



Australian Government
Australian Taxation Office

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

Input from the Australian Taxation Office

Updated 30 April 2018

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Introduction

The Australian Taxation Office (ATO) welcomes the opportunity to provide input to the Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation.

We would like to make the following key points around the terms of reference to help facilitate deliberations. The Tax Office provides this information in light of our experience of the not-for-profit (NFP) sector and our view on issues for the sector.

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

Extension of the regulatory framework beyond registered charities

The ACNC was established to provide a new regulatory framework for the not-for-profit sector. Currently charities are the only type of not-for-profit entity able to be registered with the ACNC. The not-for-profit sector is large and diverse and provides substantial service to the Australian community. It also receives significant financial support from that community, both directly through donations and indirectly through Australian Government grants and tax concessions.

Consideration could be given to extending the scope of ACNC regulation to other NFP entities. Under current tax law, most NFPs that are not charities can self-assess their access to NFP tax concessions, such as exemption from income tax. There are a number of NFP entities that have a significant turnover that are not required to register with the ACNC or be endorsed by ATO to determine their entitlement to confirm their income tax exempt status. There is little transparency on their activities and operations as these entities don't need to report, other than to meet tax obligations such as pay as you go withholding and GST. An estimate from 2017 Business Activity Statement data illustrates the numbers and annual turnover of larger entities that can self-assess.

Annual GST turnover	Tax Concession Charities	Self-assessed IT exempt
Greater than \$1B	10	Fewer than 5
\$250M - \$1B	50	10
\$100M - \$250M	100	15
\$10M - \$100M	1,750	200
\$1M - \$10M	5,450	1,050
\$250K - \$1M	6,250	2,350
\$1 - \$250K	12,600	5,900
\$0	8,200	3,400
Nil response or not registered	22,500	117,000
TOTAL	57,000	130,000

*Note that figures may not add due to rounding

The current regulation of non-charity NFPs, particularly those entities with a large turnover, seems out of sync with charities in terms of their level of accountability and transparency. We do not seek to place a regulatory burden on small NFPs or build unnecessary bureaucracy. However, ACNC regulation could readily extend to those NFPs that wish to access tax concessions that have a turnover that warrants a higher level of transparency. Adopting the existing ACNC categories for medium and large charities the first stage could require currently self-assessing NFPs with a turnover of \$1M per annum to register with the ACNC and complete an annual information statement (AIS). In the table above there are 1,277 entities in this category (inclusion of donations in turnover would increase this number). In stage two that ACNC regulation could be extended to those NFPs with a turnover of \$250,000 to \$1M per annum (2,350 in the table above).

Government entities

While it is not appropriate for ACNC to 'regulate' government entities, it would provide administrative consistency and convenience for ACNC to gather reporting from the small number of government deductible gift recipients (DGR) that have statutory reporting obligations for their DGRs. For instance all entities on three of the four DGR registers, including government entities, have a reporting requirement.

DGR reforms announced by the Government in December 2017 will require ACNC to maintain the four DGR registers and their reporting requirements from 1 July 2019. Of the around 2,670 entities on these DGR registers, around 70 are government. It is not yet clear how the reporting requirements will be maintained for the government entities.

Similarly, ACNC already gathers statutory reporting from ancillary funds that are registered as a charity with ACNC. As a red tape reduction measure this reporting is gathered on behalf of ATO as an addendum to the ACNC annual information statement. From 1 July 2019 that will extend to all non-government ancillary funds (as they will be automatically registered as a charity). There are around 3,050 ancillary funds of which around 40 are government entities. If ACNC is able to collect the reporting from these government entity DGRs, it will provide a consistent process for all ancillary funds and avoid the need to maintain a separate reporting system for this small number of entities.

Opportunity to further reduce the regulatory burden

Under the *Income Tax Assessment Act 1997 (ITAA 97)*, to remain entitled to access tax concessions, a charity must meet the subdivision 50-50 *Special Conditions*:

- (2) The entity must:
 - (a) comply with all the substantive requirements in its governing rules; and
 - (b) apply its income and assets solely for the purpose for which the entity is established.

Arguably there is regulatory overlap, as charities are also subject to the operation of comparable rules, administered by the ACNC Commissioner, in the *Australian Charities and Not-for-Profits Commission Act 2012 (ACNC Act)*.

The issue of duplication and additional red tape has been raised as an issue at meetings of the Not-for-profit Stewardship Group – a Tax Office external consultative group which includes members that represent a broad spectrum of not-for-profit clients. Sector members of the Stewardship Group continue to advocate for reform or repeal of the 50-50 *Special Conditions* in the *ITAA 97* and have made a submission to the ACNC Review that reflects

what they regard as an acceptable level of reform. The ATO is comfortable with their proposal for moderate legislative change as outlined in point 7 of their submission and we are satisfied that such change would be administrable.

ACNC Submission to the Review Panel

We make the following comments on a number of the recommendations in the ACNC submission to the Review (the relevant ACNC recommendation is boxed):

Protecting charitable assets of a deregistered charity (Recommendation 1)

The Tax office supports the introduction of measures at Commonwealth level to protect accumulated charitable income and assets when a charity's registration is revoked. A charity's constituent documents contain two key clauses in this event - the not-for-profit and winding up clauses. These clauses address the policy intent that monies or assets that have entered the NFP domain should not leave that domain. However, it can be difficult to ensure the entity's assets are distributed appropriately. The protection of charitable assets would be enhanced if the ACNC had a mechanism to prevent a revoked charity, on winding up, from distributing its assets for the benefit or gain of private individuals.

1. Consider whether measures could be introduced at the Commonwealth level to protect a charity's accumulated charitable income and assets after its ACNC registration has been revoked.

Definition of 'not-for-profit' (Recommendation 3)

We support the introduction of a statutory definition of 'not-for-profit' for the purposes of the ACNC Act and the Charities Act. If this was implemented, we would suggest for consistency that, where appropriate, the same meaning be adopted in other Commonwealth statutes.

3. Consider whether a statutory definition of 'not-for-profit' should be introduced for the purposes of the ACNC Act and the Charities Act.

The ACNC Register (Recommendation 5-6)

We note the additional data items proposed for the ACNC register and support the display of information in text or graphic format. We think it would be helpful for the Commissioner to collect and display additional information voluntarily supplied by registered charities.

5. Amend s 40-5 of the ACNC Act to give the Commissioner a discretion to:
(a) extract information from a registered charity's AIS and display it on the face of the Register entry for the charity; and
(b) display information on the Register in text or in a graphical format.
6. Consider amending the ACNC Act to authorise the Commissioner to collect and display on the Register information provided voluntarily by a registered charity for that purpose where the information would assist the public to understand the structure, operations or impact of the registered charity.

Registered charities, other than trusts and BRCs, to have a minimum number of three responsible persons (Recommendation 7)

We agree with the recommendation that a charity's governing body has a minimum number of three responsible persons with at least two responsible persons that reside in Australia. We believe this requirement will add greater scrutiny and accountability for the governing of charities. The lack of responsible persons on its governing body puts a charity at greater risk that funds will be misused as there is not the same scrutiny over decision making. Having at least three responsible persons helps to mitigate this risk.

This is particularly relevant following the announced removal of the public fund requirement for NFPs seeking endorsement as a DGR from 1 July 2019.

7. Consider whether the ACNC Act should be amended to require registered charities, other than trusts and BRCs, to have a minimum number of three responsible persons, and at least two responsible persons who ordinarily reside in Australia, with the Commissioner having the power to exempt entities should there be special circumstances where different governance arrangements are appropriate.

Disclosure (Recommendations 10-15)

We generally support broadening ACNC disclosure as proposed in ACNC submission Recommendations 10 to 15.

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

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

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

13. Amend subdivision 150-C – Authorised Disclosures of the ACNC Act to include a provision that expressly authorises ACNC officers to disclose protected ACNC information in bulk to an Australian government agency if the disclosure is reasonably necessary:

- (a) to enable data-matching, analysis or research for the purpose of assisting that agency or another Australian government agency to carry out its law enforcement or investigatory functions or activities or for the purpose of assisting the ACNC to carry out its functions; or
- (b) to enable the implementation of arrangements between the ACNC and other government agencies for the purpose of reducing regulatory duplication.

14. Amend s 150-30 of the ACNC Act by replacing 'under this Act' with 'in the performance of his or her duties as an ACNC officer'.

15. Amend s 150-50 of the ACNC Act by removing the requirement that the disclosure be for the purposes of the ACNC Act.

