its affairs in an improper or financially unsound way.

1.102 If the Commissioner has reason to believe that a registered entity is conducting its affairs in an improper or in a financially unsound

manner, the Commissioner would be able to issue an enforceable direction.

1.103 If an entity is operating in a financially unsound way it would put at risk public monies and therefore the Commissioner would have the authority to issue directions.

1.104 An example could be where an entity is borrowing heavily and there is a risk that it would become insolvent and lose charitable monies.

The direction is otherwise necessary to advance the object of this Act.

1.105 If the Commissioner has reason to believe that a direction would help to promote public trust and confidence in an NFP entity, the Commissioner would be able to issue an enforceable direction.

1.106 This circumstance would arise in situations where a specific entity is not necessarily undertaking illegal activities or breaking the law, but certain aspects of its operations are questionable and could put at risk public trust.

1.107 It also ensures that the Commissioner can act if he or she is of the view that donations or public funds more broadly are not been used in line with the purposes funds were initially provided for; and the Commissioner is able to act in situations where it is not clear that a direct contravention of the exposure draft has occurred but the actions of the regulated entity are questionable.

Kinds of directions

1.108 The exposure draft provides the Commissioner with the authority to issue enforceable directions if any of the circumstances outlined and described in the section above occur.

1.109 The kinds of directions the Commissioner will have the authority to issue are outlined and described in the sections that follow.

Direction to comply with the whole or a part of this Act; or any other Australian law that relates to the objects of this Act.

1.110 Under this kind of direction the Commissioner would be able to direct registered entities to comply with regulatory requirements specified in the exposure draft and other Australian laws.

1.111 For example, if an entity has persistently failed to provide the ACNC with information statements or financial statements, the

Commissioner would be able to direct entities to comply and provide required statements.

1.112 Another example when this kind of direction could be used would be when an entity submits a duty to notify notice and in the notice is proposing to change its governing documents in a manner which would render it ineligible for registration.

1.113 In this case, the Commissioner could direct the entity to not change its governing documents in the proposed manner.

Direct a responsible individual of the registered entity to not take part in the management or conduct of the activities of the registered entity except as permitted by the Commissioner.

1.114 Under this kind of direction the Commissioner would be able to direct responsible individuals (including individuals that are not trustees or directors) to cease participating in the management or conduct of the activities of the registered entity.

1.115 This power could be used, for example, when the ACNC is investigating the activities and arrangements of a responsible individual, and the Commissioner has reason to believe that the individual may be illegally gaining a financial advantage by virtue of responsibilities.

1.116 In these situations the Commissioner would be able to act rapidly to protect assets by directing the responsible individual to cease participating in the management of the entity.

Order an audit of the affairs of the registered entity, at the expense of the registered entity, by an auditor chosen by the Commissioner.

1.117 Under this kind of direction the Commissioner would be able to direct registered entities to engage an auditor, chosen by the Commissioner, to audit the registered entity's compliance with regulatory obligations including those specified in the exposure draft (compliance audit), and a registered entity's financial statements (compliance audit).

1.118 This kind of direction is required for the Commissioner to collect certified information that would be used to inform inquiries initiated by the Commissioner.

1.119 For example, if the Commissioner has initiated an inquiry and information provided by the entity is insufficient to form a view over whether the entity is fully compliant with regulatory requirements, the Commissioner would have the authority to request a compliance audit.

Order an entity to not enter into a specified commercial transaction, financial transaction or other transaction, including the following:

- *borrowing any amount; or*
- *repaying any money on deposit or advance; or*
- *paying or transferring any amount or asset to any entity, or creating an obligation (contingent or otherwise) to do so.*

1.120 Under this direction the Commissioner would be able to order an entity to not enter into specific transactions.

1.121 This direction is required to protect the assets of registered entities and promote public trust and confidence in the entity. It would also provide the Commissioner with an instrument to move rapidly potentially prior to the completion of a thorough investigation.

1.122 This direction could be used in situations where the Commissioner believes that funds are been used inappropriately.

Direct a registered entity to comply with its governing rules.

1.123 Under this direction the Commissioner would be able to order an entity to comply with its governing rules.

1.124 A registered entity may want to act in a manner that is inconsistent with its governing documents.

Direct an entity to do anything else 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 this Act.

1.125 This kind of direction provides the Commissioner with the broad authority to direct an entity to conduct its affairs in a manner that promotes public trust and confidence in its operations.

1.126 This direction would be required when the issue the Commissioner is trying to address is not covered by the other kinds of directions specified above.

1.127 It can include, for example, the situation where an entity is unnecessarily restricting access to goods and services it provides on a concessional basis to a subset of individuals and entities.

Penalty for contravening enforceable directions

1.128 The registered entity or responsible individual associated with the registered entity must comply with the enforceable direction within the timeframes specified by the Commissioner of the ACNC.

1.129 If a registered entity or responsible individual associated with the registered entity fails to comply with the direction, either in part or in full, the registered entity or responsible individual commits an offence.

1.130 A separate offence would be committed on each day that the direction issued by the Commissioner is not followed. The maximum penalty for each offence would be 50 penalty units.

1.131 These penalties are comparable with other Commonwealth regulators that have the power to issue enforceable directions, including section 11CG (Non-compliance with a direction) of the *Banking Act 1959*.

1.132 Findings of breaches and penalties issued by the courts on entities may be included on the ACN register and ACNC website.

Reviews of directions

1.133 Directions will generally be used by the Commissioner as short-term instrument to ensure registered entities are compliant with the exposure draft and relevant Australian law more generally.

1.134 The Commissioner will be given the authority to revoke or amend an enforceable direction, if he or she considers that the direction is no longer necessary or appropriate.

1.135 If the Commissioner does not amend or revoke the enforceable direction for a period of 12 months after he or she has issued the direction, the Commissioner must consider within a reasonable time after the end of the 12 months whether it would be reasonable to vary or withdraw the direction.

1.136 Directions issued by the Commissioner would be subject to the reviews and appeals procedure applicable to the Commissioner's administrative decisions.

1.137 Further information on the reviews and appeals procedure can be found in chapter 7 of the explanatory memorandum.

Suspension and removal of trustees

1.138 The Commissioner will be provided with the authority to suspend or remove trustees or corporate responsible individuals.

1.139 Suspension of responsible trustees should be used in situations where the contravention or more general wrongdoing is minor compared to the circumstances surrounding removal, such as when there is a deliberate failure to report to the ACNC.

1.140 If the Commissioner decides to remove a trustee under this section, the Commissioner must give to the trustees a written notice:

- setting out the decision; and
- giving the reasons for the decision.

Statutory threshold

1.141 The threshold is stronger when compared to the threshold which is required to be met prior to the Commissioner issuing directions.

1.142 This reflects the fact that suspension or removal of trustees could have a profound impact of the livelihood and careers of those individuals.

1.143 The Commissioner may suspend any or all of the trustees of a registered entity if the Commissioner is satisfied that the registered entity, or any of the trustees of the registered entity, are conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence.

1.144 The suspension and removal of trustees by the Commissioner would be subject to the reviews and appeals procedure applicable to the Commissioner's administrative decisions.

1.145 Further information on the reviews and appeals procedure can be found in chapter 7 of the explanatory memorandum.

Commissioner to appoint acting trustees in cases of suspension or removal

1.146 If the Commissioner suspends all of the trustees of a registered entity, the Commissioner must appoint a single entity to act as the trustees during the period of the suspension.

Injunctions

1.147 Injunctions will be sought by the Commissioner from the courts in circumstances when:

- a registered entity has engaged in serious and persistent contraventions of the ACNC Act;
- the Commissioner needs to move rapidly to ensure that public monies are used appropriately; and
- when a third party related to registered entities is given an order to undertake or to stop undertaking a specific activity.

1.148 Injunctions will also be used in situations where a registered entity does not follow a direction which has been issued by the Commissioner.

Performance injunctions

1.149 The Commissioner will have the authority to apply to the courts for performance injunctions.

1.150 Performance injunctions would be used to ensure compliance with regulatory requirements including those specified in the exposure draft and to promote public confidence in the sector.

1.151 The threshold for applying for a performance injunction will be that an entity has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or a thing, and the refusal or failure was, is or would be a:

- contravention provision in the exposure draft; or
- contravention of a direction.

Restraining injunctions

1.152 The Commissioner will have the authority to apply to the courts for restraining injunctions.

1.153 Restraining injunctions would be used to halt inappropriate activities or actions taken by registered entities or their responsible individuals, and to protect public monies and charitable assets.

1.154 The threshold for applying for a performance injunction will be that an entity has engaged, is engaging or is proposing to engage, in any conduct that would be deemed a:

- contravention of this exposure draft; or
- contravention of a direction.

Interim injunction

1.155 The Commissioner may apply for an interim injunction pending determination of an application for either a restraining or performance injunction.

1.156 Interim injunctions would be required to ensure the ACNC can rapidly move to protect charitable assets on a temporary basis prior to the agreement of more permanent arrangements.

Chapter 7

Reviews and appeals

7.1 [to be drafted]

Chapter 8

Secrecy

Outline of chapter

1.157 The exposure draft sets out the secrecy framework that underpins the treatment of personal information and confidential information provided to the Australian Charities and Not-for-profits Commission (ACNC).

Context of reform

1.158 The ACNC will be responsible for determining charitable status, including public benevolent institution, and other not-for-profit (NFP) status for all Commonwealth purposes.

1.159 The ACNC will also be responsible for implementing a ‘report-once use-often’ general reporting framework for charities and a register for charities.

1.160 Secrecy laws impose obligations of confidentiality on individuals handling government information and the prosecution of public servants for the unauthorised disclosure of such information. It is related to but different from privacy laws which seek to protect the personal information of individuals.

1.161 The management of information can be conceived of as a spectrum, with openness of information and protection of information as opposite ends of that spectrum. Secrecy provisions are situated at different points in the spectrum—at times emphasising protection; at times facilitating information handling, sharing and disclosure.

1.162 The appropriate handling of information is integral to the effective functioning of government. Secrecy laws are one element in the broader information handling framework across government.

1.163 An appropriate secrecy framework strikes a fair balance between the public interest in open and accountable government, accountable and transparent not-for-profit sector and adequate protection for Commonwealth information that should legitimately be kept confidential.

Summary of new law

Overview of the secrecy framework

1.164 The overarching objective of the secrecy framework in the exposure draft is to protect personal information and confidential information that entities provide to the ACNC.

1.165 Engagement and the trust of the NFP sector could be at risk if responsible individuals and registered entities do not have confidence that their information is being handled appropriately, which would, in turn then obstruct the ACNC in performing its roles under the exposure draft.

1.166 At the same time, the NFP sector receives substantial assistance through taxpayer funded concessions and public donations and therefore the transparency and accountability of the sector is critical to ensure public confidence that taxpayer resources and public donations are being used appropriately.

1.167 For that reason, the secrecy framework in the exposure draft has been developed to be flexible enough to protect personal and confidential information but also make certain information available, where it is in the public interest to disclose that information.

1.168 Structurally, the secrecy framework has been designed so that the Commissioner and ACNC officers, who in the ordinary course of performing their duties, have access to personal or confidential information are subject to a general prohibition on the use and disclosure of that information.

1.169 However, to ensure the ACNC is able to fulfill its functions under the exposure draft, including improving governance, transparency and accountability, and acting as a ‘one-stop shop’ regulator for the NFP sector; disclosure of the protected information is permitted in specified circumstances detailed within the exposure draft.

1.170 By structuring the secrecy framework in this manner, it ensures that it is fundamentally clear to those officers responsible for handling protected information that the disclosure of that information is prohibited in all circumstances except where it is clearly set out in the exposure draft that it may be disclosed and for what purpose.

Interaction with other privacy and secrecy regimes

1.171 Whilst the secrecy framework in the exposure draft provides for an overarching protection of information provided to the ACNC, that

information may also be protected under other related privacy or secrecy regimes.

1.172 For example, information that is provided to the Commissioner of Taxation under a taxation law is protected under Division 355 in Schedule 1 to the *Tax Administration Act 1953* and subject to the secrecy framework that was recently introduced in 2010.

1.173 Similarly, the Office of the Australian Information Commissioner also protects information that is personal and relates to an individual under the *Privacy Act 1988* (the Privacy Act). In particular, the Information Privacy Principles under the Privacy Act apply to the ACNC and set out the standards for the handling and protecting an individual's personal information.

1.174 Of note, Information Privacy Principle 11 operates to limit the disclosure of personal information by a Government agency, except to the extent that disclosure is required or authorised by or under law. Consequently, in the specified circumstances set out in the exposure draft where disclosure of protected information is authorised, the secrecy framework is consistent with the requirements under Information Privacy Principle 11 and the Privacy Act.

1.175 There is however, Commonwealth legislation that overrides the secrecy framework in the exposure draft and authorises disclosures in limited circumstances. These laws either permit particular entities such as the Auditor-General or Commonwealth Ombudsman to access protected information or provide immunity for entities who are compelled to disclose information that is protected under the exposure draft for circumstances specified in the following provisions:

- sections 32 and 33 of the *Auditor-General Act 1997*;
- section 9 of the *Ombudsman Act 1976*;
- section 44 of the Privacy Act
- section 12 of the *Parliamentary Privileges Act 1987*; and
- schedule 6 to the *Anti-Terrorism Act (No. 2) 2005*.

Operation of the secrecy framework

Definition of 'ACNC officer'

1.176 An **ACNC officer** as defined in the exposure draft is intended to include an individual who fills the statutory appointment of Commissioner

as well as any individual that is directly engaged under the *Public Service Act 1999* and is performing duties in the ACNC.

1.177 The definition also extends to those individuals whose services are made available to the Commission or engaged as a consultant under the exposure draft.

1.178 This definition broadly covers those public servants and statutory office holders who are involved in the work of the ACNC and are likely to have access to information that would be considered, 'protected Commission information' (defined below).

1.179 Those public servants whose function relate to the work of the ACNC but do not involve working for the ACNC are not intended to be covered under this definition. For example, those public servants who analyse the policy underlining the ACNC and advise the Government would not be considered an ACNC officer under this definition.

Definition of 'protected Commission information'

1.180 **Protected Commission information** as defined in the exposure draft includes all information that was disclosed to, or obtained by an ACNC officer, under, or in relation to, the exposure draft where the information relates to the affairs of an entity other than the ACNC officer and where the information identifies, or is reasonably capable of being used to identify an entity.

1.181 For example, protected Commission information would include information that is not currently in the public domain and may have been provided to the ACNC on a registration or compliance document such as an application form for registration or a duty to notify of major changes submissions.

1.182 Personal information that is provided to the ACNC related to responsible individuals, management, and employees of a registered entity is also protected Commission information and as it pertains to an individual is also subject to the Information Privacy Principles under the Privacy Act.

1.183 Information that is either in the public domain or in no way identifies an entity, or is reasonably capable of being used to identify an entity will not be considered protected Commission information.

1.184 On a related note, information that has been made public through the ACNC Register, will not be considered protected Commission information after it has been displayed on the ACNC website.

General prohibition on unauthorised use or disclosure of protected Commission information

1.185 The secrecy framework in the exposure draft prohibits the unauthorised use or disclosure of protected Commission information by an entity, whether that entity is an ACNC officer or not. This prohibition also extends to those entities that are engaged to provide services relating to the ACNC.

1.186 The use and disclosure of protected Commission information is unauthorised where it is not permitted under the exposure draft.

1.187 The unauthorised use or disclosure of protected Commission information by an entity is an offence and a court can impose upon an individual a penalty of imprisonment of up to two years or 120 penalty units or both.

1.188 The *Crimes Act 1914* also prescribes rules for converting penalties for natural persons into a penalty that applies to a body corporate.

On-disclosure of protected Commission information

1.189 Where protected Commission information is disclosed under an authorised disclosure provision in the exposure draft to another agency or individual, there is a general prohibition on the ‘on-disclosure’ of that information. This means the receiving entity will be unable to disclose or use that information.

1.190 However, on-disclosure including use of the information will be authorised where the on - disclosure is consistent with the purpose or intent for which the information was originally disclosed or where it is allowed under another statute.

1.191 For example, if this information was passed on to law enforcement agency under the understanding that it would be used in a prosecution, and this information was passed on to the Commonwealth Director of Public Prosecutions, it would be an authorised on-disclosure.

1.192 Where an on-disclosure is unauthorised, it constitutes a criminal offence. Similar to the offence for unauthorised disclosure under the exposure draft, the maximum penalty for this offence will be two years imprisonment or 120 penalty units or both.

Authorised disclosures by ACNC officers

1.193 There are certain circumstances where it is necessary for an ACNC officer to disclose protected Commission information to another entity in order for the ACNC to undertake its roles and responsibilities under the exposure draft.

1.194 In these cases, where the disclosure is authorised in the exposure draft, the general prohibition on unauthorised use of protected Commission information is overridden and the ACNC officer may disclose the information to the extent authorised and no more.

1.195 These authorised disclosures include:

- disclosure to the public for the purpose of promoting public trust and confidence in the NFP sector;
- disclosure to an authority of the Commonwealth, a State or a Territory;
- disclosure with consent of the entity;
- disclosure where lawfully available to the public; and
- disclosure to the Advisory Board.

Disclosure to promote public trust and confidence

1.196 A disclosure of protected Commission information is authorised where it meets the following conditions:

- the information disclosed only relates to a particular registered entity; and
- it is reasonably necessary to disclose the information for the purpose of maintaining public trust and confidence in NFP entities; and
- the information disclosed does not include personal information as defined in the Privacy Act.

1.197 The Commissioner, through legislative instrument, will determine and provide guidance on what information is reasonably necessary to disclose in order to maintain public trust and confidence in NFP entities.

1.198 This legislative instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

1.199 Where an ACNC officer makes an authorised disclosure of protected Commission information in this sense, it will involve placing the protected information on the ACNC Register and ACNC website. Following this, the information will be considered in the public domain and will no longer be protected Commission information for the purposes of on-disclosure provisions.

1.200 The type of information that is expected to be disclosed under this authorised disclosure and published on the ACNC Register and ACNC website will be both quantitative and qualitative information on registered entities.

1.201 The quantitative information is likely to include financial reports such as statements of financial performance and statements of financial positions. Whereas the qualitative information is likely to include a description of the purposes, objectives, activities and achievements of registered entities.

1.202 It is also anticipated that the ACNC will utilise this authorised disclosure power to publish warning notices it issues as part of its investigative activities. Warning notices may relate to responsible individuals or registered entities.

1.203 The warning notice will contain information on the breaches of legislation, or information on any misconduct or mismanagement that has occurred in the administration of the registered entity.

Disclosure to an authority of the Commonwealth, a State or a Territory

1.204 A disclosure of protected Commission information will be authorised where it is:

- a disclosure to an authority of the Commonwealth, a State or a Territory; and
- in furtherance of the objects of the exposure draft (i.e. to promote public trust and confidence in NFP entities).

1.205 This authorised disclosure will enable the ACNC to fulfil its role under the exposure draft as a ‘one-stop shop’ regulator for the NFP sector.

1.206 Creating a ‘one-stop shop’ regulator for the sector will centralise the sector’s interaction with the Australian Government, and reduce the

compliance burden and red tape faced by NFP entities that have multiple obligations under different jurisdictions.

1.207 Over the longer-term it is possible that the ACNC will centralise the sector's interaction with not only the Commonwealth but also with State and Territories Governments; centralising regulation as well as reporting functions.

1.208 By authorising ACNC officers to disclose information in accordance with the exposure draft that is required by other government departments and agencies this will also improve the efficiency of national regulation of the NFP sector. A one-stop shop regulator would also produce costs efficiencies as the required information would be provided and collected on the single occasion, instead of on multiple occasions.

1.209 The Commonwealth, State and Territory authorities that are expected to have information disclosed under these provisions will be those that administer laws using registration as a pre-condition to entitlements and those that administer laws that go to maintain and promote trust and confidence in NFP entities.

1.210 For example, the ACNC may provide a 'seamless' application process for entities applying to be a registered entity and applying for an Australian Business Number (ABN). This interaction with the Australian Business Registrar will be authorised under this disclosure provision and will ensure that 'behind the scenes' there is a process for disclosure or relevant information for efficient registration of the ABN and the registered entity.

Disclosure with consent of the entity

1.211 Where a responsible individual or registered entity provides their consent to an ACNC officer in writing, then disclosure of the protected Commission information relating to that responsible individual or registered entity is authorised to the extent that it is consistent with the consent given by the relevant entity.

Disclosure of information lawfully made available to the public

1.212 Where the protected Commission information has been made lawfully available to the public under this exposure draft or any other applicable law, then an ACNC officer may further disclose this information.

1.213 However, this disclosure is not authorised where the protected Commission information was made publicly available in breach of this exposure draft or another applicable law. In that case, disclosure or on-

disclosure of the protected Commission information would remain prohibited unless another authorisation provision applies.

Disclosure to the Advisory Board

1.214 In order to ensure the Advisory Board is able to fulfil its roles and responsibilities under this exposure draft, an ACNC officer may disclose protected Commission information to the Advisory Board to assist them in undertaking their duties under the exposure draft.

Chapter 9

The Commission and the Advisory Board

Outline of chapter

- 1.215 The exposure draft:
- outlines the establishment and functions of the Australian Charities and Not-for-profits Commission (ACNC);
 - outlines the establishment, functions and powers of the Commissioner of the ACNC;
 - sets out the terms and conditions of appointment of the Commissioner, as well as the Commissioner's powers of delegation;
 - establishes a Special Account for the ACNC and the reporting requirements of the ACNC; and
 - outlines the establishment, functions and powers of the Advisory Board, including the membership of the Board.

Context of reform

Operation of current provisions

1.216 Currently, there is no single institution responsible for the regulation of the not-for-profit (NFP) sector.

1.217 In the absence of a single regulator, the Australian Taxation Office (ATO) has become the de facto regulator for the NFP sector at the Commonwealth level through its role of endorsing tax exempt charities, and administering NFP tax concessions. The current law requires charities to be endorsed by the ATO to access tax concessions ear-marked for charities. Hence, the ATO, by default, also is responsible for determining charitable status.

1.218 Endorsement by the ATO requires submitting an application form which requires entities to provide information as to why they are eligible for endorsement, including their governing rules.

1.219 ASIC has a smaller role and currently regulates and registers those NFP entities that are constituted as companies limited by guarantee.

1.220 NFP entities more generally are able to self-assess their access to income tax concessions are therefore, in effect, are not regulated specifically to ensure public monies are used appropriately.

1.221 In addition, much of the current regulation of the NFP sector occurs at the state or territory level, given that many of the structures currently used by NFPs do not fall under Commonwealth laws.

Rationale for major changes

1.222 Following a number of reviews into the issue, and after extensive public consultation with the NFP sector, the Government announced that a centralised approach to regulating NFP entities would streamline the regulation processes, making it easier for the NFP sector to comply.

1.223 In particular, the Government is establishing a new national regulator, the Australian Charities and Not-for-profits Commission (ACNC) from 1 July 2012 to promote public trust and confidence in the NFP sector by administering a new national regulatory framework for the sector. This will promote good governance, accountability and transparency of NFP entities.

1.224 Over time, the ACNC will provide a 'one-stop shop' for regulation and reporting for the sector. It will initially be responsible for regulation of NFPs, including charities and community organisations, at the Commonwealth level. It will provide education and support to the sector, and implement a public information portal.

The Australian Charities and Not-for-profits Commission

1.225 This exposure draft seeks to establish the ACNC.

1.226 The ACNC is a new Commonwealth statutory office which provides a 'one-stop shop' for the support and regulation of the NFP sector.

1.227 The ACNC commences operations from 1 July 2012.

1.228 From 1 July 2012, the ACNC is responsible for determining the legal status of entities seeking charitable, public benevolent institution (PBI), and other NFP benefits on behalf of all Commonwealth agencies.

1.229 In the long term the role of the ACNC is expected to expand to include responsibility for the regulation of all NFP entities which access tax concessions or other Government benefits regardless of their legal form.

1.230 Other responsibilities include implementing a 'report-once, use-often' reporting framework by 1 July 2013; establishing a public information portal by 1 July 2013; and providing education and support to the sector.

1.231 This exposure draft provides that the ACNC is constituted of:

- the Commissioner of the ACNC, and
- the staff supplied to the Commissioner by the Commissioner of Taxation. Although staff are provided by the Commissioner of Taxation, they will be officers of the ACNC and report to the Commissioner of the ACNC.

1.232 The ACNC will form part of the Australian Government but will have independent administration by a statutory office holder, the Commissioner of the ACNC.

1.233 The ACNC has the role of assisting the Commissioner in the performance of his or her functions.

1.234 The ACNC enjoys the same privileges and immunities as the Crown.

The Commissioner

1.235 This exposure draft establishes the position of the Commissioner of the ACNC.

1.236 The Commissioner is to have the general administration of the Bill, and the other powers and functions conferred or imposed on them by this Bill, or any other laws.

1.237 The Commissioner will have the power to do all those things which are necessary or convenient to be done for or in connection with the performance of their functions.

1.238 The Commissioner may have regard to the advice and recommendations of the Advisory Board in carrying out his or her functions and exercising his or her powers.

1.239 However, the Commissioner may disregard the advice or recommendations of the Advisory Board, even if this advice has been provided in response to a request by the Commissioner for such advice.

1.240 The Commissioner may, in his or her discretion, attend Advisory Board meetings.

Terms and conditions of appointment

1.241 The exposure draft sets out the terms and conditions of the Commissioner's appointment.

1.242 The Governor-General is responsible for the appointment of the Commissioner by written instrument.

1.243 The Commissioner is appointed on a full-time basis, for a period not exceeding 5 years. The written instrument of appointment contains the period of appointment.

1.244 The Commissioner will be eligible for re-appointment.

1.245 The exposure draft provides for circumstances when there may need to be an Acting Commissioner. The exposure draft gives the Minister the power to appoint an Acting Commissioner when there is a vacancy in the office, or if the Commissioner is unable to perform the duties of the office. The rules that apply to acting appointments are set out in the *Acts Interpretation Act 1901* (Cth).

1.246 Any acts done under by the Acting Commissioner will be valid, and these acts will not be invalidated merely because there may have been some small or clerical error in their appointment, or because the occasion for the appointment had not arisen, or because the occasion to act had not arisen or had ceased.

1.247 The Remuneration Tribunal will be responsible for determining the remuneration and leave entitlements of the Commissioner. The Minister also has a discretion to grant the Commissioner leave, for example, if unforeseen circumstances arise in the Commissioner's personal life.

1.248 The regulations may prescribe a remuneration amount that is to apply if no determination by the Remuneration Tribunal is in operation. The regulations may also prescribe any allowances owing to the Commissioner.

1.249 The Commissioner will be responsible for disclosing to the Minister, in writing, all interests, pecuniary or otherwise, that the

Commissioner has or acquires which conflict or may conflict with the proper performance of the Commissioner's functions.

1.250 The Commissioner is not allowed to engage in paid employment outside their duties as Commissioner of the ACNC, without the Minister's approval.

1.251 The Minister is responsible for setting terms and conditions of the Commissioner's office (if any) which are not covered by the exposure draft.

1.252 If the Commissioner wishes to resign from their position, this may be done by giving the Governor-General a signed notice of resignation. The resignation will take effect from the day it is received by the Governor-General, unless the notice specifies another day in the future.

1.253 The exposure draft provides for the termination of the appointment of the Commissioner in certain circumstances, including:

- for misbehaviour or incapacity (either physical or mental); or
- if the Commissioner:
 - becomes bankrupt;
 - applies for bankruptcy;
 - compounds with his or her creditors; or
 - makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- if the Commissioner is absent for a certain period of time without a leave of absence; or
- if the Commissioner engages in other paid work without the Minister's approval; or
- if the Commissioner fails to comply with any terms or conditions of employment provided by the Minister in accordance with the exposure draft.

1.254 The Commissioner is able to delegate his or her powers or functions in accordance with this exposure draft. The delegation must be

in writing, and must be to a person holding the position, or performing the duties, of a Senior Executive Service employee working in the ACNC.

1.255 The delegate must exercise their powers in accordance with any written directions provided by the Commissioner.

Staffing and consultants

1.256 The exposure draft provides details of the staffing of the ACNC, and the ability of the ACNC to engage consultants.

Special Account for the ACNC

1.257 A Special Account for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act) is established by the exposure draft. This will be the ACNC Special Account.

1.258 A Special Account is an appropriation mechanism that sets aside amounts within the Consolidated Revenue Fund for expenditure for special purposes.

1.259 The exposure draft provides that the ACNC Special Account may be credited in certain circumstances.

1.260 The Special Account will be used to pay or discharge costs, expenses and other obligations incurred by the Commonwealth in relation to the performance of the Commissioner's functions; to pay for remuneration or allowances to persons in accordance with the Act; or to meet any expenses associated with administering the Special Account.

Reporting

1.261 The Commissioner will be responsible for providing an annual report to the Minister.

1.262 This report must be prepared as soon as practicable after the end of the financial year (1 July to 30 June) for presentation to Parliament.

1.263 The report will provide details on the Commissioner's operations during that year.

1.264 The Annual report must include:

- an evaluation of the ACNC's overall performance during the year;
- the financial statements in accordance with the FMA Act;
- an audit report on the financial statements.

1.265 The provisions about annual reports in the *Acts Interpretation Act 1901* will also apply to the Commissioner's annual report.

The Advisory Board

1.266 The exposure draft establishes the Advisory Board which will advise the Commissioner in relation to his or her functions.

1.267 The Advisory Board consists of at least two, but no more than eight members (other than ex-officio members). There will be one Chair of the Advisory Board, who will have additional functions.

1.268 The members must have expertise relating to charities and NFP entities, and experience and appropriate qualifications in relation to law, taxation or accounting.

1.269 The members will be expected to have specific knowledge of the NFP sector and how the sector operates.

1.270 The Advisory Board's function will be to provide advice and make recommendations to the Commissioner in relation to the Commissioner's functions under this Act.

1.271 Generally the Advisory Board will provide advice and make recommendations to the Commissioner in response to a request for such advice from the Commissioner. However, the Advisory Board is able to provide advice to the Commissioner without any such request.

1.272 The Advisory Board has the power to do anything which is necessary or convenient in connection with performing its function.

1.273 The Commissioner is not bound to act in accordance with any advice or recommendations from the Advisory Board.

1.274 The Minister may provide other terms and conditions, other than those provided for by this Act, which must be obeyed by the Advisory Board members.

Appointment

1.275 The Minister may, by written instrument, appoint a member of the Advisory Board.

1.276 Members of the Advisory Board are appointed on a part-time basis, and must be an ordinary resident in Australia.

1.277 One of the members of the Advisory Board will be appointed by the Minister as the chair of the Advisory Board. Another member will be appointed as the deputy chair.

1.278 The Minister is also able to appoint ex-officio members to the Board. Ex-officio members of the Advisory Board will be appointed on a needs basis, and are expected to be remunerated for their sitting fees only. Ex-officio members may be employees of the Commonwealth, in which case, they will not receive additional remuneration amounts from the Commonwealth.

Remuneration

1.279 The remuneration of the members of the Advisory Board, including the Chair, will be determined by the Remuneration Tribunal.

1.280 If there is no remuneration determination in place, members will be paid in accordance with the remuneration amounts set out in the regulations.

1.281 The regulations may prescribe any allowances that may be payable to the members.

Disclosure by members

1.282 As with the Commissioner, members of the Advisory Board have a duty to provide the Minister with written notice of all interests, pecuniary or otherwise, that the member has which may conflict with the proper performance of the member's functions as Advisory Board member.

1.283 The member must disclose these interests to the Minister as soon as practicable after the member becomes aware of the potential for a conflict of interest.

Resignation and termination

1.284 Members of the Advisory Board may resign from their position on the Board by giving the Minister a signed notice of resignation.

1.285 The Chair and the Deputy Chair are able to resign from their positions of Chair and Deputy Chair respectively, but still be a member on the Advisory Board.

1.286 The resignation takes effect on the day it is received by the Minister, unless otherwise specified for a day in the future.

1.287 The Minister has the discretion and power to terminate a member's appointment at any time.

Meetings

1.288 Under the exposure draft, the Chair of the Advisory Board has additional responsibilities in relation to the convening of meetings.

1.289 The Chair must convene at least four Advisory Board meetings in each financial year, and has the discretion to call additional meetings if these are necessary for the efficient performance of the Advisory Board's function.

1.290 The Advisory Board has discretion as to the way it operates; however, it must comply with any written matters determined by the Commissioner in relation to the operation of the Advisory Board. A determination made by the Commissioner in this regard is not a legislative instrument.

1.291 The Chair must ensure that minutes of the Advisory Board meetings are kept.

1.292 Members of the Advisory Board have a duty to disclose to the other members any direct or indirect financial interests in matters being considered, or about to be considered, at Advisory Board meetings.

1.293 This duty applies to interests which could conflict with the proper performance of the Advisory Board's functions. The interest must be disclosed to the other members as soon as practicable, and recorded in the minutes of the meeting.

1.294 The member with the interest must exclude themselves from the discussion and any subsequent decisions made by the Advisory Board, unless given permission by the Chair to participate.

1.295 If the member with the interest happens to be the Chair of the Advisory Board, then the Commissioner must give permission for the Chair to participate in the discussion and any subsequent decisions relating to that member's interest.

1.296 The Chair of the Advisory Board may invite the Commissioner to attend all or any part of the Advisory Board meeting.

Chapter 10

Miscellaneous

Outline of chapter

- 1.297 The exposure draft:
- outlines the requirements for approved forms for material given to the Commissioner;
 - outlines the address for service rules; and
 - sets out the meaning of core concepts.

Context of reform

1.298 Generally, new Acts set out common rules which govern the operation of administrative matters.

1.299 These rules set out matters such as the manner in which forms must be provided to the Commissioner and the way in which the Commissioner must deliver documents to registered entities and responsible individuals.

1.300 A set of common rules about the manner in which forms must be submitted and documents must be provided helps ensure the integrity and efficiency of giving material to the Commissioner.

1.301 The rules also help provide for administrative efficiency and simplicity in the operation of the Australian Charities and Not-for-profits Commission (ACNC).

1.302 New Acts are also built around a number of core concepts which are set out in detail in later Parts of the Act, but have general application.

Approved forms

1.303 The approved form rules deal with requirements about giving material to the Commissioner.

1.304 The exposure draft provides for the Commissioner to approve the form of certain documents that the ACNC will routinely collect.

1.305 This allows the Commissioner to approve common forms such as returns, notices, applications and statements.

1.306 The rules also allow the Commissioner to determine how information is to be provided to the ACNC.

1.307 The Commissioner may also defer the time within which an approved form is due.

1.308 The exposure draft also sets out appropriate integrity requirements for such forms, including requiring a declaration to be signed by an entity where the form requires.

Address for service

1.309 The address for service provisions in the exposure draft set out the rules for how documents may be served on registered entities (or responsible individuals or liquidators or administrators of registered entities) by the ACNC, this will include documents such as directions, warnings and penalty notices.

1.310 It will be important for registered entities to keep their details up to date with the ACNC in order to ensure they receive all material sent to them.

1.311 Failure to update an address with the ACNC may lead to a registered entity failing to fulfil an important obligation that is required of them.

Core concepts

1.312 The exposure draft uses the concept of 'entity' as a catch all for any individual or body. It will be used in contexts where it is appropriate to refer to such a wide grouping.

1.313 See the explanatory memorandum to the Income Tax Assessment Bill 1996 for a more detailed explanation about the definition of entity.

1.314 Other core concepts include small, medium and large registered entities and responsible individuals which are explained in chapters 3 and 4 respectively.

Chapter 11

Penalties

11.1 [to be drafted]

Chapter 12

Consequential amendments

12.1 [to be drafted]

Chapter 13

Transitional provisions

13.1 [to be drafted]

Chapter 14

Regulation impact statement

14.1 [to be drafted]

