



Senate Economics Legislation Committee

ACNC Repeal: effects on the charitable sector

2 May 2014



Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

2 May 2014

Dear Senators

Thank you for inviting me to make a submission to your inquiry into the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (Repeal Bill).

I am pleased to make this submission so that the experience of the Australian Charities and Not-for-profits Commission (ACNC) over the last 16 months, and the earlier experience of the ACNC Taskforce, can assist the Committee's inquiry into the impacts on Australia's charitable sector of the abolition of the ACNC by the passing of the Repeal Bill.

I acknowledge that many from the sector will speak to the Committee about their experience of the ACNC, consultation with them about the ACNC's abolition and the likely impacts of that course of action for them. Indeed the ACNC model exists today because of their contribution to extensive consultation over more than a decade.

Similarly, the Department of Social Services, the Australian Taxation Office and the Australian Securities and Investments Commission and other government stakeholders are well placed to assist with submissions on broader policy considerations, possible consequential impacts across particular parts of the sector, and taxation and corporations law matters.

This submission is written foremost with the interests of the Australian community and the not-for-profit sector in mind. The economic and social significance of Australia's charitable and broader not-for-profit sector must be recognised. The sector is large, annually contributing billions in to our economy, and it is continuing to grow. It brings benefits to all Australians, making it a crucial part of society worthy of recognition and respect.

A demonstration of respect, and acknowledgment of the sector's maturity, is a tailored regulatory framework to underpin and support the sector's work. This helps to ensure regulatory certainty and high levels of public trust and confidence, which contribute to the heart of the sector's sustainability.

While I am proud of what the ACNC has achieved in its short life, I continue to posit that it is not the ACNC brand which should be the focus of debate, rather what constitutes good charity regulation. As indicated in my meetings with Ministers, their advisers and departmental officials, I am willing to share my experience to inform proposals for models of effective charity regulation.

This submission will demonstrate that the ACNC offers one model of effective charity regulation for Australia.

Sincerely

Susan Pascoe AM
Commissioner, Australian Charities and Not-for-profits Commission

KEY TERMS

Unless indicated otherwise, terms used in this submission have the following meanings:

ACNC	Australian Charities and Not-for-profits Commission
ACNC Act	<i>Australian Charities and Not-for-Profits Commission Act 2012 (Cth) and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth).</i>
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Charities Act	<i>Charities Act 2013 (Cth)</i>
COAG	Council of Australian Governments
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
FATF	Financial Action Task Force, an inter-governmental body formed to develop and promote the implementation of international anti-money laundering and counter-terrorism financing standards.
NSCOA	National Standard Chart of Accounts
NFP, not-for-profit	An organisation with rules that do not allow it to distribute profits or assets to its members, the people who run it or their friends or relatives. The organisation does not carry out activities for the private benefit of its members.
Repeal Bill	<i>Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (Cth)</i>

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EXECUTIVE SUMMARY

Context – importance of good charity regulation

Charities and not-for-profits are an essential part of the fabric of Australian society. They enrich our culture, protect our environment, educate our children, enable us to practice our faith, promote our health and well-being, strengthen our democracy, contribute to good public policy and advocate for our communities.

Australians are rightly passionate about not-for-profits and the contribution they make. Not-for-profits account for nearly 5 per cent of GDP and comprise some 600 000 organisations (about 60 000 of which are charities). The sector is estimated to be growing at around 8 per cent each year, exceeding the mining industry in relative growth terms.

It is critical that such an important sector has regulation that is fit-for-purpose, and that supports (rather than hinders) it to be healthy and sustainable. Effective regulation provides assurance to the public that Australian charities are well-governed and doing good work for the community. This ultimately serves the public interest by underpinning public trust and confidence. High trust helps to promote Australia's high levels of charitable giving and volunteering.

What is being proposed – 2014 Repeal Bill

On 3 December 2012, the Australian Charities and Not-for-profits Commission (**ACNC**) was established to be Australia's first independent national regulator of charities.

On 19 March 2014, the Government introduced a bill to abolish the ACNC and replace it with a 'successor agency' (the Repeal Bill). The Regulatory Impact Statement to the Repeal Bill envisages a return of regulatory functions back to the Australian Taxation Office (**ATO**) and Australian Securities and Investments Commission (**ASIC**). The Repeal Bill is currently before the Senate Economics Legislation Committee 'to thoroughly consider the impacts on Australia's charitable sector of the repeal of the ACNC'.

ACNC submission outline

Key points for the Committee to note are:

- **the pre-ACNC regulatory environment (Part 2)** – after decades of inquiries and submissions, the deficiencies with the regulatory landscape facing charities were well documented. The ACNC was established to address some of these deficiencies
- **return to ATO and ASIC (Part 3)** – a return of regulatory functions back to ATO and ASIC would mean a return to the same regulatory deficiencies, the loss of a specialist regulator and unnecessary transitional costs for charities. It would also mean a significant loss of public transparency and accountability
- **work of the ACNC to date (Part 4)** – in 16 months, the ACNC has made significant progress, setting up Australia's first free, online, national register of charities, a 'report-once use-often' framework to reduce red tape, and a specialist sector-tailored approach. The public and charities would lose this if the ACNC is abolished
- **full implementation of ACNC model (Part 5)** – if allowed to be fully implemented, the ACNC model has the potential for very significant longer term benefits (such as simplifying and streamlining fundraising requirements and reducing duplicative reporting across agencies and jurisdictions). Such opportunities will be lost if the ACNC model is not given time for full implementation
- **the future of effective charity regulation (Part 6)** – just as the ACNC model followed years of extensive inquiry and consideration, any successor model of charity regulation should consider the principles of good charity regulation. The risks and cost of abolishing the ACNC

could be minimised if the successor model retains (i) a public register of charities, (ii) proportionate reporting, and (iii) independent regulatory decision-making.

Deficiencies in the pre-ACNC regulatory environment

Australian charities and other not-for-profits faced complex, onerous and duplicative regulatory and reporting arrangements before the ACNC was established. The deficiencies in the regulatory environment that existed prior to the ACNC were extensively documented and evidenced in at least six major parliamentary and independent inquiries and the subject of extensive sector consultation over the last two decades. Three key policy drivers for the introduction of a specialist national regulator were:

- duplicative, inconsistent and complex regulation – red tape for charities
- fragmented regulatory oversight, with over-regulation for some and inadequate oversight for others – creating a risk of ‘market failure’
- a lack of transparency and a need for ‘consumer’ protection – affecting public trust and confidence.

These problems were the catalyst for the establishment of the ACNC – Australia’s first national charity regulator.

Return to regulation by ATO and ASIC

A return of regulatory functions to the ATO or ASIC means a return to the regulatory deficiencies that used to face charities. If the ATO was the successor agency to the ACNC, there would be a return to ‘de facto regulation’, and a perceived conflict of interest between the functions of determining charitable status and tax revenue collection. If reporting and governance requirements were returned to ASIC, charities would face the re-introduction of more prescriptive obligations, filing and late fees and strict enforcement of penalties.

Being regulated by generalist regulators such as the ATO and ASIC would again see fragmented and patchy oversight, with the loss of specialist sector-specific expertise and support, and a regulatory approach tailored to the needs of charities.

There would be significant costs associated with this proposed policy change. These include working through legislative amendments to 42 Acts, transitional costs (such as transferability of IT systems, loss of staff expertise) and challenges (such as re-integrating data to the ASIC register).

The majority of charities have invested in adjusting to ACNC requirements and may feel their time and money has been wasted if there is a return of functions without discernible benefits.

Work of ACNC to date – what would be lost

The ACNC was established as a key mechanism to address regulatory duplication, fragmentation and a lack of transparency. Its statutory objects mirror these policy drivers, as the ACNC is tasked to support:

- public trust and confidence
- the health and sustainability of charities
- red tape reduction for charities.

The ACNC’s setup has been developed in close and extensive consultation with the sector, including by the ACNC Implementation Taskforce. Key achievements of the ACNC in its first 16 months include:

- **Australia’s first register of charities:** where the public can access free, up-to-date information about a charity’s purpose and activities before they give money or volunteer

- **a framework for reducing red tape:** the mechanism for charities to ‘report-once use-often’ (via the Charity Passport) to be launched in May 2014; harmonised reporting requirements for South Australia and Australian Capital Territory ready to implement; many types of charities (schools, Indigenous corporations, companies limited by guarantee) with a single reporting point; and transitional arrangements (for incorporated associations, co-operatives and charitable fundraising) that avoid the preparation of separate reports
- **a specialist approach:** a specialist regulator with a registration, guidance, advice and regulatory approach tailored to the sector and its stakeholders, delivered by staff who understand the sector and with a remit to support charities.

The impact for charities of undoing this work should not be under-estimated.

Full implementation of ACNC model – what could be lost

Discontinuing the ACNC model not only forgoes the work already done, it means the future benefits that could be achieved would not occur. Perhaps most significantly, the public could lose the promise of a fully populated Charity Register with rich data to support philanthropy and volunteering.

Charities could lose the promise of a fully implemented framework for harmonised and streamlined regulation. This would be achieved through the broad adoption of the ‘report-once use-often’ mechanism (the Charity Passport) by government agencies across all levels of government, as well as harmonisation of reporting requirements to states beyond the jurisdictions that are already agreed.

Finally it should not be forgotten that the ACNC framework can be leveraged further to simplify and reduce red tape. This includes the opportunity for streamlining fundraising reporting (relying on the single reporting point of the Charity Register and shared via the Charity Passport).

Expansion of harmonised fundraising reporting beyond South Australia and the Australian Capital Territory would dramatically reduce compliance costs for charities. Fundraising reform is a top priority for the sector and an area recognised as making the most difference for red tape reduction.

A fully developed charity regulator could also assume other useful roles, such as administering a new specialist legal structure for charities, overseeing standardisation of financial reporting, applying a harmonised charity definition and applying arms-length expertise to emerging and often contentious charity law issues.

Future of effective charity regulation

Given that the ACNC model emerged after decades of inquiries and consultation, any successor model of charity regulation needs to consider and address the regulatory deficiencies that were identified by this work and the ACNC was introduced to fix.

Charity regulation needs to be assessed against established principles of good charity regulation (such as independent decision-making, effectiveness and efficiency, clarity and transparency, certainty, proportionality and consistency).

Based on these principles, the risks and cost of abolishing the ACNC can be minimised if any successor model retains at least three key regulatory functions:

- (i) a public register of charities
- (ii) proportionate reporting
- (iii) independent regulatory decision-making.

Options that would retain these three elements could include adjustments to the current ACNC model or a smaller pared-back ‘registrar of charities’ model.

Drawing on reflections from the recent International Regulators' Forum in Melbourne (April 2014), it is also important to consider international trends in charity regulation.

Australia is a relative late-comer, as most comparable jurisdictions either already have independent charity regulators or are setting them up. Contrary to common perception, the New Zealand charity regulator was not abolished. Rather, it was retained and moved into a line Department (not the revenue agency) as part of a broader machinery of government changes. There were also potential savings by that Department providing back office support – similar to the current ACNC/ ATO relationship. The Charity Commission of England and Wales, while under review for its regulatory performance and leadership, is not under threat in terms of its model of independent charity regulation.

Abolishing Australia's sector regulator would leave a regulatory gap in terms of the international regulation of charities operating across borders. Any new model should be cognisant of the work of the Financial Action Task Force, which places obligations on Australia's regulation of money-laundering and terrorist financing. Australia was assessed as only partially-compliant with requirements in 2005. The next review (August 2014) was expected to be more favourable in relation to the regulation of not-for-profits due to the introduction of the ACNC and its associated Charity Register and reporting of (particularly financial) information.

Final remarks

Australia's not-for-profit sector makes a tremendous contribution to the Australian community, and economy. Such an important sector requires a clear, consistent and proportionate regulatory environment that supports, rather than hinders, charities.

The business sector has enjoyed a specialist regulator applying a nationally consistent reporting and fundraising regime since 2001. The loss of the ACNC model signals the loss of comparable status to the business sector in terms of having a tailored regulatory environment and dedicated regulator.

The Repeal Bill, the subject of the Committee's inquiry, does not contain any information about who will be the 'successor agency' to the ACNC, the arrangements and timing of a transition to this agency, and its role, powers and functions. The successor agency is to be named in a legislative instrument and the other details will be in a second repeal bill (yet to be released).

However, the Regulatory Impact Statement to the Repeal Bill does foreshadow a return to the ATO and ASIC – namely, the pre-ACNC situation, with all of the associated regulatory deficiencies.

Regardless of who is the successor agency or the form of the successor model, the sector has asked for a regulatory framework that meets the principles of good charity regulation.

As a minimum, this would require the model to retain a register of charities, proportionate reporting and an independent decision-maker. This would help ensure that the progress made by the ACNC model (and its fuller potential) is carried forward for the benefit of charities and the public. Retaining these three elements would support the work of charities, ultimately protecting public trust and confidence, and fostering charitable giving and volunteering.

1. BACKGROUND

To understand what is proposed to be abolished, this Part covers a brief outline of the ACNC's purpose, structure and functions.

1.1 Establishment

On 3 December 2012, the Australian Charities and Not-for-profits Commission (**ACNC**), Australia's first independent national charities regulator was established. This followed more than a decade of lobbying by the sector and others, recommendations from six parliamentary and independent inquiries (including two Productivity Commission reports)¹ and extensive consultation.²

1.2 Purpose

Those charities wishing to access Commonwealth charity tax concessions and other benefits must register with the ACNC. Despite its name, the ACNC does not regulate not-for-profits that are not within the legal definition of 'charity'. (At the time of its establishment, the ACNC's coverage was intended to be expanded to all not-for-profits at a future date.)

The charity sector is a central part of civil society. The charities the ACNC regulates are diverse, including social service organisations, health and aged care services, educational institutions, arts initiatives, animal welfare groups, religious groups, philanthropic trusts, and environmental organisations. Not-for-profits accounts for nearly 5 per cent of gross domestic product and comprise some 600 000 organisations (about 60 000 of which are charities). The sector is estimated to be growing at around 8 per cent each year,³ exceeding the mining industry in relative growth terms.⁴

Ultimately, the ACNC's work protects and enhances public confidence in the sector and promotes the public interest in having a healthy, strong and transparent sector.

1.3 Legislative Structure

The ACNC's objects under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (**ACNC Act**) are to:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector through increased accountability and transparency
- support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector
- promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

The ACNC administers the ACNC Act, *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth), and the *Australian Charities and Not-for-profits*

¹ See Appendix A for a list of inquiries and the associated number of submissions.

² For example, through Treasury's 2011 Final Report on the Scoping Study for a NFP Regulator, the work of the ACNC Taskforce (see Australian Charities and Not-for-profits Commission Implementation Taskforce, *Implementation Report*, June 2012, acnctaskforce.treasury.gov.au/content/publications/implementationreport/downloads/ACNC_ir.pdf, accessed 28 April 2014), and two Senate inquiries into its legislation. See Appendix A for a full chronology.

³ Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, Table 3, Overview Page XXIX. The not-for-profit sector's total Gross Value Added (GVA) between the two financial years 1999-2000 and 2006-2007 grew at an annual rate of 7.8%. The Productivity Commission compares the GVA figures, adjusted for inflation, from the Non-Profit Institutions Satellite Accounts prepared by the Australian Bureau of Statistics (ABS) for the years 1999-2000 and 2006-2007.

⁴ See 'Australian System of National Accounts 2012-2013 5204.0, ABS, 'GVA by industry' tables. The GVA of the Mining sector increased from 86 029 to 107 266 in inflation adjusted terms during the seven years between 1999-2000 and 2006-2007, which represents an average annual growth rate of 3.5% over the period. 2006-2007 is the last period in which reliable data for the not-for-profit sector is available – 'Non-Profit Institutions Satellite Account 2006-07', ABS. A Satellite Account for the 2012-2013 financial year is currently being prepared by the ABS, due for release 30 June 2014.

Commission Regulation 2013 (No. 3) (Cth). There are 39 other pieces of legislation relevant to the ACNC's operations which would need to be reviewed if the ACNC is abolished.⁵

To achieve its objects, the ACNC's functions include:

- maintaining a public register of Australian charities, currently numbering more than 60 000
- registering new charities and deregistering those which are no longer eligible
- collecting information on charities, primarily through an Annual Information Statement
- receiving and acting on complaints about registered charities
- monitoring charities for compliance with legal requirements and, if necessary, issuing charities with directions to comply
- driving the reduction of unnecessary or duplicative regulation and reporting (red tape) in the sector, in cooperation with other agencies
- providing advice and guidance to the sector and the public, to enhance the transparency and good governance of the sector.

1.4 Independence

The ACNC Commissioner is an independent statutory office-holder appointed by the Governor-General. The current Commissioner is Susan Pascoe AM (appointed for a 5 year term until 2017).⁶ As an independent regulator, the ACNC must report annually on its performance to Parliament.⁷ The ACNC has a separate budgetary allocation (the ACNC Special Account) for the performance of its functions.

The ACNC takes most of its back office services from the ATO on a fee-for-service basis negotiated under a Memorandum of Understanding.⁸ The structure of the ACNC is a cost-effective way to protect the ACNC's independence of decision-making while maximising the efficient use of existing government resources. The ACNC comes under the Treasury portfolio (in terms of the ACNC Act) but the policy lead for the not-for-profit sector is within the Department of Social Services.⁹

The ACNC is supported by a statutory Advisory Board¹⁰ appointed by the Minister¹¹ for their background and expertise in the sector, charity law, tax and accounting. Its members are drawn from the sector, professional practice and government. The Board is tasked with providing independent advice and support to the Commissioner on strategic and governance issues.

1.5 More information

The ACNC has recently published up-to-date information about its performance and role – see Appendix B.

⁵ See Appendix D for a list of legislation relevant to the ACNC.

⁶ For more information about ACNC leaders see 'Our leaders', acnc.gov.au/ACNC/About_ACNC/Corporate_info/Our_leaders/ACNC/Edu/Leaders.aspx, accessed 28 April 2014.

⁷ ACNC Act, Division 130.

⁸ See the ACNC's MOU with the ATO, acnc.gov.au/ACNC/Pblctns/Pol/MOU/ACNC/Publications/MOU.aspx, accessed 28 April 2014.

⁹ The Treasury administers the ACNC Act and the Charities Act, but only to the extent of its application to taxation and corporations law. The Department of Social Services administers the Charities Act except to the extent that it is administered by Treasury. See the *Administrative Arrangement Order*, www.dpmc.gov.au/parliamentary/index.cfm, accessed 30 April 2014.

¹⁰ ACNC Act, Chapter 6. See *ACNC Advisory Board*, acnc.gov.au/ACNC/About_ACNC/Corporate_info/ACNC_advisory/ACNC/Edu/Advis_Board.aspx, accessed 28 April 2014.

¹¹ The current Advisory Board were appointed by the (then) Assistant Treasurer, The Hon. David Bradbury MP.

2. PRE-ACNC REGULATORY ENVIRONMENT

This Part covers problems with the regulatory landscape which were the catalyst for the ACNC's establishment, as identified by multiple inquiries and after extensive sector consultation.

Key points

- Support for an independent, specialist, national regulator from six major inquiries and 2 000 plus submissions from the sector over the last two decades
- The three main policy drivers for the ACNC:
 - duplicative, inconsistent and complex regulation – red tape
 - fragmented regulatory oversight, with over-regulation for some and inadequate oversight for others – creating a risk of 'market failure'
 - a lack of transparency and a need for 'consumer protection' – affecting public trust and confidence

2.1 Why was the ACNC established?

The 'mischief' the ACNC was introduced to fix is a critical consideration for the Committee. It goes to the core of the Committee's terms of reference, particularly in the absence of details about the 'successor agency' or the form of a successor model.

Despite the economic contribution and growth of Australia's not-for-profit sector, its regulatory framework has not been on a par with that of the business sector.

The business sector has enjoyed a specialist regulator applying a nationally consistent reporting and fundraising regime since 2001.¹² However, for some charities there was little or no transparency and, as a consequence, often little or no public accountability. For others, there was a significant red tape burden – avoidable compliance costs because of duplicative and/or over-regulation and reporting.

The establishment of the ACNC was the first step in providing a specialist, independent national regulator providing tailored advice and support for the whole sector.

The policy drivers behind the establishment of the ACNC have been well explored and documented by six major parliamentary and independent inquiries¹³ over the last two decades, as well as in various academic and sector research pieces.¹⁴ In response to extensive consultation over this period, the sector has put substantial time and effort (including more than 2 000 submissions) into voicing and documenting its concerns about the fundamental deficiencies in its regulatory framework.¹⁵

¹² The 2001 Corporations Act provided a truly national system of regulation as a result of the states referring some powers in relation to companies to the Commonwealth. Prior to 2001, the regime for the business sector was a co-operative scheme. While the pre-2001 framework had shortcomings, it was still a vastly more nationally consistent regime than charities enjoy even with the ACNC.

¹³ See Appendix A for a chronology of previous inquiries.

¹⁴ Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-for-Profit Regulation*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2004; National Roundtable of Nonprofit Organisations, *The assessment of charitable status in Australia, Current practice and recommendations for improvement*, 2007. See also related reports from the Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, www.qut.edu.au/business/about/research-centres/australian-centre-for-philanthropy-and-nonprofit-studies, accessed 30 April 2014.

¹⁵ See Appendix A.

In shaping the ACNC, the ACNC Implementation Taskforce undertook extensive consultation with all stakeholders, including:

- round table forums with more than 50 representatives from government, the sector and academia
- individual meetings with key stakeholders from government, the sector, overseas regulators and members of Parliament
- numerous speaking engagements
- community consultations in nine cities (17 separate sessions)
- receiving 117 written submissions.¹⁶

Core policy drivers

There were three core policy drivers behind the establishment of the ACNC:

- a. duplicative, inconsistent and complex regulation – red tape and regulation that was not ‘fit for purpose’
- b. fragmented and inadequate regulatory oversight
- c. lack of public transparency – need for ‘consumer’ protection.

To properly explain the impact on the sector that could arise from the abolition of the ACNC (that is, a return to the pre-ACNC environment), each of these policy drivers are detailed below.

2.2 Duplicative, inconsistent and complex regulation – red tape

Prior to the ACNC and the Charities Act, there were more than 178 pieces of Commonwealth, State or Territory legislation that involved 19 separate agencies regularly determining the charitable purpose or charitable status. At the Commonwealth level there were 15 definitions of ‘charity’ – with the establishment of the ACNC, these have been reduced to a single definition of charity being determined by a single regulator.

To access taxation or other concessions, charities had to prove their status multiple times and according to varying definitions. Unsurprisingly, frustration about this issue has been raised consistently in submissions by the sector over decades.¹⁷

For fundraising, a charity wishing to fundraise across Australia did (and, unfortunately, still does) have to apply for separate fundraising licences with duplicative and very different reporting obligations:

“It [Caritas Australia] needs eight fundraising certificates for eight different jurisdictions, all of which have different rules; none of them work in harmony. And since 1995, with the Industry Commission report and numbers of inquiries, the Productivity Commission, Senate inquiries, it is a no brainer that we need to reduce all of this duplication, have the one-stop shop, and do it well. And have a regulator that understands charities as well as understanding taxation” Father Brian Lucas, Australian Catholic Bishops Conference¹⁸

Because of these limitations, fundraising using the internet and other digital media remains largely unregulated despite exponential growth in these activities.

¹⁶ For full details see Appendices B and C in the ACNC Implementation Taskforce’s *Implementation Report* June 2012.

¹⁷ In its 2010 report, the Productivity Commission said, “These views echo the findings of previous and contemporary reviews... and research.”, Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, 2010 p.115.

¹⁸ Interview with Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, with Philip Clark, 666 ABC Canberra, 16 April 2014.

Taken together, this duplication, inconsistency and complexity did not provide a ‘fit for purpose’ regime. Instead it hindered the contribution of the sector, meaning less resources were available for providing vital services:

“the result [of the previous regulatory framework] is an operating environment that is highly confusing and inequitable and which stymies non profit organisations” Australian Council for Social Services¹⁹

2.3 Fragmented and inadequate regulatory oversight

2.3.1 Patchy regulatory oversight

The mix of sector regulators (from incorporating to tax to Attorneys-General) was uncoordinated, providing over-regulation for some and, at the other extreme, leaving serious gaps for others:

“NFPs are increasingly operating across state boundaries. For these NFPs, the inconsistencies between similar legal forms and the cost of complying with differing legislation are a major source of concern... Incorporated entities operating across state borders had an inappropriately high regulatory burden, whereas other entities such as unincorporated associations had almost no regulatory oversight” Australian Productivity Commission²⁰

At the Commonwealth level, regulation was shared between generalist regulators that covered specific aspects: the ATO for tax concessions and ASIC for charitable companies. There were gaps where some groups (quite legally) were not ‘on the radar’ – for example, unincorporated charities that self-assessed for taxation purposes. Without basic reporting, the size and scope of these organisations, or the nature of their charitable activities was unknown.

The oversight of charitable trusts, at common law, rests with state Attorneys-General. However, this role is not part of the day-to-day work of an Attorney-General and, given many charitable trusts are established by a will without a specific beneficiary,²¹ there is often no advocate to urge the Attorney to exercise those powers.

In 1989 the Victorian Legislative Council report on the law relating to charitable trusts, noted:

*“... there are potential problems with the Attorney General acting as protector of charities due to a lack of resources and an identifiable officer or point of contact”*²²

In 1993, Prof Myles McGregor-Lowndes observed:

*“There is evidence to indicate that...supervision of the Attorney General is often non-existent and although often recommended, there are no administrative agencies whose prime task is to regulate charities”*²³

There appears to be little evidence that the situation of Attorneys-General supervision of charities has changed since these observations.

This is similar to the experience in other countries²⁴ where, although the Attorney-General may retain the formal role as the protector of charities, the work is, in practice, part of the role of the charity regulator.

¹⁹ Australian Council of Social Services, *Submission to the Senate Standing Committee on Economics Inquiry into the disclosure regimes for charities and not-for-profit organisations*, 2008, p.2.

²⁰ Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, 2010, p. 128

²¹ Rather wills often describe a class of beneficiaries such as ‘those charities working for the relief of poverty in Victoria’

²² Victorian Legal and Constitutional Committee, *Report on the Law Relating to Charitable Trust*, 34th Report to Victorian Legislative Council, May 1989.

²³ McGregor-Lowndes M., *Inquiries, Empirical Research and Regulatory Failure*, Working Paper No. 31, 26 October 1993, p. 35, eprints.qut.edu.au/53168/1/31_McGregor.pdf, accessed 30 April 2014.

²⁴ For example, the regulators of England and Wales, Scotland and New Zealand.

2.3.2 Gap in international regulation

Australia is a founding member of the global Financial Action Task Force (FATF)²⁵ which has developed and promoted the implementation of international anti-money laundering and counter terrorism financing standards. FATF have recommended oversight and transparency of not-for-profits in order to minimise the risk of them being misused to generate, or be conduits for, resources intended to finance terrorist activity.²⁶ In its last review (2005), FATF assessed Australia as only partially compliant.

The creation of the ACNC – specifically the ACNC Register collecting annual (especially financial) information and the ACNC’s compliance function – assists with Australia’s compliance with FATF’s recommendations. The ACNC is contributing to the Government’s current statutory review of Australia’s standards regime.²⁷ A formal international peer review of Australia’s level of compliance with FATF’s recommendations will be conducted in August 2014.²⁸

2.3.3 Need for a specialist regulator

Those involved in running charities reported mixed experiences with their Commonwealth, state and territory regulators, largely because they are often under resourced and not specialist services.²⁹ All are part of broader bodies, with a range of disparate and/or unrelated regulatory functions (for example, racing and gaming, tenancy, and motor car traders).³⁰ None of these regulators maintain a free public register of charities.³¹ Often access to more than the name and date of registration of the organisation involves paying a fee (for example, to look at the organisation’s constitution).³²

Core concerns about Commonwealth regulators identified in previous inquiries are discussed below.

a. ATO as de facto regulator

In the absence of a sector regulator the ATO became the ‘de facto regulator’. Many in the sector held the view that the ATO had at least a potential conflict of interest between its revenue collection role and its regulatory role to determine charitable status.³³

The Treasury made the following comment in its submission to the House of Representatives Standing Committee on Economics July 2012:

“The draft legislation also expressly provides that the ACNC officers act independently of the ATO, for example, when making registration decisions. This structural separation will help to address any perceived conflicts of interest that currently exist with the ATO’s revenue collection role as the default NFP regulator”³⁴

²⁵ See www.fatf-gafi.org, accessed 29 April 2014.

²⁶ Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations*, 16 February 2012, www.fatf-gafi.org, accessed 29 April 2014.

²⁷ See *Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006*, <http://www.ag.gov.au/Consultations/Pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx>, accessed 30 April 2014.

Submissions for the public consultation closed 28 March 2014.

²⁸ With the final report to FATF members due to be presented in February 2015.

²⁹ Across Australia, there were 16.95 equivalent full time staff directly engaged in administering fundraising legislation at the end of 2010-11. This is an average of 0.6 full time staff per 500 registrations in Australia. A total of 204 complaints were received by regulators in 2010-11. During the four years since 2007-08 there were 703 complaints. A total of 10 prosecutions were reported across Australian jurisdictions in 2011. From 2007-08 to 2010-11 the total number was 47. See the fact sheet *Registered Fundraising Organisations*, Australian Centre for Philanthropy and Non-profit Studies, 2012, <https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers>, accessed 30 April 2014.

³⁰ For example, NSW Fair Trading also regulates tenancies, property agents and home building licensing, and Consumer Affairs Victoria regulates owners corporations, retirement villages and motor car traders.

³¹ South Australia have a list of charities with licences for charitable collections for that state: http://www.charities.sa.gov.au/default.asp?action=charities_list

³² By contrast, approximately 22 000 governing documents (constitutions, rules, trust deeds etc.) can be viewed free online at acnc.gov.au/findcharity, accessed 23 April 2014.

³³ *Explanatory Memorandum to Australian Charities and Not-for-Profits Commission Bill 2012 and Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012*, ‘Regulatory Impact Statement: establishing a regulator for the not-for-profit sector’, Chapter 16, pp. 283-299.

³⁴ Australian Treasury, *Submission to House of Representatives Standing Committee on Economics: Inquiry into ACNC draft legislation. Submission*, July 2012, p. 2.

The ATO itself called for a separate body to determine charitable status in its submission to the 2001 Charity Definition Inquiry:

*“It is also our view that administration would be better served by a single, **independent** [emphasis added] common point of decision making on definitions leading to conclusions about whether organisations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example”* Australian Taxation Office³⁵

The final report of the Charity Definition Inquiry stated that the determination of charitable status should be separate and independent from taxation administration.³⁶

The sector was also frustrated that the ATO did not actively support organisations seeking charitable status. This occurred because it is outside the ATO’s role which is limited to administering tax law. It did not have legal mandate to support or educate on issues such as good governance.

b. ASIC as corporate regulator

Charities represent a very small percentage of companies (about 6 000 out of 2 million plus ‘for profit’ businesses³⁷), therefore it is reasonable that ASIC did not provide an approach that was tailored to sector needs.³⁸ While it efficiently assisted with the formal steps associated with incorporation and winding up, it did not have a mandate or the expertise to understand and monitor if a company was acting in accordance with its particular charitable purposes.³⁹ The overwhelming majority of ASIC-regulated bodies do not have any specified ‘purposes’ (objects),⁴⁰ let alone being required to adhere to purposes that entitle them to be a particular charity type such as ‘harm prevention’ or ‘public benevolent institution’.

The 2008 Senate Economics Committee Inquiry into Disclosure Regimes for Charitable and Not-for-profit Organisations noted that ASIC’s role is:

*“in the regulation of the business sector, whose objectives and aims are vastly removed from those of Not-For-Profit Organisations”*⁴¹

Sector surveys reflected concern about ASIC’s ability to understand their needs:

“...there is dissatisfaction with ASIC’s performance as a regulator of NFP companies. For example, 54% of respondents believe it is inaccessible to non-business people and 70% of respondents believe that the Corporations Act and the way it is implemented by ASIC is more appropriate to ‘for-profit’ than NFP companies. In view of these (and other) findings, it appears that dissatisfaction with ASIC derives principally from the fact that ASIC is not a specialist NFP regulator” Woodward & Marshall⁴²

³⁵ ATO, *Submission to the Inquiry into the Definition of Charities and related Organisations*, 2001, pp.2-3, www.cdi.gov.au/submissions/298-ATO.doc, accessed 29 April 2014.

³⁶ “As a matter of principle, the Committee believes that the charitable status of an entity should stand independently of the taxation concessions that may attach to that status. We therefore favour the establishment of an independent body to be responsible for determining the charitable status of entities.” (Committee for the Inquiry into the Definition of Charities and Related Organisations, *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2001, p. 290.)

³⁷ As at March 2014, there were 2.08 million companies registered in Australia (www ASIC.gov.au/ASIC/ASIC.nsf/byheadline/2014-company-registration-statistics?openDocument#total, accessed 29 April 2014).

³⁸ For example, it automatically issued penalties to all charitable companies that were late in filing their annual information.

³⁹ ASIC would have been concerned about fraud or breach of directors duties, however these are different to the concerns that arise in relation to charitable purposes.

⁴⁰ Under s 124 of the Corporations Act, a company has the legal capacity and powers of an individual. That is, they are not legally required to have objects (purposes). This is distinct from mission-driven charitable companies that ASIC also regulates.

⁴¹ Senate Standing Committee on Economics, *Disclosure regime for charities and not-for-profit organisations*, 2008, p. 45, www.aph.gov.au/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/charities_08/report/report_pdf.ashx, accessed 23 April 2014.

⁴² Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-for-Profit Regulation*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2004. There were 1 665 responses to the survey that the paper reports on.

This concern has been confirmed in submissions from the sector, for example:

“[ASIC is] *unlikely to ever give the attention to the not-for-profit sector that it deserves and warrants as it would only ever be a subset of its main game*” Australian Red Cross⁴³

The case of Bread Research Institute Australia⁴⁴ illustrates the challenges of generalist regulation of the charity sector:

Bread Research Institute was a charitable company limited by guarantee regulated by ASIC. In February 2011 it changed its structure to a private company for the benefit of its three remaining directors. This change simply required submitting an ASIC form. The three directors then distributed the assets between themselves. These assets have been reported as being in excess of \$50 million.⁴⁵

This would have been prevented by the ACNC. The charity would have had to notify the ACNC of any change to its constitution and apply to be removed from the Register. The ACNC would have refused to do so unless its assets were applied to other charitable purposes

2.3.4 Desire to avoid damage to the reputation of the sector – ‘market failure’

Fragmented and inadequate regulatory oversight has led some to characterise the pre-ACNC regulatory environment as risking ‘market failure’ for the not-for-profit sector.⁴⁶ For example, while public companies have shareholders that actively monitor company performance, not-for-profits operate under very different governance structures, often working for vulnerable beneficiaries who may not have a strong voice. Without its own fit-for-purpose regulator like the business sector has, it is difficult to see how the sector could be supported by an effective regulatory framework, particularly when issues of governance or public crises of confidence arise.

In the global context, the experience from overseas jurisdictions supports this concern. Media attention on ‘sham’ charities or other ‘scandals’ was the catalyst for establishing specialist regulators in Singapore,⁴⁷ Scotland,⁴⁸ New Zealand,⁴⁹ and most recently Ireland.⁵⁰ Fortunately, this was not the case with the establishment of the ACNC, although the Bread Research Institute case (see Part 2.3.3) illustrates the present danger.

The consequences of market failure in the context of the sector are serious – for charities their most significant asset is often their reputation (brand). The sector relies heavily on (discretionary) public donations of time and money. The harm to public trust and confidence should there be a market failure would have significant impacts on philanthropic giving and volunteering.

⁴³ Raper M., Director of Services and International Operations, Australian Red Cross, at Senate Standing Committee on Economics, Reference: Disclosure regimes for charities and not-for-profit organisations, *Hansard*, 30 October 2008, pp. 49-50.

⁴⁴ This matter is currently before the Supreme Court of New South Wales, *Grain Technology Australia Limited v Rosewood Research Pty Ltd*, NSWSC Equity Division, case number 201300152562.

⁴⁵ Grigg A. and Chenoweth N., ‘Easy dough from non-profit to \$50m’, *Australian Financial Review*, www.afr.com/p/national/easy_dough_from_non_profit_6yW4Fy6WGxmlhYeOpppNgQ, accessed 23 April 2014.

⁴⁶ Drum P. (Head of Business and Investment Policies, CPA Australia), CPA Not-For-Profit Conference, 17 March 2014, Perth.

⁴⁷ See ‘National Kidney Foundation financial scandal’, *Singapore Infopedia*, 2005 eresources.nlb.gov.sg/infopedia/articles/SIP_2013-07-01_120748.html, accessed 30 April 2014.

⁴⁸ Chief Executive Office of the Scottish Charity Regulator, David Robb, said at the International Charity Regulators Conference: “We had some high profile scandals where significant amounts were misappropriated. The Scottish Parliament was persuaded to act.”, ‘International Praise for Aus Charity Regulator’, *Pro Bono Australia*, 10 April 2014, www.probonoaustralia.com.au/news/2014/04/international-praise-aus-charity-regulator, accessed 29 April 2014.

⁴⁹ See for example Tizard J., *Address to NZ Federation of Voluntary Welfare Organisations*, Wellington, 8 September 2004, www.beehive.govt.nz/speech/address-nz-federation-voluntary-welfare-organisations-wgtn, accessed 30 April 2014.

⁵⁰ See for example Sheehan, M., ‘Wallets put away as charities’ reputations in tatters’, *Independent*, 27 April 2014, www.independent.ie/opinion/analysis/wallets-put-away-as-charities-reputations-in-tatters-30221270.html, accessed 30 April 2014.

2.4 Lack of public transparency – need for ‘consumer protection’

Before the ACNC Register, potential donors and volunteers, did not had access to a free, up-to-date and trusted source of data about a charity’s status, purposes, activities, beneficiaries or governance arrangements.

The 2008 Senate Economics Committee Inquiry was sparked by an article in ‘Choice’ magazine raising public concern about the lack of information on how donations are used. The article found that donors overwhelmingly wanted information about the use of their donated dollar, yet the availability of such information varied widely.⁵¹ The desire for this information was affirmed in research commissioned by the ACNC in 2013.⁵² The Productivity Commission Report also found that increased transparency and public scrutiny of not-for-profit organisations was warranted to maintain public trust in the sector.

The lack of access to information has been raised as a concern by some in the sector:

“[reference to abolition of the ACNC] is one other serious assault on consumer protections ...it’s essential for donors to have complete confidence that the charities they are donating to are clean, well governed and operated on a financially sound basis” Taxpayers Association Inc⁵³

The need for a public register of charities to support public trust is in line with standards published by the International Center for Not-for-Profit Law which argues a ‘public register of civic organisations is necessary to protect citizens’.⁵⁴ Australia’s only partial compliance with the FATF requirements⁵⁵ was, to a significant degree, because of the absence of a up-to-date public register and the collection of annual (especially financial) information.

2.5 Recommended model to address identified regulatory shortcomings

In the face of these regulatory deficiencies and years of inquiries with thousands of submissions from the sector, the Productivity Commission in its major 2010 Research Report outlined what an effective regulatory regime would look like:

“NFPs’ compliance costs are minimised when they have to face a single clear set of requirements — whether in regard to registration, tax endorsement or fundraising — with common reporting standards and requirements, and where one report satisfies most, if not all, obligations. The public benefits when it can easily access information on an NFP from a trustworthy source, as do philanthropists and government agencies”

Australian Productivity Commission⁵⁶

To address regulatory duplication, the Productivity Commission recommended a ‘national one-stop shop’ to consolidate Commonwealth regulatory oversight and tax endorsement. A national regulator administering a public register was found to be key to achieving greater transparency, with appropriate guidance provided on governance matters.⁵⁷ The ACNC was born out of these recommendations.

⁵¹ Senate Standing Committee on Economics, *Disclosure regimes for charities and not-for-profit organisations*, December 2008, p. 6.

⁵² See ACNC-commissioned research to examine public trust and confidence in Australian charities, *Public trust and confidence in Australian charities*, 2013, acnc.gov.au/ACNC/Pblctns/Rpts/PublicTrust/ACNC/Publications/Reports/Trust_con.aspx, accessed 29 April 2014.

⁵³ See Taxpayers Australia Inc, *Media Release: Charity begins in parliament*, 25 March 2014, www.taxpayer.com.au/NewsDetail/28084/Charity_begins_in_parliament, accessed 29 April 2014.

⁵⁴ Including requiring disclosure of “the way funds received from public donations are spent” (Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, Sections 3.5 and 7B).

⁵⁵ See Financial Action Task Force, www.fatf-qafi.org, accessed 30 April 2014.

⁵⁶ Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, 2010, p. 115.

⁵⁷ Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, 2010, p. XLIII.

3. RETURN TO ATO AND ASIC

Drawing on the regulatory deficiencies identified in the pre-ACNC regime (Part 2), this Part covers the consequences of a return of regulatory functions to the ATO and ASIC.

Key points

- **Significant costs with return of functions, including amending 42 Acts**
- **Sector-specific expertise and support, tailored regulatory approach, and public register of charities will be lost in return to generalist regulators**
- **ATO as de-facto regulator raises again the perceived conflict of interest between its tax collection and charity determination roles**
- **ASIC regulation of charitable companies would see the re-introduction of more prescriptive requirements, filing fees and penalties**
- **A return to ATO and ASIC may be seen by charities as time and money wasted, having just adjusted to the ACNC environment**

The Regulatory Impact Statement to the Repeal Bill confirms the Government's intent to return regulatory functions to the ATO and ASIC.⁵⁸ Such a step would fail to address any of the regulatory deficiencies outlined in Part 2. It is, at least in part, for this reason that a 2013 survey of NFPs⁵⁹ found only 6% of 1 500 respondents supported a return to regulation by the ATO.

The overall context is important. The sector is already experiencing reform fatigue, especially as the proposed return of functions to the ACNC is only part of the current raft of changes; others include the National Disability Insurance Scheme, revised privacy laws, new special conditions for tax exemptions, new tax provisions for operating outside Australia, proposed measures for unrelated business income, and changes associated with a change of government (new departments with new funding and policy directions).

There will be costs (time and money) with a change back to the ATO and ASIC. Even from a legislative perspective, returning functions will require careful legislative amendments to 42 Acts.⁶⁰ As leading charity law academics and practitioners have indicated,⁶¹ it is not as simple as passing legislation that effectively says 'imagine this never happened'.

Over the last two years there has been an effort by charities and peak bodies to embrace the ACNC regulatory framework.⁶² The success of these efforts is beginning to show in high compliance rates for the first reporting required by the ACNC.⁶³ Most individual charities are likely to regard these foreshadowed changes as more, not less, 'red tape'. From their perspective, precious time and

⁵⁸ *Explanatory Memorandum to the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014*, Regulatory Impact Statement, p. 3.

⁵⁹ 'Red Tape & Compliance Key NFP Issues - Sector Survey Results', *Pro Bono Australia*, 15 August 2013, <http://www.probonoaustralia.com.au/news/2013/08/red-tape-compliance-key-nfp-issues-sector-survey-results>, accessed 30 April 2014.

⁶⁰ See Appendix D.

⁶¹ O'Connell A and Harding M., 'Academics Warn of Unintended Consequences of NFP Reform', *Pro Bono Australia*, 6 March 2014, <http://www.probonoaustralia.com.au/news/2014/03/academics-warn-unintended-consequences-nfp-reform>, accessed 30 April 2014.

⁶² In a survey conducted between March and June 2013, 51% of respondents were clear about the ACNC's role and how they would be affected (Australian Council of Social Services, *Australian Community Sector Survey 2013*, July 2013, www.acoss.org.au/images/uploads/Australian_Community_Sector_Survey_2013_ACOSS.pdf, accessed 29 April 2014). Given that the survey was conducted just three months after the ACNC was established, this is a strong result.

⁶³ Based on the almost 26 400 Annual Information Statements submitted as at 30 April 2014 out of an estimated 30 000 that are required to submit by now, namely those charities with a financial year reporting period.

money will have been wasted because the government has reverted back to the previous model, just when they have made changes to meet ACNC requirements. For example, because the ACNC Act made consequential amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**), some of the more rigid requirements about how meetings run no longer apply to ACNC registered charities. Some charities have updated their constitutions to provide for different meeting procedures that better meet their needs, yet these provisions will be invalid if the ACNC is abolished and ASIC requirements return.⁶⁴ All this causes additional cost and uncertainty.

Returning determination of charitable status to the ATO would run counter to the continued international trend of setting up new charity regulators as bodies separate to revenue collection agencies (see Part 6.6). If the ACNC Charity Register is not maintained (including with ongoing reporting obligations and the backing of regulatory powers) this would also be counter to the recommendations of FATF (see Part 2.3.2).

3.1 Return to ATO

Concerns with the ATO as the de-facto regulator would re-emerge with the abolition of the ACNC, namely:

- **perceived conflict of interest** between the ATO's revenue collection role and its regulatory role to determine charitable status
- **non-specialist regulator** – while there is little doubt about the ATO's effectiveness as a revenue collection agency, it has by definition a tax rather than a charity focus, especially as charities are a tiny fraction of its core work
- **regulatory approach not tailored to the sector** – instead of broad outcome-based objectives like monitoring public trust and confidence, sustaining the sector or reducing red tape, the ATO's performance must be driven by tax compliance and preventing 'tax leakage'.

There are other, broader implications for the sector, including whether the ATO would continue the ATO-ACNC service standards and allow online registration applications and notifications.⁶⁵ There may also be a loss of consistency in decision-making, enhanced by the ACNC's integrated, single site model. The following additional issues are worth considering:

- **little saving as funding follows role** – determination of charitable status is a necessary pre-condition to accessing charity tax concessions and other Commonwealth benefits and must continue even if the ACNC is abolished. Funding is, therefore, unlikely to be saved by a reduction in staff (and other costs) associated with determining charitable status, unless the current service and quality assurance standards are lowered
- **IT incompatibility** – the ACNC IT system, including the ACNC Register and Charity Portal have been purpose built and involved consultation and user testing with the sector (as provided for in specific start-up budget allocations). The very high online take-up is evidence of the usability of these systems. Given the explicit intention to ensure regulatory independence, these systems have not been built to interface with more complex and larger ATO systems (designed for millions of taxpayer records and a workforce of 22 000 plus). It is unclear how much money and time would be involved in either integrating them into the ATO systems, or for the ATO to run them as a stand-alone system
- **delivery of a public-facing register** – the Regulatory Impact Statement on the Repeal Bill does not state whether the ACNC Register will continue and if the ATO will assume responsibility. It may be that this issue has not yet been resolved and will be clarified in the foreshadowed Repeal Bill No. 2. If it does, this is highly likely to require a change to the ATO's

⁶⁴ "For example, if directors abolished their annual general meetings (AGMs) when the ACNC regime's governance standards came in, they will need to start holding AGMs again if the ACNC is indeed abolished... This may involve some pre-planning" (Visevic V. cited in Australian Institute of Company Directors, 'Moves afoot to save ACNC from going up in smoke', *The Boardroom Report*, Vol. 12, Iss. 6, 2 April 2014, www.companydirectors.com.au/Director-Resource-Centre/Publications/The-Boardroom-Report, accessed 29 April 2014.)

⁶⁵ 98.5% of all charity applications to the ACNC are made online. Over 99% of individual charities submitting their Annual Information Statements have done so online.

legislative and operational framework (including IT) and a shift in focus from a 'taxpayer privacy' perspective to a 'public disclosure and confidence'

- **loss of expertise** – there will be transitional costs associated with any change management processes for ACNC staff. Staff were recruited for their technical expertise and knowledge of the sector. Significant resources have been expended in training to understand sector-specific issues, for accurate and consistent decision making, and responsive service delivery. As a consequence the service that the ACNC provides is of high quality, evidenced by customer satisfaction surveys. Because of uncertainty about the future of the ACNC, the staff attrition rate is likely to significantly increase; especially if the Repeal Bill is passed but details of the successor agency (and regulatory model) are unclear. Loss of intellectual capital is difficult to measure.

3.2 Return to ASIC

Charities incorporated as companies will face:

- **the reintroduction of filing fees** – there are no fees for filing with the ACNC, and ASIC strictly enforces fees for all late lodgments⁶⁶
- **more prescriptive meeting requirements** – these may not be suitable for all charities, for example, mandatory requirements about how annual meetings are convened⁶⁷
- **transitional issues while the ASIC register is updated** – since the ACNC's establishment, ASIC has not updated the records of charities registered with the ACNC on its companies register. Access to much data that is currently free on the ACNC Register (for example, the charity's constitution) will go back to only being accessible for a fee
- **privatisation of ASIC register** – the current proposal to privatise the ASIC's corporate register highlights the risk of increases in fees.⁶⁸ This is clearly problematic for a charity register that is premised on free access to foster public trust and confidence in charities
- **loss of specialist regulator support and tailored regulatory approach** – ASIC is a business regulator. It was never established to be a regulator of charities and, therefore, does not have the same expertise or role in developing resources to support charities incorporated (or wanting to incorporate) as companies.⁶⁹

⁶⁶ See *Fees for commonly lodged documents*, www.asic.gov.au/fees, accessed 29 April 2014.

⁶⁷ By contrast, there is more flexibility in the ACNC's government standards e.g. see *Governance Standard 2: Accountability to members*, acnc.gov.au/ACNC/Manage/Ongoing_Obs/Governance/GovStds_2/ACNC/Edu/GovStandard_2.aspx, accessed 29 April 2014.

⁶⁸ See Maher, S., 'ASIC assets sized up for \$1bn sell-off', *The Australian*, 15 April 2014, www.theaustralian.com.au/national-affairs/asic-assets-sized-up-for-1bn-selloff/story-fn59niix-1226884389870#mm-premium, accessed 29 April 2014.

⁶⁹ By contrast, as part of the ACNC's direct interest in developing resources to help those involved in setting up and running charities, it is developing a template constitution for charitable companies limited by guarantee

4. WORK OF THE ACNC TO DATE

This Part explains the work of the ACNC to date and, therefore, what charities and the Australian community will risk losing if the Repeal Bill is passed.

Key points

- For the first time in Australia, the ACNC Register provides the public with access to free, up-to-date information about a charity's purpose and activities before they give money or volunteer
- As part of its progress in reducing red tape for charities:
 - the Charity Passport launching May 2014, allowing for information 'reported once' to the ACNC to be 'used often' by others
 - single reporting point for certain charities (companies limited by guarantee Indigenous corporations, schools)
 - ACNC's Annual Information Statement would meet South Australia and Australian Capital Territory reporting requirements (harmonised model)
 - transitional arrangements granted by the ACNC Commissioner
- Positive sector feedback to tailored registration process, guidance and advice shows benefits of a specialist ACNC model

In its first 16 months, the ACNC has demonstrated the benefits of setting up Australia's first national register of charities, establishing a 'report-once use-often' framework to reduce red tape, taking a sector-tailored approach. These are discussed in more detail below.

4.1 National Charity Register – supporting public trust and confidence

While the ATO previously 'endorsed' charities to be tax exempt, these charities were not required to provide regular returns to the ATO. Australian governments and the public did not have basic, up-to-date, information about charities. Charities had to provide the same information to different government agencies as there was no single repository of core information.

In July 2013, the enhanced ACNC Register (including a version for mobile devices) was launched as Australia's first national online database of registered charities. The Register has increased transparency and accountability, while still preserving privacy where sufficient public interest warrants particular information be withheld from public view.⁷⁰

Since the initial transfer of data from the ATO, the Register has grown to 60 352 charities⁷¹ and has had more than 335 000 views. This growth has been facilitated by the adoption of a real-time online system for charities to submit their information – through the ACNC Charity Portal. The portal was launched online in November 2013, well ahead in its life cycle when compared with charity regulators overseas.⁷²

⁷⁰ For example, information like the contact details of women's shelters which, if published, could endanger public safety can be withheld. Similarly, information identifying individual donors to private ancillary funds have been withheld from the Register to protect the privacy of philanthropists and avoid unnecessary administrative burden being placed on these charities.

⁷¹ The ACNC is also in the process of removing charities that are no longer operating from the Register. (These charities were included in the data transferred from the ATO at the time the ACNC was established.)

⁷² For example, the Canadian Revenue Agency (Charities Directorate) is only moving to an online submission system later in 2014. The Scottish Charity Regulator moved to an online system in mid 2012, six years after it was first established. See Appendix E.

As at 1 May 2014 (unless otherwise stated):

<p>ACNC Register</p>	<p>acnc.gov.au/ACNC/FindCharity 60 352 charities 335 000 + views, mobile views 22 000 +</p>
<p>ACNC Charity Portal Password protected part of the ACNC website where charities can update their information in real time</p>	<p>charity.acnc.gov.au/ACNCPortal 26 400 Annual Information Statements submitted 25 000 governing documents submitted 5 000 financial reports voluntarily submitted 88 000 visits to the Charity Portal</p>

4.1.1 Benefits of the Register

The problems caused by the lack of data on the sector are discussed in Part 2.4. The Register benefits the public, charities (and those they deal with), and government.

For the public, the Register provides greater transparency. For the first time in Australia, the public is able to obtain core information about a charity before giving money or volunteering,⁷³ including information on a charity's purpose, activities, governance and beneficiaries. From July 2014, there will also be information on financial status.

The Chief Executive Office of the Scottish Charity Regulator, Mr David Robb, said while attending the International Charity Regulators Forum:

*"There was no dedicated regulator in Scotland until 2005. There was little transparency and the relevant department had few resources to check on charities. There was no annual reporting system or active policing. We had some high profile scandals where significant amounts were misappropriated. The Scottish Parliament was persuaded to act. It was a big step forward. Now basic information is provided to the public and charities appreciate that the regulator understands their business and offers advice sensitive to their situation"*⁷⁴

Research commissioned by the ACNC found that trust and confidence in Australian charities increased significantly, when they understood the role of the ACNC.⁷⁵ The research also found 77% of participants believed a public register of charities to be 'very important'.⁷⁶ These findings are consistent with similar surveys conducted over many years by the Charity Commission of England and Wales.⁷⁷ Maintaining and enhancing public trust and confidence is critical for the sustainability of the sector.

⁷³ Two volunteering peak bodies (Volunteering Australia and Volunteering SA & NT) were signatories to an open letter in support of the ACNC led by the Community Council of Australia. See *Open Letter to Government: Retain the Charity Regulator* dated 18 March 2014 www.communitycouncil.com.au/node/165, accessed 28 April 2014.

⁷⁴ See 'International Praise for Aus Charity Regulator', *Pro Bono Australia*, 10 April 2014, www.probonoaustralia.com.au/news/2014/04/international-praise-aus-charity-regulator, accessed 29 April 2014.

⁷⁵ In April and May 2013, the ACNC commissioned a research project to examine public trust and confidence in Australian charities to by external provider ChantLink. The survey marked the first time an Australian Government agency had measured public trust and confidence in Australian charities. Key findings based on survey of 1 624 people included that the level of trust in charities and a range of other organisations increased from a mean score 6.6 to 7.0 once the ACNC's role was explained. See ACNC, *Public trust and confidence in Australian charities*, 2013, acnc.gov.au/ACNC/Pblctns/Rpts/PublicTrust/ACNC/Publications/Reports/Trust_con.aspx, accessed 29 April 2014.

⁷⁶ ACNC, *Public trust and confidence in Australian charities*, 2013, p. 6, acnc.gov.au/ACNC/Pblctns/Rpts/PublicTrust/ACNC/Publications/Reports/Trust_con.aspx, accessed 29 April 2014

⁷⁷ See the 'Public trust and confidence in charities' reports at www.charitycommission.gov.uk/about-the-commission/our-research/research-reports/, accessed 29 April 2014.

A national Register has considerable practical benefits for charities by enabling them to provide assurance to donors, volunteers, banks and other stakeholders. In particular:

- a charity certificate (backed by a regulator-maintained public Register) enables a charity to prove its credentials more easily than by providing copies of letters from the ATO, as was previously the case
- a national Register will fast-track the introduction of new internet domains such as '.ngo', proposed for October this year.⁷⁸

Charities can also find out more about similar charities, facilitating opportunities for greater collaboration, learning and good practice. Before someone starts a new charity they can look on the Register to see if there is an existing charity they could join, rather than spending time and money creating a new one.

Previously, secrecy constraints on the ATO meant that its records concerning purpose and activities of tax exempt charities were not publicly available. This meant any inconsistencies in the charitable status and tax concessions between 'like entities' was not visible. For example, in *Bicycle Victoria v. Commissioner of Taxation*,⁷⁹ a question arose as to the relevance of the endorsement of an organisation with similar purposes and activities to the applicant organisation. The Commissioner of Taxation argued that disclosure concerning another taxpayer would be in breach of the confidentiality provisions of Division 355 of Schedule 1 to the *Taxation Administration Act 1953*.

The Register provides policy makers and government agencies with an evidence base for improving the regulatory model for the sector, as well as ensuring they are better informed when funding and working with the sector on the delivery of services:

"In the absence of a single regulator, governments lack data and knowledge of Australia's not-for-profit organisations and are therefore unable to develop appropriate policies to better regulate them and encourage their formation" Prof Lyons, University of Technology⁸⁰

4.1.2 Building the Register

The data received from the ATO to form the basis of the Register was out of date, including an estimated 4 200 charities that are no longer operating. The ACNC has worked continuously to 'cleanse' this data, including working to remove the charities that are ineligible or no longer operating. This is critical work to building a credible accurate and up-to-date Register that the public can rely on.

Promotion and public awareness of the Register is building, supported by:

- regularly 'putting information back out', based on analysing the data collected – for example, the ACNC produces regular sector snapshots giving a general breakdown of information on charities it has registered. A research report analysing the first 26 000 Annual Information Statements collected for 2013 will be released shortly
- publishing (non-personal) information to data.gov.au (the Commonwealth government's central data repository) – this enables researchers to conduct independent analysis to improve the knowledge base about the sector
- playing an educative role on the use of data – for example, publishing information and multi-media resources on safe giving, community out-reach (including radio promotions for non-English speaking communities) and a fact sheet on limitations of using financial information to understand a charity's work (with Queensland University of Technology).

⁷⁸ See 'Registry To Launch New Charity Web Domains', *Pro Bono Australia*, 22 April 2014, www.probonoaustralia.com.au/news/2014/04/registry-launch-new-charity-web-domains#, accessed 29 April 2014.

⁷⁹ [2011] AATA 444 (24 June 2011).

⁸⁰ Lyons M., Submission to Inquiry into The Disclosure Regimes for Charities and Other Not-For-Profit Organisations by the Senate Standing Committee On Economics, August 2008, pp. 7-8.

4.2 Progress in red tape reduction

Red tape reduction is one of the ACNC's statutory objects, and is part of its annual report to Parliament. Accordingly, the ACNC is constantly mindful of the regulatory burden it might be placing on charities.

However, red tape reduction can only be minimised in this context by first setting up a 'single clear set of common requirements'. The form of the report needs to be agreed before it can be lodged once but used often.⁸¹ Time is needed to negotiate with each agency on exactly how the sharing of this information will work in practice.

Ideally, there also needs to be a strong mandate to drive uptake by individual agencies (such as the Commonwealth Grant Guidelines) and across all levels of government to streamline reporting for the sector (such as a mandate from the Council of Australian Governments).

Unfortunately, momentum has stalled due to uncertainty about the ACNC's future.

"Stopping the reforms when they are only half-way complete would be unfortunate" Chair, Australian Charity Law Association⁸²

Despite the challenges, the ACNC has made significant progress in red tape reduction in its first 16 months. It is collecting common charity information for the first time (via its 2013 Annual Information Statement) to populate the Register. This is setting the foundation for a single corporate report for charities to reduce duplication and harmonise regulation.

4.2.1 'Report once, use often' framework established – Charity Passport

Case study from ACNC Red Tape Forum (December 2013)

At this forum, the Good Beginnings Chief Executive Officer presented a telling summary of the reporting her charity (with a \$6 million turnover) was required to provide to government in 2012-13:

- 67 end of year reports (with financial acquittals)
- 29 separately audited acquittals
- 34 acquittals for two Commonwealth agencies under 7 contracts.

This is the sort of duplication that a single report to the ACNC can eliminate, once the framework is fully implemented.

In May 2014, the ACNC will launch the 'Charity Passport', which allows for information collected once by the ACNC to be provided (used often) to other government agencies, eliminating the need for charities to repeatedly provide the same information to different bodies. The National Commission of Audit has recognised the cost and burden of the 'repeated provision of the same information'.⁸³

Information provided to the ACNC will be shared with authorised Commonwealth agencies⁸⁴ under the *Commonwealth Grant Guidelines* (in effect since 1 June 2013). The guidelines make it mandatory for Commonwealth agencies to obtain information from the ACNC if available, rather

⁸¹ Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, 2010, p. 115.

⁸² Robinson A., cited in Australian Institute of Company Directors, 'Moves afoot to save ACNC from going up in smoke', *The Boardroom Report*, Vol. 12, Iss. 6, 2 April 2014, www.companydirectors.com.au/Director-Resource-Centre/Publications/The-Boardroom-Report, accessed 29 April 2014.)

⁸³ National Commission of Audit, *Towards Responsible Government*, see Appendix Vol. 2, p. 242, see www.ncoa.gov.au/.

⁸⁴ For example, the ACNC has Memoranda of Understanding (MoUs) with the ATO, ASIC, the Australian Federal Police, the Office of the Registrar of Indigenous Corporations and the Tertiary Education and Quality Standards Agency, as well as an exchange of letters with the Australian Business Register, to share information for their purposes.

than request the same information from registered charities. Further, if a charity provides an audited financial statement to the ACNC, then a financial acquittal should not be required by the Commonwealth agency unless the activity is 'higher risk'. This framework will eradicate (or at least drastically reduce) duplicative reporting for the significant number of charities delivering services under Commonwealth funding agreements.

There are proposed changes to these Grant Guidelines from 1 July 2014. However, the public draft of the proposed revised guidelines make it clear that Commonwealth funding agencies should not ask for information that has already been collected by government regulators and is available to them.⁸⁵

The Australian Capital Territory and South Australia have accepted the ACNC's offer to share its data at no cost – see Part 4.2.4. This will save their regulators the cost of collecting the same or similar information. This data-sharing offer has also been made to all other states and territories as well as on an agency-by-agency basis. It does not require any shift of regulatory functions or any referral of state powers. As each new agency accepts the Charity Passport, it will further build the reach of the 'report once, use often' model, eliminating reporting to multiple agencies and jurisdictions.

So how much progress has really been made? *The Regulatory Impact Statement to the Repeal Bill states:*

"The ACNC was established with the intention of it being a single reporting point for charities. This has not eventuated and the majority of charities continue to provide information to multiple jurisdictions."⁸⁶

However, many charities have already noted the benefits. For example:

"We genuinely believe the ACNC was the right model. I agree, the first versions looked a bit rough and ready, but they have been very consultative. I would like to think it could continue. It could do with more refining, I acknowledge that, but certainly I don't want to see the likes of Lifeline Canberra providing four, five reports every year when one will do ... Transparency is vitally important for us" Chief Executive Officer, Lifeline (ACT)⁸⁷

For some in the sector, there is already a single reporting point with the establishment of the ACNC:

- *companies limited by guarantee (that do not undertake public fundraising activities) only have to report once to the ACNC (not ASIC)*
- *schools only have to report financial information to the Department for Education (not ACNC)*
- *Indigenous corporations continue to report to the Office of Registrar of Indigenous Corporations (not ACNC)*
- *incorporated associations and charitable fundraising organisations operating in South Australia and Australian Capital Territory only have to report once to the ACNC (not their state regulator), if planned harmonisation goes ahead.*

There are also transitional arrangements that minimise duplication. For incorporated associations, cooperatives and fundraising organisations, the ACNC Commissioner will accept the same financial reports that these charities provide to their other regulators. This allows the ACNC to keep working on longer term red tape reduction, while these charities can provide the same report for no extra fee and with benefit of being on free online Register.

⁸⁵ Department of Finance, *Supplementary submission to Joint Committee of Public Accounts and Audit Inquiry into Public Governance, Performance and Accountability Act 2013 Rules Development*, www.pmra.finance.gov.au/files/2014/04/Attachment-C-Draft-PGPA-Rule-Commonwealth-Grants-Rules-and-Guidelines.pdf, accessed 24 April 2014.

⁸⁶ See *Explanatory Memorandum to the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014*, Regulatory Impact Statement, p. 3.

⁸⁷ Interview with Mike Zissler, Lifeline (ACT) CEO, with Philip Clark, 666 ABC Canberra, 16 April 2014.

What about more burden for some? The ACNC recognises that some charities (such as unincorporated associations) have experienced an initial increase to their regulatory obligations if they were previously unregulated. However, for many, if they had to report for funding acquittal or public fundraising purposes, there is a potential reduction if the ACNC model is allowed to continue – as the architecture for ‘report once use often’ is now in place. This was anticipated during the establishment of the ACNC:

*“[after] the report-once use-often approach is **fully implemented** [emphasis added], that there would be an overall offset against the additional costs resulting from reporting. It acknowledged that for small charities may see an increase in compliance costs in the initial stage”* Regulatory Impact Statement to ACNC Act ⁸⁸

In addition, as outlined in Part 2, the regulatory framework was needed to address gaps in transparency and accountability. Any initial increase in regulation for those that were previously unregulated was considered by parliament as a minimum level of accountability required for ‘all NFP organisations receiving substantial public monies (charities)’. ⁸⁹ As tax concessions are a significant source of government support to the sector, it was considered necessary for governments to examine the legitimacy of claims, and demand accountability. ⁹⁰ This is in line with international practice. ⁹¹

4.2.2 Appropriate reporting framework

ACNC’s reporting requirements were designed in close consultation with charities to ensure that the right information (amount and type) is collected in proportion to charity size. ⁹² The consultation process for the 2014 Annual Information Statement was conducted through an online survey, email, post, face-to-face and teleconference. In response to feedback, questions were changed or removed to find the right balance. ⁹³ As the ACNC Commissioner stated:

“We are keen to work with the sector to ensure that reporting requirements are kept to a minimum, while allowing for the collection of information to populate the Register, and to create the Charity Passport which itself will also contribute to red tape reduction” Susan Pascoe AM ⁹⁴

For some, group concessions are also provided under the ACNC Act – for example, ‘basic religious charities’ do not have to provide any financial reporting. ⁹⁵

The ACNC’s reporting requirements are modest compared to overseas charity regulators. For example, the Canadian and US regulators have (paper-based) forms with detailed (including

⁸⁸ Explanatory Memorandum to Australian Charities and Not-for-Profits Commission Bill 2012 and Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012, ‘Regulatory Impact Statement: establishing a regulator for the not-for-profit sector’, Chapter 16, p. 294.

⁸⁹ Explanatory Memorandum to Australian Charities and Not-for-Profits Commission Bill 2012 and Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012, ‘Regulatory Impact Statement: establishing a regulator for the not-for-profit sector’, Chapter 16, pp. 283-299.

⁹⁰ O’Connell A., ‘The Tax Position of Charities in Australia: Why Does it Have to be so Complicated?’ (2008) 37 *Australian Tax Review* 17, <http://www.law.unimelb.edu.au/tax/research/current-research-projects/defining-taxing-and-regulating-not-for-profits-in-the-21st-century/publications>; O’Connell A., ‘Watching over the helpers: why regulation of charities matters’, *The Conversation*, 27 December 2013 <http://theconversation.com/watching-over-the-helpers-why-regulation-of-charities-matters-19971>, accessed 30 April 2014.

⁹¹ International best practice states “if civic organisations engages substantially in economic activities, receives substantial benefits from the state, operates under a licence or permit, or engages in substantial public fundraising ... it is appropriate to require that it provide information on its finances and activities, both to relevant agencies of the state and to the public” (Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, pp. 65-66).

⁹² ACNC reporting varies depending on whether a charity is small (has annual revenue less than \$250 000); medium (between \$250 000 and \$1 million) and large (\$1 million or more).

⁹³ See *Analysis of the 2014 Annual Information Statement Consultation*, acnc.gov.au/ACNC/Contact_us/Pub_consult_comment/2014AIS/ACNC/Report/2014AISconsult_analysis.aspx, accessed 30 April 2014.

⁹⁴ See ACNC, *The Commissioner’s Column*, 13 May 2013, www.acnc.gov.au/ACNC/Comms/Com_Col/CC_20130513.aspx, accessed 30 April 2014.

⁹⁵ ACNC Act, s60-60.

financial) questions,⁹⁶ and the US Form 990 having ten times the number of questions compared with the ACNC 2013 Annual Information Statement which has 17 non-financial questions.

The ACNC was unable to populate the Register using information from other regulators due to the lack of consistent reporting requirements. Also, much of the state and territory-based reporting was paper-based, making information transfer cumbersome and costly. There were legislative barriers for other government agencies in releasing such information to the ACNC.

4.2.3 Consistency of data – National Standard Chart of Accounts

The ACNC has been careful to ensure consistent, standardised reporting where possible.

From June 2013, the ACNC took carriage of the ongoing maintenance and updating of the National Standard Chart of Accounts (**NSCOA**), an initiative of the Queensland University of Technology.⁹⁷ NSCOA provides a common approach to capturing accounting information for use by not-for-profits and government. The Commonwealth, state, territory and local governments agreed through Council of Australian Governments to accept NSCOA for all reporting purposes. NSCOA, and the ACNC's stewardship of it, has made a significant contribution to red tape reduction. **One state alone has estimated savings of \$3.1 million a year over ten years.**⁹⁸ In the event of the abolition of ACNC, a home needs to be found for the NSCOA initiative so its potential is not lost.

The ACNC has ensured consistency with the Australian Bureau of Statistics and international classifications relevant to not-for-profits in forming categories in its forms.

4.2.4 Harmonising regulatory requirements

The most effective way to eliminate duplication and inconsistency is for regulatory requirements to be harmonised so that a single report can be lodged with a single body which is then responsible for sharing that report with others. This is the approach South Australia and the Australian Capital Territory have agreed to as the most efficient way to harmonise their incorporated associations and fundraising requirements with the ACNC model.⁹⁹ **In fact, the ACT Government has recently estimated that it will be cutting red tape by up to \$2 million a year for local charities if the ACNC is retained.**¹⁰⁰

The Chief Executive Officer, Lifeline - ACT said:

*“The ACNC was never allowed to hit its straps. Late last year I lodged our return with them. It was entering a couple of keystrokes, enter to the one-stop-shop where everyone can see it and it's very transparent. At the moment I'm still supplying to the ACT Government and New South Wales Governments various reports. But the proposal, certainly from the ACT Government was to abolish those report requirements, and they would defer to the ACNC. And I know that's what New South Wales planned as well.”*¹⁰¹

⁹⁶ This reporting is in addition to any US state or Canadian provincial reporting requirements.

⁹⁷ ACNC, *Media release: QUT and not-for-profit sector reduce red tape to save charities millions*, 12 June 2013, acnc.gov.au/ACNC/Pblctns/Media_centre/Med_Rel/ACNC/Comms/Med_R/MR028.aspx, accessed 30 April 2014.

⁹⁸ See 2011 report on the implementation of the Victorian estimated compliance costs savings of \$3.1 million a year over 10 years ('New Standard Chart of Accounts Saves Victorian NFPs Millions – Review', *Pro Bono Australia*, 25 August 2011, www.probonoaustralia.com.au/news/2011/08/new-standard-chart-accounts-saves-victorian-nfps-millions-review, accessed 23 April 2014).

⁹⁹ In 2013, the Government of South Australia consulted on an Exposure Draft which proposes changes in South Australia to harmonise reporting. ACNC registration would automatically authorise charities to fundraise in South Australia and exempt them from providing financial information twice. South Australian incorporated associations registered with the ACNC would also be exempt from reporting to the South Australian regulator. The Australian Capital Territory Government announced in March 2013 that there will be changes to the Australian Capital Territory incorporated associations and charitable collection legislation to avoid duplication in reporting in a similar way.

¹⁰⁰ Andrew Leigh MP and Andrew Barr MLA *Media release: ACNC will cut costs for Canberra Charities*, 16 April 2014, www.andrewbarr.com.au/story/acnc-will-cut-costs-canberra-charities, accessed 30 April 2014; McLroy T., 'Aging charities regulator to cost ACT not for profits as much as \$2m', *Canberra Times*, 16 April 2014, www.canberratimes.com.au/act-news/axing-charities-regulator-to-cost-act-not-for-profits-as-much-as-2m-20140415-36q6i.html, accessed 30 April 2014.

¹⁰¹ Interview with Mike Zissler, Lifeline (ACT) CEO, with Philip Clark, 666 ABC Canberra, 16 April 2014.

Unfortunately implementation has not yet occurred because of the uncertainty regarding the ACNC's future. Other states and territories interested in following this model have paused negotiations because of this uncertainty.¹⁰²

4.2.5 Streamlined, online registration process

The ACNC and the ATO have worked together to provide a single, online form for registering for charitable status and Commonwealth tax and other benefits. Previously the ATO process was paper-based, but 98.5% of applications are now made online. The separation of decision-making about charitable status has not increased the application period.

4.2.6 Target other opportunities to reduce red tape

The ACNC has also played a catalytic role to drive further opportunities to reduce red tape across government, by setting up sub-sector working parties and forums.¹⁰³ With uncertainty regarding the ACNC's future, the work of these groups has been halted. However, other foundational work has been pursued – for example, the ACNC hosted a forum of almost 100 people drawn from government, sector, professional advisers and academics in December 2013 to gather input on red tape reduction initiatives.¹⁰⁴ The forum yielded 17 recommendations for red tape reduction grouped into five themes: national approach; risk; outcomes; funding agreements and reporting; and sector capacity.

There was overwhelming consensus that the priority for red tape reduction is harmonisation of regulatory requirements across jurisdictions.¹⁰⁵ The ACNC was encouraged to continue its work with states and territories to harmonise reporting by incorporated associations and for fundraising purposes. Sector advocates in particular were adamant that the not-for-profit sector should not be denied the harmonised regulatory environment enjoyed by the for-profit sector.

4.2.7 Some concerns about more reporting (red tape)

The following is a summary of the ACNC's response to concerns raised the Financial Services Council.

Concerns raised about the burden

The Financial Services Council recently stated that the ACNC is:

“more of a cost burden ... than a significant benefit...charitable trusts will save more than \$2m in compliance costs with the disbandment of the ACNC”¹⁰⁶

The Council asserted that the ACNC had been given an unprecedented level of powers beyond ASIC's' and that the 'information role of the ACNC is of little benefit to the sector'.

¹⁰² Before the political uncertainty over the future of the ACNC, negotiations were also in progress with the Tasmanian Government and another state for similar harmonisation of regulation for charities in those jurisdictions. Constructive discussions were also underway with State Revenue Commissioners.

¹⁰³ ACNC, *Red tape reduction*, acnc.gov.au/ACNC/About_ACNC/Redtape_redu/ACNC/Report/Red_tape.aspx, accessed 30 April 2014.

¹⁰⁴ The 'Measuring and Reducing Red Tape in the Not-for-profit Sector' forum was held in December 2013 in Canberra with 95 people attending. See *Red tape reduction forum report - Measuring and Reducing Red Tape in the Not-for-profit Sector*, February 2014, acnc.gov.au/ACNC/Pblctns/Rpts/RTRforum/ACNC/Report/rtrforumreport.aspx, accessed 30 April 2014.

¹⁰⁵ Australian Charities and Not-for-profits Commission, *Forum Report: Measuring and Reducing Red Tape in the Not-for-profit Sector*, February 2014, p.8. Another important recommendation was to measure the red tape burden on charities in Australia and to identify target areas for red tape reduction. The ACNC commissioned research into the regulatory and reporting burden on charities at the Commonwealth level, including a conceptual framework, case studies and red tape mapping and costing consistent with the Government's costing methodology. The report will be available in June 2014.

¹⁰⁶ Financial Services Council, *Media Release: ACNC abolition will save significant costs for the charitable sector*, 20 March 2014, www.fsc.org.au/downloads/file/MediaReleaseFile/2014_0319_ACNCabolishmentwillsavesignificantcostsforthecharitablesector.docx, accessed 30 April 2014.

The ACNC has considered these concerns:

- **has duplication increased?** – charitable trusts are only required to submit basic corporate information and financial reports that they would likely have prepared as part of discharging their trustee duties. The ACNC has worked closely with trustee companies to streamline their submission of information on behalf of multiple charities (through a bulk lodgment process). As noted in Part 4.2.1, there is potential for duplication to be removed over time as the Charity Passport is implemented
- **is there a new cost burden?** – a recent Corporations and Markets Advisory Committee (CAMAC) review found there was a need for more data and transparency on charitable trusts.¹⁰⁷ There are 2 000 plus charitable trusts with more than \$3 billion under management and a shrinking number of trustee companies.¹⁰⁸ The Review referred to concerns about “*unresolved stewardship and disclosure issues regarding the role of [Licensed Trustee Companies] in the administration of charitable trusts*”.¹⁰⁹ Reporting to the ACNC goes some way to address these concerns, increasing transparency through the Register. The Review proposed that the ACNC more actively scrutinise trustee companies by conducting ‘stewardship audits’. Any initial increase in compliance for trustee companies may be appropriate for greater transparency and oversight.¹¹⁰
- **are the ACNC’s powers too broad?** – there is no basis for the assertion that ACNC has greater powers than other Commonwealth regulators. Rather, the ACNC model is based on the same or similar powers to other Commonwealth regulators.¹¹¹ In fact, the ACNC has narrower powers than agencies such as the ATO, ASIC and the Australian Prudential Regulation Agency. These agencies have the power to apply for search and seizure warrants under their respective legislation, whereas the ACNC is only able to monitor compliance. Also, many of the powers given to the ACNC can only be exercised with a narrow class of charities that come within the definition of ‘federally regulated entities’.¹¹²

4.3 Sector-specific approach

In addition to addressing the lack of credible data and duplicative regulation, the ACNC’s work is driven by its commitment to be a sector-specific regulator. In all aspects of its operations, the ACNC’s establishment has been based firmly on understanding the sector – its diversity, its mission and values driven approach, its volunteer base and the role of its stakeholders such as members and funders.¹¹³

¹⁰⁷ Corporations and Markets Advisory Committee (CAMAC), *Administration of charitable trusts*, May 2013, [www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2013/\\$file/Charitable_Trusts_Report_May2013.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2013/$file/Charitable_Trusts_Report_May2013.pdf), accessed 30 April 2014.

¹⁰⁸ For example, the two major private trustee companies (Equity Trustees Limited and ANZ Trustees) have recently merged. This merged company will manage in total some \$40 billion in funds (including some of the country’s largest philanthropic trusts) and will have 91% of philanthropic capital. Equity Trustees distributed more than \$14.5 m in 2013 to charities on behalf of the 206 charitable trusts it managed. See ‘Major Merger for Trustee Companies’, *Pro Bono Australia*, 11 April 2014, www.probonoaustralia.com.au/print/news/2014/04/major-merger-trustee-companies, accessed 30 April 2014.

¹⁰⁹ CAMAC, *Administration of charitable trusts*, May 2013, para. 1.5.2, [www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2013/\\$file/Charitable_Trusts_Report_May2013.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2013/$file/Charitable_Trusts_Report_May2013.pdf), accessed 30 April 2014.

¹¹⁰ See Seccombe M., ‘Andrews leads fight to abolish charities commission’, *The Saturday Paper*, 29 March 2014, www.thesaturdaypaper.com.au/news/politics/2014/03/29/andrews-leads-fight-abolish-charities-commission/1396011600, accessed 30 April 2014.

¹¹¹ For example, the ATO has the same type of information gathering powers, and the same or similar monitoring powers are contained in Commonwealth legislation such as the *Aged Care Act 1997* (Cth), the *Civil Aviation Act 1988* (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Migration Act 1958* (Cth).

¹¹² ACNC Act, s 205-15.

¹¹³ For example, the ACNC regularly engages through user reference groups, its Advisory Board, involvement in a broad range of speaking engagements, face to face education sessions across the country, and using social and other media. It has also consulted broadly on significant issues, such as the ACNC regulatory approach and the detail and form of annual reporting requirements.

4.3.1 Tailored and independent registration

The ACNC has invested in training staff to ensure consistent and expert decision-making. Each application is handled by a single case officer. Regular customer survey of applicants have found high levels of satisfaction.

"You advertised yourself as a one-stop shop and you have delivered" Carolyn Kitto, Coordinator, Stop the Traffik

"The ACNC's handling of our application was extremely professional; we were very pleased with the process, particularly given we applied in the run-up to Christmas. A great start for the ACNC!" Andrew Strainer, The Helmsman Project Director

"The whole system was extremely painless. We registered online and it was very simple, very quick and very efficient." Roberta Thompson, Assistant Manager, Ashford Aged Care Facility

"The registration process was smooth and easy. The registration team gave us the best help for us" Pastor Carbrera, Joy of Life Christian Church

4.3.2 Specialist support for the sector

The ACNC has been able to provide tailored guidance and advice, with an emphasis on ensuring the sector feels supported to understand and meet new requirements. Like registration, high service standards require timely responses and feedback has been overwhelmingly positive.

"The advice staff member ... was quite extra-ordinarily helpful. Not to mention courteous, patient in the extreme, and refreshingly efficient. I really appreciated her help" small faith based crisis centre

"Done and done. Every time we've spoken to ACNC advice, they've provided great, clear and quick responses!" [Ausdroid Foundation @AusdroidCF](#) (Twitter, 18 April 2013)

The following is feedback on ACNC guidance received from a stakeholder survey commissioned by the ACNC in June 2013 (49 telephone interviews with ACNC stakeholders):

"It was well presented, and more importantly, it was readable. Because the people who are reading this might just be volunteers, like in our case. The information [in the ACNC's guidance materials] wasn't daunting so [our volunteer secretary] was willing to read it" (Small charity)

"We've seen the very good work that they've done as far as publishing information about what they do and how they intend to regulate the sector, I think that the information that they've put out is very good and obviously written by people who know the sector, and understand what the sector needs" (Large charity)

"Their stuff is accurate, accessible, well presented, not overly wordy, it demonstrates a high degree of understanding of the audience that it's directed to" (Peak body)

And from social media:

"Thankyou [@ACNC_gov_au](#) - awesome summary by the Board for the Commissioner on good charity regulation - so helpful to us organisations!!!" [PerthPublicArtFound @nathanqiles16](#) (Twitter, 12 February 2013)

"Very Helpful RT [@ACNC_gov_au](#): They're quick, colourful + make [#charity](#) obligations so clear + simple-new videos!" [Associations Forum @AssocForumAU](#) (Twitter, 21 November 2013)

4.3.3 User reference groups

The ACNC has established two user groups to ensure regular communication with sector leaders and their professional advisers. These groups meet quarterly. They provide specialist and very useful insights into operational matters, helping the ACNC to continuously improve its services.

4.3.4 Overall snapshot

Information about the work of the ACNC and relationships the ACNC has with other regulators is in Appendix B. Answers to some commonly asked questions are also outlined in that Appendix.

The following table (next page) is a quick snapshot of the support the ACNC has provided charities so far.

Phone calls answered	45 572 telephone calls, with an average wait time of 33 seconds Current hours of service: 9 am - 6 pm Australian Eastern Standard Time
Written queries answered	28 231 correspondence 98% resolved within 2 days <ul style="list-style-type: none"> • 55,921 pieces of written correspondence received (email, fax, paper) • 59% of complex enquiries resolved within 5 days • 79% of general enquiries resolved within 2 days
Website guidance	825 000 visits to acnc.gov.au <ul style="list-style-type: none"> • Average visit is 6 minutes, people visit approximately 5 pages per visit. • 216 000 reviews of ACNC factsheets, guides or FAQs
Other guidance support	<ul style="list-style-type: none"> • 52 fact sheets, 7 podcasts, 12 videos • 2 guides (governance fraud prevention) and 'Quick Tips'
Face to face outreach	<ul style="list-style-type: none"> • 16 community presentations across 13 cities, with more than 2000 attendees (with one session video recorded for the website) • Presented 32 information and education sessions across 22 cities, with 1 600 attendees, (including regional and some remote locations).
Research data on charities	<ul style="list-style-type: none"> • Published information it has collected back to the sector and public (e.g. sector snapshots on first 250 and 1000 ACNC registered charities) • Published data sets to data.gov.au • Research to obtain baseline evidence of public trust and confidence in Australian charities • Extensive report giving overview of NFP Sector Reform • Research network established (80+ researchers) • Research awards
Research support	<ul style="list-style-type: none"> • Published data sets to data.gov.au • Research to obtain baseline evidence of public trust and confidence in Australian charities • Extensive report giving overview of NFP Sector Reform • Research network established (80+ researchers) • Research awards

As a smaller and more nimble agency, the ACNC has also demonstrated an accessible approach, for example through its use of social media. Most people running charities are volunteers and it is important they are able to receive timely, easy-to-understand assistance through multiple channels.

4.4 Tailored compliance approach

4.4.1 Broader governance remit

Monitoring and improving the governance of charities goes to the heart of enhancing public trust and confidence in the sector and is consistent with international practice.¹¹⁴

Having a legislative remit that extends to governance¹¹⁵ means the ACNC can receive complaints about the sector which were previously unaddressed. From December 2012 to 31 March 2014, the ACNC received more than 686 complaints and investigated or reviewed more than 272 cases. The source of most complaints is the public. These numbers will increase as more people become aware of the ACNC's regulatory role.

The ACNC has encountered a wide range of eligibility and governance issues, including:

- inappropriate use of charitable funds for example, for private benefit or under fraud or criminal activities
- lack of accountability to members
- those involved running charities failing to meet their duties.¹¹⁶

4.4.2 ACNC expertise and approach

The ACNC works with charities to protect charitable assets and take steps to improve their governance frameworks. The ACNC's regulatory approach aims for the least intrusive action, escalating only if there is serious or deliberate wrong-doing, or where vulnerable people or significant charitable assets are at risk.¹¹⁷ When systemic issues are identified, the ACNC responds by developing guidance to support better practice.¹¹⁸ This approach is supported by the ACNC's graduated enforcement powers which allow flexibility in response before de-registration or the imposition of fines. ACNC has also worked with other enforcement agencies including state and federal police where appropriate under the terms of inter-agency agreements.¹¹⁹

Compliance case example:

The ACNC received information that a senior staff member of a charity was using the charity's credit card for private purchases. Initially, the Board had difficulty accepting that this had occurred. After working closely with the ACNC, the Board were able to identify the extent of the theft and what failure of governance had allowed it to occur unnoticed for several years.

On the ACNC's recommendation, the Board stood the employee down, reported the matter to the police, advised the charity's stakeholders of the situation and, with the benefit of independent external advice, introduced new internal controls to lower the risk of fraud in the future, and lift transparency and accountability of the charity. The charity is now 'back on track' delivering services to its beneficiaries.

¹¹⁴ International standards suggests that it is good practice to have some mandatory rules for governance. See Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, Chapter 4.

¹¹⁵ Under the governance standards. See acnc.gov.au/ACNC/Manage/Ongoing_Obs/Governance/ACNC/Edu/GovStds_overview.aspx, accessed 30 April 2014. These governance standards do not apply to Basic Religious Charities (ACNC Act, s 45-10(5)).

¹¹⁶ For the ACNC's most serious compliance cases, see ACNC, *Media release: Good governance a priority for new charities – regulator*, 17 April 2014, acnc.gov.au/ACNC/Comms/Med_R/MR_076.aspx, accessed 30 April 2014.

¹¹⁷ See ACNC, *Our regulatory approach*, acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09, accessed 30 April 2014.

¹¹⁸ For example, *Protect your charity from fraud: The ACNC's guide to fraud prevention* was developed to give practical tips on how to manage and address fraud, as well as providing a public signal that the ACNC is monitoring this issue (see acnc.gov.au/ACNC/Publications/FraudGuide/FraudGuideIntro.aspx, accessed 30 April 2014).

¹¹⁹ See Appendix B.

So what difference did the ACNC make? If this case was handled solely by the police, their involvement would have been limited to a criminal justice perspective, without a broader perspective of supporting the charity to inform its stakeholders and improve its governance so it can continue to provide services. The ATO would be limited to dealing with this case from a tax law perspective, rather than addressing governance issues that threaten public trust and confidence more generally.¹²⁰ Regulation of charities may not be a high priority for ASIC, state or territory incorporating regulators or the Attorneys-General due to resource constraints or more limited legislative ambit.¹²¹

4.4.3 ACNC compliance impact

To give a sense of the quantum involved, of the ACNC's 12 most serious cases currently being investigated, the charitable assets involved amount to \$68 million.

As the ACNC begins to collect financial information from July 2014, and the Register becomes fully populated, the ATO will have more reliable evidence on which to base its compliance activities:

*"The measure [establishment of the ACNC] is expected to result in additional tax revenue of \$41.0 million over four years as a result of increased compliance activity to ensure that not-for-profit tax concessions are used only as intended."*¹²²

These revenue targets are on track to being met.¹²³

The partnership between the charity regulator and the revenue agency works well in countries like New Zealand, where the Department of Inland Revenue has stated that it regularly relies on the reporting data collected by the charity regulator to better target compliance resources.¹²⁴

4.5 Case example: impact of abolition of ACNC

On the next page is a hypothetical example that shows the impact of the ACNC regulatory model on a typical charity.

¹²⁰ It is generally considered inappropriate for tax authorities "to examine any aspects of a civic organisation other than those directly related to taxation" (Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, Section 8.3).

¹²¹ See Part 2.3.1.

¹²² Treasury, *2011-12 Budget Paper No.2*, Part 2: Expense Measures: Not-for-profit sector reforms – Australian Charities and Not-for-profits Commission – establishment, www.budget.gov.au/2011-12/content/bp2/html/bp2_expense-22.htm, accessed 30 April 2014.

¹²³ These expectations were the subject of questions to the ATO at the Senate Economics Legislation Committee, 26 February 2014.

¹²⁴ On 8-9 April 2014, the ACNC hosted the International Charity Regulators Meeting in Melbourne, a high level biennial conference for common law charity regulators (including the Canada, New Zealand, Scotland, Ireland, England and Wales and Singapore). Of these, all jurisdictions had an independent charity regulator, except for Canada which had a Charity Directorate located within the Canadian Revenue Agency. For a summary, see acnc.gov.au/ACNC/Pblctns/Rpts/IntReg/ACNC/Publications/Reports/InternationalReg.aspx, 30 April 2014.

'Rainbow House' example

Rainbow House is a charitable company limited by guarantee under the Corporations Act. It carries out fundraising online, as well as receiving funding from the Department of Health. It is entitled to receive Commonwealth tax concessions as a 'tax concession charity'.

Before the ACNC

Rainbow House had to:

- report changes and annual returns to ASIC, as well as meeting and director duty requirements
- for its fundraising – register with every state and territory and report separately to all (except Tasmania and NT)
- provide acquittal information to the Department of Health
- apply for and maintain endorsement with the ATO

Advantages under the ACNC

Rainbow House:

- reports to the ACNC instead of ASIC, meaning no more ASIC filing fees or the risk of strict penalties for late notifications or reports
- has more flexibility on how to run its organisation (due to outcomes-based ACNC governance standards that can be tailored to charities, rather than prescriptive Corporations Act provisions)
- has a profile of its corporate information (what it does, its constitution, where it operates, its size) available for the public to access for free on ACNC Register (more limited information on the ASIC register for a fee)
- has a single gateway through the ACNC if it wants to change its charity registration subtype or apply for different tax concessions
- can access to specialist advice on its obligations through the ACNC advice service (phone or email) and guidance on the ACNC website
- can use the ACNC's template constitution to update its constitution and improve its governance
- under the ACNC's report-once use-often framework (via the Charity Passport, May 2014), will not have to provide core information to multiple government agencies (e.g. Department of Health). When the ACNC collects its financial report, the Department will not request the same report and will take ACNC information for its funding acquittal (which is not high risk)
- If the harmonisation process with SA and ACT were to continue, Rainbow House would also not have to submit reports for fundraising to these state regulators

If the ACNC were abolished with functions returned to ATO and ASIC

Rainbow House:

- must adjust its notification, reporting and governance obligations being transferred back to ASIC and again face filing fees, strict penalty regime and prescriptive requirements
- no longer has the assurance for its donors or other stakeholders of its bona fides through the free ACNC Register (instead, users will have to pay to search the ASIC register)
- return to submitting duplicative and different reports (with associated extra costs) in relation to fundraising and funding acquittals, with no hope of these requirements reducing in the near future
- would have to use letter from the ATO as evidence its tax concession status (for example, for their bank or potential funders)

5. FULL IMPLEMENTATION OF ACNC MODEL

This Part covers the significant opportunity lost for charities if the ACNC model is not fully implemented.

Key points:

Abolishing the ACNC would risk losing further progress on the work outlined in Part 4:

- a fully populated Charity Register supporting enhanced public trust and confidence
- broad adoption of the Charity Passport (report-once, use-often) to further reduce red tape (end of chance for 'one-stop-shop' for reporting)
- specialist approach that supports healthy charities

Future benefits of the ACNC model that may be lost include:

- chance to streamline fundraising reporting through reliance on Charity Register
- a broader role in other regulatory improvements, such as specialist legal structure, standardised financial reporting, and harmonised charity definition
- growing regulatory expertise to respond to emerging charity law issues

An alternative regulatory model may not receive the same sector support

"The opportunity inherent in the ACNC of a single agency with a single focus of the NFP sector, gathering data and experience for the betterment of all NFPs and the broader community warrants review and deliberate consideration rather than speedy demolition" Prof David Gilchrist, Curtin University¹²⁵

The ACNC has achieved much in its first 16 months, most of which would be lost if the regulatory function was returned to the ATO and ASIC. These losses include:

- the potential of a future charity register with rich data that can be used to benefit the sector
- an established 'report-once use-often' framework to drive down regulatory duplication
- a sector-specific approach to registration, advice, guidance and research, and
- a tailored compliance framework and broader scope to oversee governance.

In addition to these significant impacts, abolishing the ACNC model (without allowing its full implementation) would mean the potential loss of the following future benefits:

- a broader role in regulatory improvements (such as fundraising harmonisation)
- expertise to respond to emerging charity law issues.

Regulation is most effective when it has the broad support and trust of the regulated parties. It is unclear how quickly any successor agency would be able to garner similar levels of support.

Future benefits and other points are explained below.

¹²⁵ Gilchrist D., 'Not for profit regulation – a longer term view', *Better Boards Australasia*, 8 April 2014, betterboards.net/governance/notforprofit-regulation-longer-term-view/, 30 April 2014.

5.1 Role in regulatory improvements

Not only can a dedicated regulator play a driving role in red tape reduction initiatives, it can also be a catalyst for the broader regulatory improvements.

5.1.1 Fundraising (reporting and licensing)

Fundraising reform has been on the agenda of the Council of Australian Governments Not-for-Profit Reform Working Group since 2009, with progress flagged as ‘Red – milestones not met’.¹²⁶ A ‘report-once use-often’ framework managed by a charity regulator could serve as authorisation to fundraising nationally. Achieving national fundraising reform ranked as the top priority for the sector in the 2013 Pro Bono survey¹²⁷ and the ACNC’s Red Tape Reduction Forum.¹²⁸

If the South Australian and Australian Capital Territory harmonisation models are implemented, this would dramatically reduce fundraising compliance costs for charities operating in these jurisdictions.¹²⁹ With demonstrated red tape reduction results, other individual agencies and/or state and territory governments may adopt this model.

Fundraising regulation is already undertaken by Singapore’s charity regulator, which holds fundraising licence information on its register, together with other charity information.

5.1.2 Specialist legal structure

A new legal form tailored to the needs of charities and other not-for-profits could be developed and then regulated by the charity regulator. This would address the limitations of other legal forms in terms of operating across state borders (incorporated associations) and the inflexibility of the corporate model for the not-for-profit sector.

This has been implemented successfully in Scotland, with the Scottish Charitable Incorporated Organisation which allows charities to incorporate with the charity regulator, rather than having to deal with Companies House.¹³⁰ There has been high uptake of this new corporate form by new charities. England and Wales are close to implementing a similar model.

5.1.3 Standardised financial reporting

Financial reporting reform could be driven by the charity regulator. The regulator, could for example:

- continue to develop NSCOA
- provide clarity on certain accounting requirements as anticipated in the ACNC Act (grouping provisions)¹³¹
- improve Australia’s compliance with FATF recommendations
- provide clarity about other accounting matters such as fundraising reporting – the ACNC could provide clear definitions to guide charities on which costs are best classified as ‘service-related’ or ‘administration’ by working in conjunction with states, territories and accounting standards-setting bodies.

Several overseas charity regulators play a significant role in financial reporting for the sector. For example, the Charity Commission of England and Wales has developed a Statement of

¹²⁶ *Seamless National Economy: Report on Performance 2001-2012*, submitted to Council of Australian Governments, November 2012.

¹²⁷ See ‘Red Tape & Compliance Key NFP Issues - Sector Survey Results’, *Pro Bono Australia*, 15 April 2014, www.probonoaustralia.com.au/news/2013/08/red-tape-compliance-key-nfp-issues-sector-survey-results, accessed 30 April 2014.

¹²⁸ The ‘Measuring and Reducing Red Tape in the Not-for-profit Sector’ forum held in December 2013. See *Red tape reduction forum report - Measuring and Reducing Red Tape in the Not-for-profit Sector*, February 2014, acnc.gov.au/ACNC/Pblctns/Rpts/RTRforum/ACNC/Report/rtrforumreport.aspx, accessed 30 April 2014.

¹²⁹ World Vision estimates that it spends \$1 million per year on fundraising compliance (Productivity Commission, *Research Report: Contribution of the Not-for-Profit Sector*, 2010, p. 138).

¹³⁰ Introduced in April 2011 as new ‘hybrid’ legal form for charities that has ‘lighter’ requirements than those for companies, see www.oscr.org.uk/about-scottish-charities/scio/, accessed 30 April 2014.

¹³¹ Under ACNC Act, Subdivision 60-G.

Recommended Practice and the New Zealand regulator will, from 2015, take responsibility for ensuring charities comply with new mandatory accounting standards.

5.1.4 Harmonisation of definition of charity

While the Charities Act creates a single definition of charity for all Commonwealth purposes, there is still no alignment across all Australian governments. A charity regulator could continue to work across government to achieve national alignment.

Unfortunately, the uncertainty about the future of the ACNC has stalled progress at the state level. For example, the reason given for not going ahead with the Queensland Law Society's submission to align the Queensland definition with the Commonwealth definition was:

*"Further, the recent federal reforms in relation to the 'not-for-profit' sector are still in a state of flux. The Minister for Social Services, the Hon Kevin Andrews, has announced the Federal Government's intention to consult with the sector on 'abolishing the Australian Charities and Not-for-profits Commission and establishing a centre for excellence and a possible national register of charities'."*¹³²

5.2 Expertise to respond to emerging charity law issues

In the longer term, the loss of an independent specialist regulator could be felt as new, and possibly more controversial and political issues of charity determination arise; where activities 'push the envelope' of what is within the legal definition of 'charity'.

Discussions at the recent International Charity Regulators Forum¹³³ highlighted the benefits of charity law expertise in a specialist regulator as a way to best deal with the sometimes contentious intersection between the regulation of charities and the interest of government.

As mentioned in Part 2.3.3, the ATO has stated that it is desirable to have independent decision-making.¹³⁴ Such sentiments were echoed recently in England and Wales as a response to a suggestion that the revenue agency take on the functions of the Charity Commission.¹³⁵

5.3 Sector acceptance for current model

Loss of sector support is an important issue. A healthy trusting relationship between the regulator and the sector allows for more effective and efficient regulation. By contrast, a sector hostile to its regulator is more likely not to comply, or look for creative ways to avoid compliance. This requires greater resources of the regulator, and is less likely to achieve intended outcomes.

Fortunately, the ACNC receives strong support from the sector it regulates. As mentioned, much of the sector advocated for an independent specialist regulator in their submissions to the numerous inquiries and consultations. This support has continued throughout the establishment and early life of the ACNC. The ACNC's concerted focus on sector engagement and the provision of extensive and timely guidance and education has helped sustain this.

For example, a recent survey has found 81% of the sector supported the ACNC. The survey also found:

¹³² Queensland Law Reform Commission, *A review of the Trust Act 1973*, Report No 71, December 2013 at Chapter 3, para [48], at p. 208.

¹³³ 8-9 April 2014, Melbourne, see acnc.gov.au/ACNC/Pblctns/Rpts/IntReg/ACNC/Publications/Reports/InternationalReg.aspx, accessed 30 April 2014.

¹³⁴ ATO, *Submission to the Inquiry into the Definitions of Charities and Related Organisation*, 2001, www.cdi.gov.au/html/public_submissions.html accessed 30 April 2014.

¹³⁵ Chair of the Public Administration Select Committee Bernard Jenkin was recently quoted as saying that the transferring charity regulation to the UK's tax agency's is "bonkers", citing the lack of independence from Ministers as a major concern, "particularly when regulating charity issues like excessive political campaigning and other politically sensitive questions" see Mair V., 'Jenkin: Hodge wish to scrap Charity Commission is 'bonkers'', 4 March 2014, www.civilsociety.co.uk/governance/news/content/17047/jenkin_hodge_wish_to_scrap_charity_commission_is_bonkers#UxWxiawazCQ, accessed 30 April 2014.

“The ACNC is seen as a key actor in addressing a number of the areas of concern identified in the survey, including governance, accountability, transparency, and streamlined reporting”
Pro Bono survey¹³⁶

Similarly 83% of respondents said the sector needed a regulator. Most respondents were ready to meet their ACNC obligations.¹³⁷ In late 2013, an online poll found 74% of respondents when asked about their views on plans to cut the ACNC thought this was a ‘bad idea’.¹³⁸

This has been translated through to active levels of engagement across the sector. The ACNC has received a high compliance rate with its first annual reporting requirement (some 80%).¹³⁹ This is made more remarkable given the fact that an estimated 68% of these charities are small, and in view of the uncertainty surrounding the ACNC’s future.

In summary, regulation is the most effective when it has the broad support and trust of regulated parties. The passing of the Repeal Bill without information about the successor agency or an alternative regulatory model will create uncertainty for the sector. Aside from the difficulty of garnering similar levels of support for any replacement model, abolishing the ACNC risks the perception of ignoring the sector’s voice.

¹³⁶ Prior to the 2013 Federal election, Pro Bono Australia undertook independent research with the NFP sector. Respondents overwhelmingly stated that the reduction in government red tape and compliance costs (93%) was the most important initiative in developing the Australian Not for Profit sector in the past three years. The survey report also found that for many respondents the ACNC is seen as a key factor in improving the sector over the next three years. See ‘Red Tape & Compliance Key NFP Issues - Sector Survey Results’, *Pro Bono Australia*, 15 August 2013, www.probonoaustralia.com.au/news/2013/08/red-tape-compliance-key-nfp-issues-sector-survey-results, accessed 30 April 2014.

¹³⁷ Grant Thornton, *Doing good and doing it well? Grant Thornton Australia and New Zealand Not for Profit sector survey 2013/14*, 2013, www.grantthornton.com.au/Industry-specialisation/not_for_profit.asp, accessed 30 April 2014.

¹³⁸ See result of past poll October- November 2013 in *Our Community Pulse Poll*, www.ourcommunity.com.au/leadership/leadership_article.jsp?articleId=4998, accessed 30 April 2014.

¹³⁹ Based on the almost 26 400 Annual Information Statements submitted as at 30 April 2014 out of an estimated 30 000 that are required to submit by now namely, for those charities with a financial year reporting period.

6. EFFECTIVE CHARITY REGULATION

This Part covers the key elements of effective charity regulation as identified from ACNC and overseas experience.

Key points

- **Charity regulation needs to be assessed against principles of such as independent decision-making, efficiency, certainty and sector understanding**
- **Retain three core functions:**
 - a public register of charities
 - a proportionate reporting
 - independent regulatory decision-making
- **Need an agency to drive red tape reduction for the sector (with the tools of the Register and Charity Passports)**
- **Consider successor models other than abolition, improvements to ACNC model or a smaller pared-back 'registrar' model**
- **Reflections from the International Regulators' Forum (April 2014) are provided**

As demonstrated in Parts 4 and 5, the ACNC model offers one model of effective regulation to address the policy problem outlined in Part 2. It is by no means the only model that can be considered. The aim of charity regulation should be to enable the sector to achieve public benefit.

Reflecting on the experience to date, and regardless of the exact successor model, the significant losses from abolishing the ACNC as explained in this submission could be mitigated if certain key attributes and functions are continued:

- **regulatory gaps are closed** – given the policy drivers for establishing a sector regulator (Part 2), passing the Repeal Bill (without more) will leave a significant regulatory gap. De-facto regulation by ATO and a return to ASIC will not address the serious policy problems of duplication, inconsistency and lack of transparency that pre-dated the ACNC
- **red tape reduction momentum continued** – to ensure the particular red tape issues facing the sector are not lost within a broader business sector deregulation focus
- **principles of good charity regulation are followed** – these include independent decision-making, effectiveness and efficiency, clarity and transparency, certainty, proportionality and consistency and understanding of the regulated sector,¹⁴⁰ and
- **three key regulatory functions are retained** – (i) public register of charities, (ii) proportionate reporting system required (to populate the register) and (iii) independent regulatory decision-making (to 'enter' and 'exit' the public register).

These three regulatory functions can be either retained by amendments to the current (ACNC) regulator model or in a new successor agency, for example in the form of a 'pared-back' registrar of charities. By contrast, if the successor model solely consists of a return of status quo under ATO and ASIC, there is a real risk that all three elements will be lost together with the associated costs of the transition (see Part 2.4 and 3).

¹⁴⁰ See Appendix C: Advisory Board Principles of Good Charity Regulation.

Australia is a relative late-comer to charity regulators, as most comparable common law jurisdictions have already either established independent charity regulators and some are setting up new ones. Abolishing Australia's sector regulator would leave a regulatory gap in terms of the international regulation of charities operating across borders, and cross-border donations and volunteers. For example, ACNC has initiated communities of practice in regulation and compliance with charity regulators in other Australian and overseas jurisdictions. Any successor model should also be cognisant of Australia's international obligations under FATF's current review.

6.1 Regulatory gap to be addressed

Any successor model detailed in the further repeal bill (Repeal Bill No. 2) must consider the gaps in the pre-ACNC regulatory environment set out in Part 2:

- **a fit-for-purpose regulatory framework** – if functions are returned to the ATO and ASIC, the replacement model needs to address the problems of the past in not having a specialist regulator (see Part 2.3.3). Without a broader ambit to consider general governance issues, regulation is hamstrung by the need to refer any charity wrongdoing to tax law breaches (see Part 4.5)
- **the issues of the lack of data and the need for consumer protection** – without a free, online fully searchable register that the public can access, there will not be a simple way in which a member of the public can verify the credentials (bona fides) of any registered charity. Without a database of comparable information that the public can access, the contribution of the sector (especially that of philanthropy) will remain hidden. There will not be verified data on the sector that can be used to inform sound public policy and research. This is an issue identified by the National Commission of Audit which stresses the need for databases to be maintained and shared.¹⁴¹

6.2 Red tape reduction momentum continued

If the ACNC is abolished, consideration needs to be given as to how best to ensure that charities and other not-for-profits are not overlooked in the broader de-regulation agenda.

It was apparent from the International Charity Regulators Forum that the ACNC Charity Portal and Charity Passport were leading the way in removing duplicative reporting for the sector. It is critical that this progress is not lost in the future deregulation agenda for not-for-profits.

6.3 Principles of good charity regulation

Any successor model should take account of the established principles of best practice regulation, regularly relied upon by bodies like the Productivity Commission and OECD.¹⁴² Expert advice from the ACNC Advisory Board suggests that these translate into the following principles of good charity regulation:

- independence of decision-making (free of sector, political or commercial influence)
- effectiveness and efficiency in achieving clearly defined policy goals
- clarity, transparency and accountability
- fairness and natural justice in decision making and administrative processes
- integrity and certainty

¹⁴¹ National Commission of Audit, *Towards Responsible Government*, see Appendix Vol. 2, pp. 241-242, see www.ncoa.gov.au/.

¹⁴² See the characteristics of 'good regulation' in Coghlan P., 'The principles of good regulation', *Achieving Better Regulation in Services Conference*, 26-27 June 2000, Canberra, www.pc.gov.au/data/assets/pdf_file/0020/9191/abros.pdf, accessed 30 April 2014, cited in Productivity Commission, *Research Report: Performance Benchmarking of Australian Business Regulation: Role of Local Government as Regulator*, 'Appendix I Principles of best practice regulation', 18 July 2012, p. 626, www.pc.gov.au/projects/study/regulation-benchmarking/local-government/report, accessed 30 April 2014; COAG, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, p. 4, www.dpmc.gov.au/deregulation/obpr/proposal/coag_requirements/coag-guidance.cfm, accessed 30 April 2014.

- proportionality, consistency and regulatory necessity
- understanding of, and respect for, the contribution of the sector
- integration, consistency and support of other laws, agreements and international obligations.

The full details of the Board’s advice to the ACNC Commissioner is set out in Appendix C.

6.4 Three key regulatory functions to retain

Reflecting on the ACNC’s experience to date, good charity regulation principles and learnings from overseas, the ACNC proposes that the costs for charities of departing from the full sector-specific regulator model (Parts 4 and 5) may be mitigated if any successor model retains, as a minimum, the following three features:

<p>1. Free, national, online public register of charities that includes financial and non-financial information</p>	<ul style="list-style-type: none"> • This would address dual policy objectives of (1) providing a mechanism to reduce regulatory duplication and (2) increasing transparency to maintain public trust and confidence • All comparable overseas jurisdictions feature an online register of charities that the public can freely access • This is also in line with the requirements for regulating international money-laundering and terrorism¹⁴³
<p>2. Proportionate mandatory reporting system (to populate the register)</p>	<ul style="list-style-type: none"> • This would populate the register with reporting information that is proportionate and is necessary to the objectives of maintaining public trust and reduction of regulatory duplication • Without some element of mandatory annual reporting, an accurate public register cannot be maintained • All comparable overseas jurisdictions feature annual mandatory reporting on activities and financial performance (see Part 6.6)
<p>3. Independent regulatory decision-making (to allow charities to ‘enter’ and ‘exit’ the public register).</p>	<ul style="list-style-type: none"> • This would ensure the sector’s and the public’s confidence that the charities featured on the register meet minimum requirements of assurance • The advantages of expert determination of emerging charity law issues as discussed in Part 5.2 • All comparable jurisdictions feature independent determination of charitable status - free of sector, political or commercial influence, and separated from any potentially conflicting government functions, including (except US and Canada) the influence of tax revenue considerations

Retaining these elements are consistent with international guidelines for the regulation of the not-for-profit sector produced by the Center for Not-for-Profit Law, which recommend:

- a ‘single national registry of all NFPs accessible to the public’,¹⁴⁴ and

¹⁴³ Under the Financial Action Task Force, www.fatf-gafi.org, accessed 30 April 2014.

¹⁴⁴ For the “citizen’s own protection to be able to check a purported civic organisation is a legal person, and to find out purposes, location, governing body etc” (Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, Section 3.5).

- a 'separate governmental agency to determine charitable status, that is an independent commission'.¹⁴⁵

The ACNC is aware that at least one state is considering establishing a separate (and duplicate) register if the ACNC Register is not retained. This would be a retrograde step in an already fragmented regulatory landscape. Retaining these three key regulatory functions at the Commonwealth level enables the progress made to date in establishing a national register, the 'report-once use-often' framework and reporting regime to be built into the successor model.

6.5 Possible alternatives

As the Regulatory Impact Statement to the Repeal Bill only refers to 'returning' regulation to the ATO and ASIC, the concern would be that the three elements referred to above will not be continued.

The 'successor agency' to the ACNC could deliver these three elements, for example, by either:

- continuing the current sector-specific regulator model (with further examination of how to reduce the red tape burden), or
- forming a new successor agency, for example in the form of a 'pared-back' registrar of charities.

The first option is consistent with those in the sector that argue that just because there were some issues with the setup of a new agency, it is not in itself a reason to 'throw the baby out with the bathwater'.¹⁴⁶ For example:

"There are some features of the ACNC that are excellent that we need to retain. There are some other elements where some further refinement and minimisation of red tape, ... all of that can be finessed and we can have a very, very good outcome." Australian Catholic Bishops Conference¹⁴⁷

The second option could involve a smaller 'successor agency' with more limited regulatory functions and powers,¹⁴⁸ more in line with recommendation 6.5 of the 2010 Productivity Commission Report. This agency could continue to maintain a charity register backed up by regulatory powers to oversee 'entry and exit' of charities. By maintaining the register, the registrar's work would underpin that of a new Centre for Excellence. However, the synergies of having registration and compliance combined with the policy, education and advice functions should not be under-estimated.

Voluntary reporting cannot deliver comprehensive sector-wide oversight and the partial data collected can go out of date quickly. That is why sector-based 'watchdogs' operate by supplementing government regulation, drawing on information that charities are legally required to annually report to Government. For example, the US GuideStar, Charity Navigator and BBB Wise Giving Alliance all rely on data collected by the US tax revenue agency.

Degrees of independence that can be considered for the successor agency range from being:

- embedded within line Departments (New Zealand, albeit that this regulator is comprised of a board that can independently make decisions free from Ministerial direction), to
- a fully independent statutory agency (England and Wales) that is protected from Ministerial influence under statute.

¹⁴⁵ This solves the problems of "agency expertise, regulatory capacity and bias" and "eliminates all too frequent interministerial conflict and inconsistency" (Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, Section 3.2B).

¹⁴⁶ Gilchrist D., 'Babies and Bathwater – Repealing is not the same as Fixing', *Pro Bono Australia*, 6 March 2014, www.probonoaustralia.com.au/news/2014/03/babies-and-bathwater-%E2%80%93-repealing-not-same-fixing, accessed 30 April 2014.

¹⁴⁷ Interview with Father Brian Lucas, General Secretary of the Australian Catholic Bishops Conference, with Philip Clark, 666 ABC Canberra, 16 April 2014.

¹⁴⁸ For example, the enforcement powers could be reduced to core deregistration powers (the power to issue a notice asking a registered charity 'show cause' as to why they should not be removed and the power to revoke registration). While this would prevent a fully graduated approach to compliance, these are the only enforcement powers the Canadian charities (revenue) regulator has.

The ACNC itself represents a quasi-independent model which features a statutory office-holder who has a separate appropriation and reports annually to Parliament, but with back office support functions provided by the ATO.

6.6 International context

The ACNC model was developed drawing from and improving upon best practice regulatory models across the world. Jurisdictions reviewed included Singapore, New Zealand, Scotland, and Northern Ireland, the United States and Canada.

Any successor model of regulation should consider Australia's place in the international context, including the contribution Australia makes to the international regulatory framework. Taking away the current regulatory model completely would mean Australia would join a declining number of countries without a specialist regulator.¹⁴⁹

Of comparable countries, only the US and Canada still have de facto regulation by their tax agencies, and even they have a comprehensive online public register of charities with a mandatory annual reporting regime (see Table comparing models in Appendix E). New charity regulators are also being set up in Ireland and Jamaica 'as part of a world-wide push to improve public transparency of the charities sector, increase giving, cut compliance costs and reduce red tape.'¹⁵⁰

Useful reflections from the International Charity Regulators' Forum in the context of any successor model are:

- **New Zealand charity regulator continues** – rather than abolishing its regulator¹⁵¹ the New Zealand charity regulator was moved into the Department of Internal Affairs (a line Department, not tax agency). The NZ Government wanted to bring a number of small agencies back into mainstream government to achieve administrative efficiency by sharing back-end resources, making it more like the Australian model. The charity register, annual reporting and all the functions and powers of the NZ Charities Commission remain intact
- **England and Wales regulator still active** – similarly the model of independent charity regulation remains very much intact in England and Wales and the model commands bi-partisan political support.¹⁵² There has been recent criticism of the Charity Commission on its poor management and leadership. The Public Accounts Committee called on the Commission to "use its statutory powers to regulate charities more effectively". It recommended stronger enforcement and regulatory practice, not less.¹⁵³ The UK Government has recently appointed a new Board and Chief Executive for the Commission
- **tax regulation model in Canada is different** – any regulatory model relying solely on tax law needs to address any actual or perceived conflict of interest in functions (see Part 2.3.3). In Canada's case, its leadership is careful to stress that their Directorate are strongly focused on charities, not just tax, and maintains an separate identity from the rest of the Canadian Revenue Agency. It also ensures its recruitment reflects this focus, and is not based solely on tax administration skills. Helpfully, the Charities Directorate uses the terminology of 'registering' charities for tax exemption, and maintains an online register of annual Charity Information Returns that feature contact information, a general overview of activities and

¹⁴⁹ 8-9 April 2014, Melbourne, see acnc.gov.au/ACNC/Pblctns/Rpts/IntReg/ACNC/Publications/Reports/InternationalReg.aspx, accessed 30 April 2014.

¹⁵⁰ See the open letter led by the Community Council of Australia, *Open Letter to Government: Retain the Charity Regulator*, 18 March 2014 www.communitycouncil.com.au/node/165, accessed 28 April 2014.

¹⁵¹ As stated in the Regulation Impact Statement to the Repeal Bill, p. 4. For information about Charities Services New Zealand see www.charities.govt.nz/, accessed 30 April 2014.

¹⁵² The Regulation Impact Statement to the Repeal Bill, p. 4, also refers to the Minister for Social Services' "discussions with charities in the UK that confirmed continuing red tape despite the presence of a Charity Commission". No detail or figures are provided with this claim. Note that, unlike the ACNC, the Charity Commission of England and Wales is not statutorily tasked to reduce red tape.

¹⁵³ This was in order to extend the criteria for disqualification of board members where there is misconduct or abuse of charity property. See Charity Commission England and Wales, *Extending the Charity Commission's powers to tackle abuse in charities*, 4 December 2013, www.gov.uk/government/consultations/extending-charity-commissions-powers-to-tackle-abuse-in-charities, accessed 30 April 2014.

financial information.¹⁵⁴ Both the Canadian Form T4033¹⁵⁵ and US Form 990¹⁵⁶ are paper-based forms that feature extensive and detailed questions, including financial information

- **self-regulation and government regulation are not mutually exclusive** – the choice between self-regulation (through, for example, a sector-based ‘Centre of Excellence’) and government regulation is not binary. For example, in Australia, the ACNC has been careful to leverage, and not duplicate the important work done by peak organisations and service providers to foster good governance.¹⁵⁷ Self-regulation and government regulation can be explicitly integrated, such as the Singapore model through the close cooperation between Commissioner of Charities and the Charity Council,¹⁵⁸ a board of sector and government representatives that promotes governance through a best practice (non-mandatory) governance code. Another example is in the US where sector-based organisations provide a ‘rating service’ of charities,¹⁵⁹ by relying on rich historical reporting data collected by the US tax agency. The integration of voluntary regulation is also in line with international practice¹⁶⁰
- **leaving a gap in international regulation** – Instead of playing an active role in regulating the increasing number of organisations, donations and volunteers that cross national borders, the effect of the Repeal Bill would be to leave a regulatory gap for such activities.¹⁶¹ An example of this is the regulation of international money laundering and terrorist financing, overseen by FATF.¹⁶² Its 2005 review assessed Australia as only partially compliant. The establishment of a specialist regulator with the functions of determining charitable status, maintaining a public register, collecting annual information (especially financial) and regulatory powers (information gathering, monitoring and enforcement powers), was expected to lift Australia’s level of compliance. The formal peer review of Australia’s compliance with FATF recommendations will be conducted in August 2014.¹⁶³

¹⁵⁴ See Canada Revenue Agency, *What is a Registered Charity Information Return?*, www.cra-arc.gc.ca/chrts-gvng/lstngs/2b-eng.html, accessed 30 April 2014.

¹⁵⁵ See Canada Revenue Agency, *Form: Registered Charity Information Return*, www.cra-arc.gc.ca/E/pbg/tf/t3010/t3010-14e.pdf, accessed 30 April 2014.

¹⁵⁶ See Internal Revenue Service, *Form: Return of Organization Exempt From Income Tax*, www.irs.gov/pub/irs-pdf/f990.pdf, accessed 30 April 2014.

¹⁵⁷ See for example the ACNC guidance and education policy which explicitly stresses not duplicating high quality sector guidance on good governance (ACNC, *Commissioner’s Statement: Guidance and education*, acnc.gov.au/ACNC/Publications/Policy_PDFs/CommSt_GandE.aspx, accessed 30 April 2014).

¹⁵⁸ See the Charity Council website, www.charitycouncil.org.sg/index.html, accessed 30 April 2014.

¹⁵⁹ Such as the US National Charity Navigator: www.charitynavigator.org/. See also other US rating or analysis organisations Guide Star, www.guidestar.org/, and Give Well, www.givewell.org/, accessed 30 April 2014.

¹⁶⁰ International best practice encourages “basic minimum standards of conduct to be enacted as laws, with civic organisations encouraged to set higher standards through voluntary self-regulation” (Open Society Institution in cooperation with the International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organisations*, 2nd edition, 2004, Chapter 12).

¹⁶¹ To give a sense of the scope of overseas giving: in 2010–11, Australian NGOs raised over \$1 billion in funding from the Australian public to support their international community development and volunteer programs in more than 100 countries (‘Year Book Australia 2012’, Australian Bureau of Statistics, p. 214). 1,200 Australians volunteer their time and skills each year to work in developing countries on government-funded volunteer programs alone (‘Independent Review of Aid Effectiveness’, April 2011, Australian Government, Page 307, <http://www.aidreview.gov.au/publications/aidreview.pdf>, accessed on 30 May 2014.)

¹⁶² Financial Action Task Force, www.fatf-gafi.org, accessed 30 April 2014.

¹⁶³ With the final report to FATF members due to be presented in February 2015.

7. CONCLUSION

The economic and social significance of Australia's charitable and broader not-for-profit sector make this a sector worthy of recognition and respect. Every Australian benefits from a robust, vibrant, independent and innovative civil society. The regulatory regime in place prior to the establishment of the ACNC did not provide the strong and coherent underpinning this sector needs for its ongoing sustainability.

This important sector deserves a 'fit for purpose' regime as enjoyed by the business sector for more than a decade. The NFP sector has made more than 2 000 submissions to multiple inquiries, scoping and discussion papers and other consultations calling for reform, with a specialist regulator as their lynchpin for other improvements.

In this submission impacts for the sector have been outlined in light of:

- regulatory regime deficiencies that existed before the ACNC was established
- implications arising from the return of functions to the ATO and ASIC
- what the ACNC has achieved to date
- benefits that are still to be achieved from the full implementation of the ACNC model.

The ACNC is delivering a high quality and cost-effective specialist model of charity regulation. In a little over a year, the ACNC has obtained the respect and support of those it regulates, tangibly reflected in high levels of compliance with the requirement to lodge an Annual Information Statement.

It has dealt with a wide range of complaints about charities, a minority of which have been of a very serious nature. Often the ACNC looks at issues outside the remit of others; collaborating with other agencies to ensure wrongdoing is dealt with, but in a manner that does not bring an otherwise effective charity to an end.

The ACNC Register is a significant public asset. For the first time, the public can access free, up-to-date information about a charity's purpose and activities before they give money or volunteer. There is growing awareness and use of the Register, including as a basis for research and analysis which will benefit the sector. The information the sector is providing is no longer just 'sitting on a shelf'.

The Register also provides greater transparency, further improving public trust and confidence in the sector. The maintenance of an accurate register is a key part of Australia's adherence to the recommendations of the Financial Action Task Force (an inter-governmental body that sets standards for combating money laundering and terrorist financing). For the Register to continue to be credible it must be backed by independent regulatory decision-making (to allow charities to 'enter' and 'exit').

For all its achievements, the ACNC is but one model of effective charity regulation. There are variations to the model that could be considered without losing all the gains made to date and there are overseas examples that can inform policy making.

The Repeal Bill, if passed, will have an immediate effect of creating uncertainty for the sector. There is no clarity about the role and functions of the 'successor agency', plans for the transition, what will happen to the information already provided and the Register.

Most significantly, the abolition of the ACNC (without a suitable successor model) would impact the public's trust and confidence in the sector, and therefore the sector's sustainability.

With no other known proposed alternative framework outside a return to ATO and ASIC models, the abolition of the ACNC would result in the loss of a specialist independent national regulator delivering a 'report once, use often' reporting model, a public register of charities, a national tailored approach to guidance and compliance, and the lost potential for future reforms.