

Commissioner's Interpretation Statement: Withholding or removing Commercially Sensitive information from the ACNC Register

The purpose of this Commissioner's Interpretation Statement is to provide guidance to ACNC staff, charities and the public on the exercise of the Commissioner's power to withhold or remove information from the ACNC Register; specifically, the power to withhold or remove information on the basis that the information is commercially sensitive and has the potential to cause detriment to the charity, or former charity, to which it relates, or to an individual. It also provides guidance regarding how any potential detriment will be weighed against the public interest, in determining whether the information should be withheld or removed.

This Interpretation Statement should be read in conjunction with Commissioner's Policy Statement: Withholding or Removing Information from the ACNC Register (CPS2012/5), as well as in conjunction with Appendix A, which sets out scenarios regarding how the ACNC will apply this Interpretation Statement in practice.

Commissioner's power to withhold or remove information from the Register

Section 40-10(2)(a)

The Commissioner may decline to include information on the Register, or may remove information from the Register, if the Commissioner considers that any of the following circumstances exist:

(a) the information:

- (i) is commercially sensitive; and
- (ii) has the potential to cause detriment to the registered entity (or former registered entity) to which it relates, or to an individual.

Section 40-10(3)

However, the Commissioner may include the information on the Register, or decline to remove information from the Register, if the Commissioner considers that the public interest in the Register including the information outweighs the likely adverse effect of the relevant circumstance or circumstances set out in paragraphs (2)(a) to (e).

1. Background

What is the ACNC Register?

- 1.1. The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) requires the Commissioner to maintain a public register with information about entities registered or formerly registered with the ACNC (Register).¹

What information can be withheld or removed from the Register?

- 1.2. The ACNC Act prescribes certain circumstances where the Commissioner has discretion to withhold or remove information from the Register.² The circumstances in which information may be withheld or removed are limited, and include situations where the information:
- a) is commercially sensitive and publication could cause detriment to the charity, or an individual;
 - b) is inaccurate, or likely to confuse or mislead;
 - c) is offensive;
 - d) could endanger public safety; or
 - e) is covered by the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth).
- 1.3. The focus of this Interpretation Statement is the Commissioner's power under section 40-10(2)(a) of the ACNC Act, which provides that the Commissioner may withhold or remove information that is required to be published on the ACNC Register where the information:
- a) is commercially sensitive; and
 - b) has the potential to cause detriment to the charity, or formerly registered charity, to which it relates, or to an individual.
- 1.4. Section 40-10(3) of the ACNC Act provides that in determining whether to publish the information, the Commissioner may decide to publish the information if she considers that the public interest in publishing the information outweighs the likely adverse effect.
- 1.5. Charities registered with the ACNC are able to apply to have specific information withheld. In making an application, charities need to indicate the circumstance(s) relied upon, and explain why the circumstance applies to their information. The level of evidence required in support of an application will depend upon the particular circumstances of the charity, and the claimed level of detriment.
- 1.6. This Commissioner's Interpretation Statement sets out the general approach the ACNC will take in considering such applications and determining whether commercially sensitive information should be withheld or removed from the Register. Attachment A explains some of the more common issues the ACNC has encountered.
- 1.7. Whilst it is obviously impossible to account for every potential application to have information withheld or removed from the Register, Attachment B

¹ ACNC Act, section 40-5.

² ACNC Act, section 40-10.

sets out a number of scenarios that indicate how the ACNC would approach any such applications.

2. How does the ACNC determine whether information is commercially sensitive?

What is commercially sensitive information?

- 2.1. The ACNC Act does not define 'commercially sensitive information'.
- 2.2. The ACNC generally understands commercially sensitive information to be any information of a confidential nature which has commercial value that would be reduced if the information was disclosed. This definition largely reflects the exemption set out in section 47(1) of the *Freedom of Information Act 1982* (Cth) and the current understanding as shown in the case law. The ACNC will continue to draw on existing and future decisions of courts and tribunals to assist in its interpretation.
- 2.3. Whilst the commercial sensitivity of a charity's information will be assessed by the ACNC on a case-by-case basis, the following are examples of information that courts or tribunals have found to be commercially sensitive:
 - a) trade secrets:³
 - i. designs for machinery;⁴
 - ii. designs for clothing;⁵
 - iii. designs for tools;⁶
 - iv. the results of experiments;⁷
 - v. ideas for entertainment, such as TV shows or exhibitions, which have been developed to the stage that they could be realised;⁸
 - b) personal information under the *Privacy Act 1988* (Cth) and related legislation;
 - c) documents regarding proposed projects;⁹
 - d) records of assets;¹⁰
 - e) information that may be used by competitors;¹¹

³ *Robb v Green* [1895] 2 QB 1.

⁴ *Ansell Rubber Co v Allied Rubber Industries* [1967] VR 37.

⁵ *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402.

⁶ *Seager v Copydex* [1967] 2 All ER 415.

⁷ *Smith Kline & French Laboratories v Secretary, Department of Community Services & Health* [1991] HCA 13

⁸ *Fraser v Thames Television Ltd* [1984] QB 44; *Darvall McCutcheon (a firm) v HK Frost Holdings P/L (in liq)* [2002] 4 VR 570; *Talbot v General Television Corp Pty Ltd* [1980] VR 224.

⁹ *AGL Wholesale Gas Ltd and Anor v Origin Energy Ltd and Ors* [2008] QSC 201.

¹⁰ *Robertson, in the matter of Miss Chu Pty Ltd (Administrators Appointed)* [2015] FCA 31.

¹¹ *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34.

- f) conditionally exempt documents under the *Freedom of Information Act 1982* (Cth), including where disclosure could reasonably be expected to:
 - i. prejudice the protection of an individual's right to privacy;¹²
 - ii. unreasonably affect a person in respect of their lawful business or professional affairs;¹³ and
 - iii. unreasonably affect an organisation in respect of its lawful business, commercial or financial affairs.¹⁴

What factors does the ACNC consider when assessing whether information is commercially sensitive?

- 2.4. In determining whether information is commercially sensitive, the ACNC will give consideration to the particular circumstances of the information, and the charity to which the information relates.
- 2.5. In undertaking this assessment, the ACNC acknowledges that the operations of charities across the country are diverse, and that no firm rule should be applied to the determination of what may be commercially sensitive information in the context of a charity's operations.
- 2.6. In assessing the commercial sensitivity of information, the ACNC will consider a number of factors, including:¹⁵
 - a) whether the information is used in the charity's trade or business, i.e. in relation to the activities that the charity undertakes;
 - b) the extent to which the information is known outside the charity;
 - c) the extent to which the information is known by the charity's employees, members, volunteers and/or contractors;
 - d) the measures taken by the charity to guard the secrecy of the information;
 - e) the value of the information to the charity and its competitors, including whether the value can be measured or quantified;¹⁶
 - f) the effort and money spent by the charity in developing the information;
 - g) whether the information remains current, or whether it is out of date;¹⁷ and
 - h) the ease or difficulty with which others might acquire or duplicate the information.¹⁸

¹² Section 47F, FOI Act.

¹³ Section 47G(1)(a), FOI Act.

¹⁴ Section 47G(1)(a), FOI Act.

¹⁵ *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

¹⁶ See also *Cannon and Australian Quality Egg Farms* (1994) 1QAR 491; *Hassell and Department of Health of Western Australia* [1994] WAICmr 25.

¹⁷ See also *Angel and the Department of the Arts, Heritage and the Environment* [1985] AATA 314.

¹⁸ See also *Organon (Aust) Pty Ltd and Department of Community Services and Health* [1987] AATA 396.

Is information already in the public domain commercially sensitive?

- 2.7. Where the information, which is the subject of a charity's application for withholding or removal from the Register, is already in the public domain, the ACNC will generally not hold that the information is commercially sensitive.
- 2.8. Federal and state regulators often require the lodgement of financial reports by charities, in addition to the charity's reporting requirements to the ACNC. Such reports may be available to the public upon payment of a fee. Where a fee is payable to access the document, the ACNC still views this information as being in the public domain.

Examples of charities' information that may be considered commercially sensitive

- 2.9. Information on the ACNC Register is generally unlikely to be commercially sensitive. However, there may be instances where certain information contained in a charity's financial report, or detailed explanation of a charity's activities in its Annual Information Statement, may be considered commercially sensitive.
- 2.10. Based on the above, the following are examples of charities' information (if included in financial reports or Annual Information Statements) that may be commercially sensitive where provided in sufficient detail:
- a) capital expenditures and operating expenditures;
 - b) contractor / supplier information;
 - c) donor information;
 - d) employee information;
 - e) financial arrangements;
 - f) going concern / solvency issues;
 - g) manufacturing processes;
 - h) operational information, including in relation to product pricing;
 - i) pending or settled litigation;
 - j) pending contracts;
 - k) pending mergers and acquisitions;
 - l) personal information regarding users of the charity's services;
 - m) proposed new activities / business dealings;
 - n) sales and marketing plans; and
 - o) trade secrets / patents and other intellectual property.

3. How does the ACNC determine whether publication has the potential to cause detriment?

What does “potential to cause detriment” mean?

- 3.1. Once the ACNC determines that information is commercially sensitive, it will consider whether the disclosure of the information has the potential to cause detriment to the charity, or an individual (whether or not that individual is associated with the charity).¹⁹
- 3.2. In determining whether publication of the information may cause detriment, the ACNC will consider:
 - a) whether the detriment claimed is real, actual or of substance;²⁰
 - b) whether there is a causal link between the public disclosure and the detriment claimed; and
 - c) the timing of any publication.

When is the detriment real, actual or of substance?

- 3.3. Hypothetical detriment is not enough. The publishing of the information must at least have the potential to cause harm to the charity or individual. That is, the ACNC would expect information about the specific nature of the detriment claimed (for example, a particular competitor may use the information to gain a competitive advantage), rather than a mere assertion that the detriment is likely to eventuate (for example, some possible future competitor may use the information to gain a competitive advantage).
- 3.4. In circumstances where the claimed detriment is measurable or quantifiable, the ACNC is more likely to accept that the detriment claimed will be real, actual or of substance.

When is there a causal link between the public disclosure and the detriment claimed?

- 3.5. The ACNC will also consider whether there is a causal link between the publishing of the commercially sensitive information and the detriment claimed by the charity. This requires charities to establish that the detriment is at least possible, and there are circumstances in which it may arise.
- 3.6. As the claimed detriment will usually relate to a situation which may occur in the future, there is no requirement that charities produce absolute proof that the detriment will arise. However, the ACNC must be satisfied that there is a logical connection between the publication of the information on the Register and the envisaged detriment.

Will the timing of any publication impact the potential detriment?

- 3.7. In assessing potential detriment, the ACNC will also consider the timing of any publication to the Register.
- 3.8. It is acknowledged that circumstances relating to the charity, or an individual, may change between when an application for withholding or removal is submitted, and when the ACNC makes its determination.

¹⁹ ACNC Act, section 40-10(2)(a)(ii).

²⁰ *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529; *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

- 3.9. The commercial value of information is often greater when it relates to the future (e.g. tenders not yet awarded, contracts being negotiated, plans not yet implemented). This is because the benefits attaching to the future event have not yet been secured and there is a risk that they may be taken by others. Once the potential benefits have been secured (e.g. through entering into contracts, deeds or agreements), the potential detriment is significantly reduced.
- 3.10. The ACNC will consider the impact of any changed circumstances, up to the date of the decision being made by the ACNC.
- 3.11. In light of this, the ACNC encourages open communication by charities in relation to any changes regarding the circumstances surrounding their application between the time of submitting the application and the decision being made by the ACNC.

4. How does the ACNC determine whether the public interest in publishing commercially sensitive information outweighs the potential benefit?

What is the public interest in publishing information on the Register?

- 4.1. Once the ACNC has determined that there is the potential to cause detriment through the publishing of a charity's commercially sensitive information, it will weigh this potential detriment against the public interest in publishing the information.
- 4.2. The ACNC views the 'public interest' as the achievement of the objectives of the ACNC Act, as set out in section 15-5(1) of the ACNC Act. These objectives are:
- a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
- 4.3. The ACNC will also have regard to the factors listed in section 15-10, and detailed below at paragraph 4.6, when considering the 'public interest' in publishing commercially sensitive information.
- 4.4. The ACNC Act makes it clear that there is a general public interest in publication, as transparency and accountability contribute to public trust and confidence in charities.
- 4.5. Therefore, the ACNC's starting presumption is that publication is in the public interest, with limited exceptions.

How does the ACNC determine whether the public interest in publishing outweighs the potential detriment?

- 4.6. In considering whether commercially sensitive information should be removed or withheld from the Register, the ACNC will seek to determine whether the public interest in publishing outweighs the detriment.
- 4.7. As a starting point, the ACNC will have regard to the matters set out in section 15-10. Those matters are:
- a) the maintenance, protection and enhancement of public trust and confidence in the not-for-profit sector;
 - b) the need for transparency and accountability of the not-for-profit sector to the public (including donors, members and volunteers of registered entities) by ensuring the public has access to information about not-for-profit entities;
 - c) the benefits gained from providing information to the public about not-for-profit entities;
 - d) the maintenance and promotion of the effectiveness and sustainability of the not-for-profit sector;
 - e) the following principles:
 - i) the principle of regulatory necessity;
 - ii) the principle of reflecting risk;
 - iii) the principle of proportionate regulation;
 - f) the need for the Commissioner:
 - i) to cooperate with other Australian government agencies; and
 - ii) to administer effectively the laws that confer functions and powers on the Commissioner;

(including in order to minimise procedural requirements and procedural duplication);
 - g) the benefits gained from assisting registered entities in complying with the understanding of the ACNC Act, by providing them with guidance and education;
 - h) the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia.
- 4.8. In determining whether the public interest in publication outweighs the detriment, the ACNC will also consider:
- a) who benefits from disclosure of the information;
 - b) what benefit is gained by disclosure;
 - c) what potential detriment would disclosure have; and
 - d) who would potentially suffer detriment as a result of disclosure.
- 4.9. The ACNC may also determine that the public interest is best served through removing or withholding such information from the Register. This is likely to occur where:
- a) disclosure would prejudice the ACNC's ability to obtain similar information in the future;
 - b) disclosure would impede the flow of information to the ACNC;

- c) disclosure would prejudice the protection of an individual's right to privacy;
 - d) disclosure could reasonably be expected to harm the interests of the charity, an individual or a group of individuals (whether or not such individuals are associated with the charity).²¹
- 4.10. Where the ACNC determines that the potential detriment is merely trivial or insignificant,²² even where it is measurable, this will generally not be sufficient for the information to be removed or withheld from the Register.
- 4.11. In determining an application to withhold or remove information from the Register, the ACNC will consider the supporting information supplied by the charity, and the extent of the evidence of the claimed detriment.

5. How long does the ACNC withhold commercially sensitive information?

- 5.1. In granting an application to withhold or remove information from the Register, the ACNC will generally state that the application is granted for a particular period of time.
- 5.2. This temporary withholding reflects the ACNC's view that the commercial sensitivity of information will generally reduce over time. Similarly, the ACNC's decision to withhold or remove commercially sensitive information at one point in time does not mean it will withhold similar information in the future. A charity must apply each time it wants the ACNC to consider withholding or removing information from the Register.
- 5.3. Some examples of situations where the commercial sensitivity of information will reduce over time include:
- a) contractor / supplier information, as contractors and suppliers may change or no longer be utilised;
 - b) going concern / solvency issues, as these issues may be resolved and/or the charity's financial situation may improve;
 - c) pending litigation, as the matter may be resolved, including through the courts, in which case the information will likely be in the public domain;
 - d) pending contracts, as they may have been entered into and there will be less potential detriment resulting from disclosure of the information to competitors;
 - e) pending mergers and acquisitions, as they may have occurred and there will be less potential detriment resulting from disclosure of the information to competitors, donors and recipients of the charity's service;

²¹ Based on Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982* (Cth), Part 6 Conditional Exemptions, section 6.29.

²² *Amway Corporation v Eurway International Ltd* [1974] RPC 82.

- f) proposed new activities / business dealings, as these may have come to fruition and there will be less potential detriment resulting from disclosure; and
 - g) sales and marketing plans, as they may have been implemented.
- 5.4. The ACNC will determine the length of time a charity's information will be withheld or removed from the Register on a case-by-case basis.
- 5.5. Prior to the conclusion of the withholding or removal period, the original applicant, or another interested party, may reapply to the ACNC and provide evidence regarding why the information remains commercially sensitive and should not be published.

Attachment A – Common Issues

1. Going concern issues

- 1.1. It is the ACNC's view that going concern information, i.e. information in relation to the solvency or otherwise of a charity, should generally not be withheld or removed from the Register. However, the ACNC will assess applications by charities to withhold going concern information on a case-by-case basis.
- 1.2. The ACNC believes that external stakeholders of a charity (such as users of its services, and current and potential donors and funders) have a high level of interest in its going concern issues. Disclosure of information regarding a charity's going concern issues may result in external stakeholders changing their planned actions in relation to the charity. This may include users of its services going elsewhere, or funders deciding to withdraw their funding.
- 1.3. Ensuring that external stakeholders have adequate information regarding any going concern issues is in line with the objects of the ACNC, especially in relation to enhancing public trust and confidence in the not-for-profit sector. That being said, the ACNC is also required to support and sustain the not-for-profit sector.
- 1.4. In this regard, the ACNC is mindful that going concern issues are rarely static. Whilst the future of a charity suffering from going concern issues may be uncertain, the charity has the potential to improve its financial position, including through restructuring operations, changing its financing arrangements or receiving new sources of funding. As financial reports are, by their nature, historical, they may not necessarily give external stakeholders and the general public a complete picture of a charity's ongoing financial position.
- 1.5. In assessing applications to withhold or remove information regarding going concern issues, the ACNC will consider a range of factors, including whether there have been changes to the charity's situation between when the application was submitted and when the ACNC reaches its determination.
- 1.6. Where there are changes to a charity's going concern issues, or where additional information may mitigate the potential detriment in publishing such information, the ACNC will work with the charity to ensure publication occurs, with the least possible detriment to the charity.

2. Financial reports

2.1. Only medium and large charities are required to provide financial reports to the ACNC. The ACNC takes the view that financial reports are not generally commercially sensitive in their entirety.

2.2. The table below sets out the content of a standard financial report. Whilst the terminology may vary between reports, the table indicates the approach the ACNC will generally take in determining whether the information is commercially sensitive.

Item	Explanation	Commercially Sensitive
Statement by Board of Management / Director's Declaration	The statement is generally the board's opinion regarding the financial position of the charity.	<p>These statements are generally not commercially sensitive.</p> <p>Exceptions may include:</p> <ul style="list-style-type: none"> • going concern issues; and • voluntary 'excess' information.
Director's Report	The report generally contains more information about the financial performance of the charity, and sometimes includes explanations regarding the performance.	<p>This will not usually be commercially sensitive.</p> <p>Exceptions may include:</p> <ul style="list-style-type: none"> • going concern issues; and • future plans (e.g. "subsequent events" notes).
Statement of Comprehensive Income / Income Statement	The statement shows the surplus / deficit of the charity for the year, generally at a very high level, without the provision of much detail.	<p>This will not usually be commercially sensitive in its entirety.</p> <p>Exceptions may include:</p> <ul style="list-style-type: none"> • going concern issues; • voluntary 'excess' information; and • profitability information where knowledge of the charity's financial strength may be used by competitors.

Item	Explanation	Commercially Sensitive
Detailed Income and Expenditure Statements	The statements provide more detailed information on individual items of the charity's income and expenditure.	<p>This will not usually be commercially sensitive in its entirety.</p> <p>Exceptions may include:</p> <ul style="list-style-type: none"> • going concern issues; • Specific line items (for example legal settlements); and • profitability information where knowledge of the charity's financial strength may be used by competitors.
Statement of Financial Position / Balance Sheet	The statement shows the assets and the liabilities of the charity at year end.	<p>This will not usually be commercially sensitive in its entirety.</p> <p>Exceptions may include:</p> <ul style="list-style-type: none"> • going concern issues • circumstances where knowledge of the charity's financial strength may be used by competitors.
Statement of Cash Flows	The statement shows the cash inflows and outflows of the charity for the year.	<p>This will not usually be commercially sensitive in its entirety.</p> <p>Exceptions may include:</p> <ul style="list-style-type: none"> • going concern issues; and • financial information regarding the settlement of legal disputes.
Financial Report Notes	The initial notes usually show the charity's accounting policies.	This will not usually be commercially sensitive.
	There may be other notes that break down	This will not usually be commercially sensitive.

Item	Explanation	Commercially Sensitive
	the information in the statement of financial position and comprehensive income into more detail.	Exceptions may include: <ul style="list-style-type: none"> • Specific line items (for example legal settlements)
	There may be other notes that contain more detailed information about the charity, including specific information on financing arrangements, capital and leasing commitments, related party notes, subsequent events, employee remuneration, going concern issues.	This will not usually be commercially sensitive in its entirety. Possible exceptions include: <ul style="list-style-type: none"> • going concern issues; • subsequent event notes; and • specific information regarding employee remuneration.
Auditor's Report / Compilation Report	Generally a standard document expressing an opinion on whether the financial report presents fairly the position of the charity.	This will not usually be commercially sensitive. Possible exceptions include: <ul style="list-style-type: none"> • going concern issues.

Does the publication of financial reports have the potential to cause detriment?

- 2.3. All medium and large charities must provide financial reports to the ACNC. The ACNC takes the view that, in the absence of mitigating circumstances, the likelihood of detriment in publishing financial reports is outweighed by the public interest in disclosing that information.
- 2.4. The uniform reporting requirements required by the ACNC mean that charities are open to the same level of public scrutiny. The ACNC believes such scrutiny is an essential part of enhancing public trust and confidence in the not-for-profit sector.
- 2.5. The ACNC appreciates that charities may believe disclosure of information contained in financial reports may create an undesirable perception of the charity and lead to accusations of money not being used for a proper purpose. This concern is particularly associated with spending on items such as administration, wages and travel costs, as well as retained earnings. There is also a concern that where the charity

appears to be in a strong financial position, this may result in fewer donations.

- 2.6. The ACNC takes the view that users of financial reports possess a sound understanding of how to read and interpret them.
- 2.7. Where a charity claims there is the potential for detriment based on an individual or organisation misinterpreting or misunderstanding a financial report, the ACNC will generally find that there is not a sufficient link between the disclosure and the detriment claimed.
- 2.8. The ACNC will also consider whether the information is already in the public domain, and assess the accessibility of the financial information. For example, where the financial reports of a charity are available from ASIC upon payment of a fee, a charity may still seek to have this information withheld from the Register.

Attachment B - Examples

The scenarios below outline various hypothetical situations where the ACNC may be asked to withhold or remove information from the Register, on the basis that it is commercially sensitive. The scenarios do not represent an exhaustive list, but are meant to illustrate the process the ACNC will generally undertake to assess whether or not the information is commercially sensitive and whether or not to publish it on the Register.

1 Commercial trade and potential to harm competitive position

Freedom Trade is a charity that raises money by engaging in commercial trade. It operates in conjunction with other, related charities. Freedom Trade has applied to the ACNC to withhold all of its profit and loss statements. It fears that if its profitability were known, this may result in its major competitors putting pressure on its prices. It is concerned that competitors can use information about its financial position to undercut prices and attract customers away. It has already been advised by several of its customers that a particular competitor has made approaches to them. Whilst Freedom Trade does not currently have any going concern issues, it directs all its profits to charitable work, so it does not have reserves.

(a) *Commercial sensitivity*

The ACNC would likely find that the financial reports contain commercially sensitive information.

(b) *Potential to cause detriment*

As Freedom Trade is able to provide specific facts to support its concerns, the ACNC would accept that there is the potential to cause detriment to Freedom Trade and its beneficiaries if its profitability was to suffer as a result of the publication.

(c) *Public interest considerations*

The ACNC would accept that there is a level of public interest in disclosing the information. However, the ACNC would likely find that the public interest in disclosure does not outweigh the potential detriment to Freedom Trade's future financial position if its competitors and/or large retailers undercut its pricing and affect the sustainability of the charity (s 15-10(d)).

(d) *Likely decision*

As Freedom Trade provided specific facts to support its concerns, the ACNC would likely find that the potential for detriment to Freedom Trade and its beneficiaries outweighs the public interest in the information. The information would be withheld.

Note if Freedom Trade merely asserted a potential detriment based on hypothetical future events, without identifying the competitors that it believes may undercut its pricing, then the withholding request is unlikely to be approved.

2 Solvency and charitable services

Disability Services Ltd, a charity that provides disability support services, is currently experiencing going concern issues. It has applied to the ACNC to have this information in its financial statement withheld from the Register. Disability Services Ltd has claimed that publishing the information will cause detriment because users of its services may decide to use a different service provider in the future. It is also concerned about losing a tender to undertake work for a local council.

(a) *Commercial sensitivity*

The ACNC would likely find that the financial reports contain commercially sensitive information.

(b) *Potential to cause detriment*

- (i) Individual users – publication of the information means potential users of Disability Services Ltd may choose to engage a different provider that appears more financially secure, thus there would be detriment to Disability Services Ltd.
- (ii) Council tender – it is highly likely that the council would conduct proper due diligence before awarding the contract. Therefore, the publication of the information may have little, if any, impact on the outcome of the tender. Therefore, any detriment to Disability Services Ltd would not be causally linked to the publication.

(c) *Public interest considerations*

- (i) Individual users – should Disability Services Ltd continue to experience going concern issues, and ultimately fail, this is likely to cause considerable financial and emotional hardship to the individuals currently utilising the service. Individuals are unlikely to be able to acquire financial information before engaging the services of Disability Services Ltd and are therefore more reliant on information that is publically available, including information on the ACNC Register. Although there is the potential for detriment to the charity and its beneficiaries, this detriment is outweighed by the public interest in disclosure due to the benefits gained from publishing the information (s 15-10(c)).
- (ii) Council tender – as it has been determined that the publication would not cause detriment in relation to the council tender, this question does not need to be considered.

(d) *Likely decision*

The ACNC would likely publish the information.

3 Solvency, commercial operations and harm to competitive position

Funds for Charity Ltd is a large charity that raises funds by undertaking commercial operations, and then distributing the funds to other associated charities, on a discretionary basis. Funds for Charity Ltd is experiencing severe financial difficulties and has applied to the ACNC to have its financial information withheld from the Register.

Funds for Charity Ltd submits that if its competitors learn of its financial position, they may temporarily undercut pricing and entice customers away

from Funds for Charity Ltd. Whilst a financially robust charity may be able to withstand such a tactic, Funds for Charity Ltd submits that, as a struggling charity, it does not have the resources to do so, and publishing the information may cause it to fail.

(a) *Commercial sensitivity*

The ACNC would likely find that the financial reports contain commercially sensitive information.

(b) *Potential to cause detriment*

The evidence provided by Funds for Charity Ltd indicates that there is the potential for significant detriment to both the charity and its beneficiaries, if it was to fail as a result of competitor pressure. The ACNC would consider the likelihood of such an eventuality based on, inter alia, an assessment of the competitors and beneficiaries of Funds for Charity Ltd. The potential detriment to its beneficiaries is somewhat mitigated by the fact that funds are distributed by Funds for Charity Ltd on a discretionary basis, and it is unlikely that any of the beneficiaries are solely reliant on Funds for Charity Ltd.

(c) *Public interest considerations*

There is a public interest argument in disclosing the information to allow stakeholders to make informed decisions regarding their dealings with Funds for Charity Ltd. As Funds for Charity Ltd is quite large, the public interest benefit is somewhat mitigated by the likely ability of some of its larger funders and beneficiaries to make their own enquiries regarding Funds for Charity Ltd.

(d) *Likely decision*

The ACNC will publish the information and, if Funds for Charity Ltd's financial situation has improved while the ACNC has been considering the application, invite Funds for Charity Ltd to publish its next set of financial reports early.

In situations where Funds for Charity Ltd was unable to provide specific information relating to the competitive pressures it was facing (e.g. information provided was overly general or vague) the request may be refused and the information published.

4 Solvency, commercial operations and harm to reputation

Books4Cash is a charity that conducts a commercial operation selling books to raise funds to enable it to undertake its charitable endeavours. In recent years, the trading results of Books4Cash have been poor and it is struggling financially. Books4Cash has applied to the ACNC to withhold information from the Register on the basis that if its difficulties become public, they could harm its reputation and may cause it to lose customers.

(a) *Commercial sensitivity*

The ACNC would likely find that the financial reports contain commercially sensitive information.

(b) *Potential to cause detriment*

The potential to cause detriment raised by Books4Cash may not be of sufficient substance. Whilst the fear of detriment may be real,

Books4Cash would need to provide information to establish that such fear is well-founded.

(c) *Public interest considerations*

If the ACNC does accept the potential for detriment, it will need to consider whether this is outweighed by the public interest in publication. In this situation, the public interest in publishing the information outweighs the potential for detriment to Books4Cash.

(d) *Likely decision*

The information will likely be published.

5 Reputational issues and administration expenditure

Worthy Cause Ltd is a charity that operates a fund that distributes to worthy causes. Worthy Cause Ltd incurs significant expenditure each year on collection expenses and other administrative costs. Worthy Cause Ltd has applied to the ACNC to withhold the accounts, as it believes people will not understand how charities operate and will make judgements about the level of expenditure in these areas.

(a) *Commercial sensitivity*

It is unlikely that the financial reports would be regarded as containing commercially sensitive information, as all medium and large charities are required to disclose this information.

(b) *Potential to cause detriment*

If the ACNC did hold that the information was commercially sensitive, it would be unlikely that publication would be found to cause detriment to Worthy Cause Ltd. The ACNC takes the view that those who access financial information understand what they are looking at, and that such information is not prone to misinterpretation.

(c) *Public interest considerations*

In the unlikely event that the ACNC found the information was commercially sensitive and publication had the potential to cause detriment, the public interest in publication would likely outweigh the detriment caused by publishing the information. This is because the ACNC is required to enhance public trust and confidence in the sector and it takes the view that financial disclosure supports this object.

(d) *Likely decision*

The ACNC would likely publish the information.

6 Reputational issues and legal expenditure

Help the Children is a charity undertaking charitable activities for children in need. Help the Children's financial reports reveal significant expenditure on legal fees throughout the year. The director's report explains that these legal fees arose as a result of a dispute with a group of Help the Children's members.

(a) *Commercial sensitivity*

The ACNC would likely find that the financial reports contain commercially sensitive information.

(b) *Potential to cause detriment*

Publication of the information may cause detriment to Help the Children, including through damaging its reputation.

(c) *Public interest considerations*

The ACNC would likely take the view that external stakeholders and the general public have a right to know how Help the Children's funds are being utilised. This would likely outweigh the potential detriment.

(d) *Likely decision*

It is likely that the ACNC would publish the information.

7 Future transactions

Global Change Inc. has been accumulating reserves to purchase a new business venture, which is in line with its charitable purposes. It is about to enter into a tender process in relation to this venture. Global Change Inc. has applied to the ACNC to have the information regarding this business venture and the related tender process withheld.

(a) *Commercial sensitivity*

It is likely that the ACNC would consider the information to be commercially sensitive.

(b) *Potential to cause detriment*

The ACNC would likely accept that publication would cause detriment to Global Change Inc. in the tender process, as its spending capacity would be revealed.

(c) *Public interest considerations*

In the absence of any additional information to the contrary, the ACNC would likely accept that the potential detriment outweighs the public benefit in disclosure.

(d) *Likely decision*

The ACNC would likely withhold the information until the tender process is complete.

Version	Date of effect	Brief summary of change
Version 1 – Initial statement	11/01/2016	Initial statement endorsed by Commissioner on 11/01/2016
Version 2 - Amendment		