

## Commissioner's Interpretation Statement: Withholding or Removing Commercially Sensitive Information from the ACNC Charity Register

The purpose of this Commissioner's Interpretation Statement is to provide guidance about the Commissioner's power to withhold or remove information from the ACNC Charity Register 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.

This Interpretation Statement was initially published on 11 January 2016. The current version applies from 29 October 2024 and reflects the Commissioner's understanding of the law regarding withholding or removing commercially sensitive information from the ACNC Charity Register on that date.

### Background

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 registered and formerly registered charities (Charity Register).<sup>1</sup>
2. The following information about registered charities is published on the Charity Register:
  - name
  - contact details, including its Address For Service
  - Australian Business Number (ABN)
  - registration status
  - current and former subtype registrations
  - dates of effect of current and former subtype registrations
  - governing rules
  - Responsible People (names and positions only)
  - Annual Information Statements
  - financial reports (if provided to the ACNC).<sup>2</sup>
3. The following information about formerly registered charities is published on the Charity Register:

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<sup>1</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-5.

<sup>2</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-5(1).

- name
  - ABN
  - registration status
  - former subtype registrations
  - dates of effect of former charity and subtype registrations
  - governing rules.<sup>3</sup>
4. The Charity Register also contains details of certain compliance actions if they have been taken in relation to a charity.<sup>4</sup>
  5. The ACNC Act allows information to be withheld or removed from the Charity Register under limited circumstances.<sup>5</sup> The circumstances are:
    - a) the information is commercially sensitive and has the potential to cause detriment to the registered charity, or formerly registered charity, or an individual
    - b) the information is inaccurate, is likely to cause confusion or mislead the public
    - c) the information is likely to offend a reasonable individual
    - d) the information could endanger public safety
    - e) the information is the details of a warning issued to a registered charity and, subject to certain specified conditions, it would not conflict with the objects of the ACNC Act to withhold the information.<sup>6</sup>
  6. This Commissioner's Interpretation Statement provides guidance about the first of these circumstances: the information is commercially sensitive and could cause detriment to the charity or to an individual. The ACNC website provides [guidance about the other circumstances under which information may be withheld or removed from the Charity Register](#).<sup>7</sup>
  7. Even if the circumstances to withhold or remove a piece of information exist, the ACNC may still decide to publish the information if the public interest in publishing it outweighs the likely adverse effect from publishing it.<sup>8</sup>
  8. A charity (which includes a formerly registered charity) can request the ACNC to consider withholding or removing commercially sensitive information from the Charity Register. In its request, the charity will need to explain:
    - why the information it is requesting to be withheld or removed is commercially sensitive, and

<sup>3</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-5(1)(b).

<sup>4</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-5(2)(f).

<sup>5</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-10.

<sup>6</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-10(2).

<sup>7</sup> ACNC, 'Withholding Information', <https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/withholding-information>.

<sup>8</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-10(3).

- how publication of the information has the potential to cause detriment to the charity, or to an individual.
9. The ACNC will use the information provided in the request and any other relevant information to determine:
- whether the information the charity has requested to be withheld or removed is commercially sensitive
  - if so, whether publishing the information has the potential to cause detriment to the charity or to an individual, and
  - whether the public interest in publishing the information outweighs the likely adverse effects of the detriment that could arise from publishing the information.

### How the ACNC determines whether information is commercially sensitive

10. The ACNC Act does not define ‘commercially sensitive information.’ There is no common law definition of the term, but some court decisions provide guidance.<sup>9</sup> Drawing on that guidance, the ACNC understands commercially sensitive information to be any information of a party that would disadvantage that party commercially if it were included on the Charity Register.
11. Most information published on the Charity Register will not meet this definition. For example, a charity’s name, ABN, registration status, subtype registrations, and the details of its Responsible People is not information that is commercially sensitive.
12. But, registered charities must submit Annual Information Statements (AISs) to the ACNC with details about their activities. Charities that are not [Basic Religious Charities](#)<sup>10</sup> must include certain financial information in their AISs. Medium and large charities must also submit annual financial reports to the ACNC.
13. The ACNC does not consider that an AIS in its entirety or a financial report in its entirety would usually be commercially sensitive information. But, a charity’s AIS or its financial report may include commercially sensitive information under certain circumstances.
14. The ACNC will consider all relevant information about the charity’s circumstances to determine whether information is commercially sensitive, including the following:
- How the information relates to the charity’s trade or business, i.e. in relation to the activities that the charity undertakes. For example, if a charity achieves its charitable purpose by submitting tenders, information in its financial reports relating to tender processes that are underway but not yet completed is likely to be commercially sensitive to the charity, and would disadvantage that charity if the information were known.

<sup>9</sup> *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34, 38. See also *Civic Video Pty Ltd v Paterson* [2013] WASCA 107; *Motorola Solutions, Inc v Hytera Communications Corporation Ltd (No 2)* [2018] FCA 17; *Warburton Environment Inc v VicForests (No 3)* [2021] VSC 35; *Capic v Ford Motor Company Australia Pty Ltd (Third Party Suppression Orders)* [2021] FCA 221; *Janala Pty Ltd v Hardaker (No 3)* [2023] NSWSC 446.

<sup>10</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-35. See also <https://www.acnc.gov.au/manage-my-charity-type/basic-religious-charities>.

- The steps the charity has taken (if any) to guard the secrecy of the information. If a charity has taken reasonable steps to guard the secrecy of the information, the more likely it is that the charity could suffer commercial harm if the information were known.
  - The effort and money the charity spent to develop the information. The higher the effort and expenditure, the more likely it is that the information is commercially sensitive.
  - Whether the information remains current or is out of date. Information that is out of date is less likely to be commercially sensitive than current information.
  - How easy it is for others to acquire or duplicate the information. Information that is easy to find or duplicate is less likely to be commercially sensitive.
15. The following information may be commercially sensitive if it is provided in sufficient detail in an AIS or financial report:
- capital expenditures and operating expenditures
  - contractor or supplier information
  - donor information
  - employee information
  - financial arrangements
  - going concern/solvency issues
  - manufacturing processes
  - operational information, including in relation to product pricing
  - litigation and pending litigation
  - pending contracts
  - pending mergers and acquisitions
  - personal information regarding users of the charity's services
  - proposed new activities or business dealings<sup>11</sup>
  - sales and marketing plans, and
  - trade secrets, patents and other intellectual property.<sup>12</sup>
16. The following examples are information that courts or tribunals have found to be commercially sensitive:

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<sup>11</sup> See, for example, *AGL Wholesale Gas Ltd and Anor v Origin Energy Ltd and Ors* [2008] QSC 201.

<sup>12</sup> See, for example, *Robb v Green* [1895] 2 QB 1; *Ansell Rubber Co v Allied Rubber Industries* [1967] VR 37; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402; *Seager v Copydex* [1967] 2 All ER 415; *Smith Kline & French Laboratories v Secretary, Department of Community Services & Health* [1991] HCA 13; *Fraser v Thames Television Ltd* [1984] QB 44; *Darvall McCutcheon (a firm) v HK Frost Holdings Pty Ltd (in liq)* [2002] 4 VR 570; *Talbot v General Television Corp Pty Ltd* [1980] VR 224.

- trade secrets
- designs for machinery
- designs for clothing
- designs for tools
- the results of experiments
- ideas for entertainment, such as TV shows or exhibitions, which have been developed to the stage that they could be realised
- personal information under the *Privacy Act 1988* (Cth) and related legislation
- documents regarding proposed projects
- records of assets
- information that may be used by competitors
- 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
  - ii) unreasonably affect a person in respect of their lawful business or professional affairs, and
  - iii) unreasonably affect an organisation in respect of its lawful business, commercial or financial affairs.

### How the ACNC determines whether publication has the potential to cause detriment

17. If the information a charity requests to be withheld or removed is commercially sensitive, the ACNC will consider whether including the information on the Charity Register has the potential to cause detriment to the charity, or an individual (whether or not that individual is associated with the charity).<sup>13</sup>
18. To determine this, the ACNC will consider:
  - whether the detriment claimed is real, actual or of substance<sup>14</sup>
  - whether there is a causal link between publishing the information and the detriment claimed, and
  - the timing of any publication.

#### Detriment that is real, actual, or of substance

19. A detriment will be real, actual or of substance if it has the potential to cause harm to the charity or to an individual. The fact that the people who operate the charity would feel

<sup>13</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-10(2)(a)(ii).

<sup>14</sup> *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.

uncomfortable if the information were published is not enough; nor is a remote, hypothetical detriment that is unlikely to occur.

20. For example, a charity is engaged in selling bicycles to raise funds and it is aware that one of its competitors, which is not a charity and which does not have financial statements that are available to the public, has approached its customers to try to secure their business by undercutting the charity's prices. The charity is concerned that, if information about its low reserves and operating surplus were published on the Charity Register, its competitor could develop a strategy to undercut the charity's prices to try to drive it out of business. In this example, the potential detriment to the charity is of substance because the competitor has already indicated a willingness to undercut the charity's prices.
21. In a contrasting example, a charity claims that publishing its annual financial statement on the Charity Register would cause detriment because the charity may choose to raise funds by selling bicycles in future and its future potential competitors might be able to use its financial statements to undercut its prices and drive it out of business. In this example, the detriment is hypothetical. It is not real, actual or of substance because the charity has not yet decided to sell bicycles, it does not have any competitors and there is no prospect of a competitor developing a strategy to undercut the charity's prices.
22. The ACNC is more likely to accept that a detriment is real, actual or of substance if it is measurable or quantifiable. But, if the ACNC determines that the potential detriment is merely trivial or insignificant,<sup>15</sup> even where it is measurable, the detriment will generally not be sufficient for the information to be removed or withheld from the Charity Register.

#### Logical connection between publishing the information and the detriment claimed

23. There must be a logical connection between publishing the information on the Charity Register and the detriment the charity claims could occur. If there is no logical connection, the ACNC will not accept that the potential detriment would arise due to the publication of the information.

#### Information already in the public domain

24. If a charity requests to have information withheld or removed from the Charity Register but that information is already lawfully in the public domain, the ACNC is unlikely to accept that publishing the information on the Charity Register could cause detriment.
25. The ACNC considers that information lawfully available to the public upon payment of a fee is information in the public domain. For example, some state and territory regulators require charities to provide financial reports to them, which members of the public can obtain by paying a fee. The ACNC considers that these financial reports are in the public domain.
26. However, if commercially sensitive information is in the public domain due to wrongdoing by a third party, the ACNC will take this into account when considering whether publication could cause detriment to the charity or to an individual.

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<sup>15</sup> *Amway Corporation v Eurway International Ltd* [1974] RPC 82.

### Timing of publication and potential detriment

27. The date on which a charity's information is published on the Charity Register can affect whether publication could cause detriment and the level of detriment caused.
28. The commercial sensitivity of information is often greater when it is relevant to a benefit that a charity has not yet secured because the benefit relies on a future event occurring (such as the charity being successful in a tender process that has started but has not yet concluded). Once the potential benefits have been secured, the potential detriment in publishing the information reduces significantly.
29. The ACNC will consider the impact of any changed circumstances, up to the date it decides whether to grant a request to withhold or remove information from the Charity Register. The ACNC may, in circumstances in which information will no longer be commercially sensitive after a certain date has passed, approve to withhold information for a limited period ending on that date.
30. Therefore, the ACNC encourages charities to communicate openly regarding changes to the circumstances surrounding their request between the time of submitting the request and the ACNC's decision.

## How the ACNC determines whether the public interest in publishing commercially sensitive information outweighs the potential detriment

### The public interest in including information on the Charity Register

31. After the ACNC has determined that publishing a charity's commercially sensitive information has the potential to cause detriment, it will weigh this potential detriment against the public interest in including or keeping the information on the Charity Register.
32. The ACNC's starting presumption is that publication is in the public interest, with limited exceptions. This is because the ACNC Act makes it clear that transparency and accountability contribute to public trust and confidence in charities.<sup>16</sup> Publishing information about charities promotes transparency and accountability. Withholding information about charities may contribute to mistrust in charities.
33. The ACNC will have regard to the matters set out in section 15-10 of the ACNC Act when deciding whether the public interest favours publishing or withholding or removing the information. 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

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<sup>16</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Preamble, para 4; s 15-10(b).

- 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.

34. The ACNC will also consider:

- who benefits from publication of the information
- what benefit is gained by publishing the information
- what potential detriment publishing the information could have, and
- who would potentially suffer detriment as a result of publishing the information.

35. If a charity can demonstrate that publication of commercially sensitive information on the Charity Register will hinder its participation in the market in which it operates, or will prevent it from being able to participate in the market in which it operates, the ACNC is likely to find that the potential detriment to the charity outweighs the public interest in publishing the information.

36. The ACNC will consider on a case-by-case basis whether detriment that arises in other circumstances will be sufficient to outweigh the public interest in including commercially sensitive information on the Charity Register.

#### How long the ACNC will withhold or remove commercially sensitive information from the Charity Register

37. In most cases, the ACNC will decide to withhold or remove information from the Charity Register for a limited period of time, rather than indefinitely.

38. This reflects the ACNC's view that:

- information that is commercially sensitive at one point in time may cease to be commercially sensitive as time progresses, and



- the detriment that could be caused by publishing commercially sensitive information may reduce as time progresses.
39. Examples of situations where the commercial sensitivity of information, or detriment resulting from publication of the information may reduce over time include:
- Contractor and supplier information. If a charity no longer uses a contractor or supplier, then the details of that contractor or supplier will likely no longer be commercially sensitive.
  - Going concern/solvency issues. If the issues have been resolved, publication of information about the issues is less likely to cause detriment, particularly if current information demonstrating that the issues have been resolved is also published.
  - Pending litigation. If the matter that led to the litigation has been resolved, publication of information about it is less likely to cause detriment. Additionally, if the matter is resolved in the courts, information about that matter is also likely to be lawfully in the public domain. If so, publication of the information will not cause detriment.
  - Pending contracts. Once a contract is finalised, there will be less potential detriment resulting from publication of information relating to the contract.
  - Pending mergers and acquisitions. Once a merger or acquisition is complete, there will be less potential detriment resulting from publication of information relating to the merger or acquisition.
  - Proposed new activities or business dealings. Once activities or business dealings have occurred, there will be less potential detriment resulting from publication of information about them.
  - Sales and marketing plans. Once a sales or marketing plan has been implemented, there will be less potential detriment resulting from publication of information about the plan.
40. The ACNC will determine the length of time a charity's information will be withheld or removed from the Charity Register on a case-by-case basis.
41. Prior to the conclusion of the withholding or removal period, the charity may make a new request to the ACNC to continue to withhold the information. The charity will need to provide evidence regarding why the information remains commercially sensitive and the nature of the potential detriment to the charity or to an individual if it were to be published.
42. The fact that the ACNC decides to withhold or remove commercially sensitive information at one point in time does not mean it will withhold or remove similar information in the future. A charity must make a new request each time it wants the ACNC to consider withholding or removing information from the Charity Register. For example, if the ACNC decides to withhold a charity's financial statements for one financial year, it does not mean that the charity's financial statements for the next financial year will also be withheld. The charity will need to make a new request, explaining why the information in

the financial statements for the next financial year is commercially sensitive and publication could cause detriment. The ACNC will make a decision about that new request.

## Common issues

### Financial reports

43. Only medium and large charities are required to provide financial reports to the ACNC.<sup>17</sup> The ACNC also publishes financial reports of small charities and Basic Religious Charities that provide them voluntarily.
44. Financial reports are not generally commercially sensitive in their entirety. The ACNC's uniform reporting requirements mean that registered charities are all open to the same level of public scrutiny. The ACNC considers such scrutiny is an essential part of enhancing public trust and confidence in the not-for-profit sector.
45. However, certain specific information in financial reports may be commercially sensitive information. For example:
  - information that is beyond what would ordinarily be included in a financial report ('excess' information)
  - future plans; for example, information included in 'subsequent events' notes
  - profitability information where knowledge of the charity's financial strength may be used by competitors and similar information is not publicly available about the competitors
  - specific line items in detailed income and expenditure statements (for example, legal settlements)
  - specific information regarding employee remuneration.
46. The ACNC will consider on a case-by-case basis whether the potential detriment in publishing a charity's financial reports containing commercially sensitive information is outweighed by the public interest in the information being available to the public.
47. The ACNC considers that people who read financial reports understand how to interpret them. If a charity claims there is the potential for detriment based on an individual or organisation misinterpreting or misunderstanding information in a financial report, the ACNC will generally find that the detriment claimed is not real, actual or of substance.
48. Furthermore, even if there is potential for detriment to the charity that could result from an individual or organisation misinterpreting or misunderstanding information in a financial report, the ACNC is likely to find that the public interest in maintaining, supporting and enhancing public trust and confidence in the not-for-profit sector by publishing information about registered charities outweighs any potential detriment to the charity that may be caused by a reader misunderstanding the content in a financial report.

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<sup>17</sup> *Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 60-10.*

### Solvency or going concern issues

49. The ACNC accepts that information relating to the solvency or otherwise of a charity ('going concern issues') can be commercially sensitive information. The ACNC also accepts that publication of information about going concern issues may cause detriment to a charity. For example, donors may decide not to donate to a charity if they find out that it is experiencing going concern issues.
50. Despite this, information about going concern issues will generally not be withheld or removed from the Charity Register.
51. A charity's stakeholders (such as users of the charity's services, and current and potential donors and funders) have a high level of interest in its solvency. Ensuring that stakeholders have adequate information regarding any going concern issues promotes the object in the ACNC Act of enhancing public trust and confidence in the not-for-profit sector.
52. The ACNC Act also includes the object of supporting and sustaining the not-for-profit sector. Therefore, the ACNC will work with charities experiencing going concern issues to ensure that the publication of their financial information on the Charity Register causes as little detriment as possible. For example, if a charity was experiencing going concern issues but has resolved those issues, we will work with the charity to ensure that the information on the Charity Register includes that it is no longer experiencing going concern issues.

## Examples

### 1 - Commercial trade and potential to harm competitive position

Charity A raises money for its charitable purpose by engaging in commercial trade. Charity A has requested that the ACNC withholds its financial report and the financial information in its Annual Information Statement. It fears that if its profitability were known, competitors could use information about its financial position to undercut prices and attract customers away. Several customers have already advised Charity A that a particular competitor has approached them. Charity A cannot determine its competitor's financial position, as its competitor is not required to make its financial statements publicly available. Charity A does not currently have any going concern issues, but it has limited reserves, because it uses the majority of its profits to further its charitable purpose.

#### *a) Commercial sensitivity*

The ACNC would likely find that the financial report and the Annual Information Statement contain commercially sensitive information, as they can be analysed to obtain information regarding Charity A's profitability. This information is commercially sensitive to Charity A and, in the industry in which Charity A operates, it could cause commercial harm to Charity A if it were known to competitors.

#### *b) Potential to cause detriment*

As Charity A is aware that one of its competitors has approached its customers, it has evidence that publication of the financial report could cause detriment that is real and of substance. If Charity A is forced out of business through its competitor's behaviour, there will be detriment to both Charity A itself and to the beneficiaries of its charitable purposes.

*c) Decision*

The ACNC would likely decide that the adverse effects to Charity A and its beneficiaries from publishing the financial report outweighs the public interest in publication. One of the objects of the ACNC Act is to support the sustainability of the not-for-profit sector, and the ACNC can support Charity A to be able to continue operating under its current business model if it decides to withhold Charity A's financial report from the Charity Register.

The ACNC would likely withhold Charity A's financial report for the year the request is made from the Charity Register, along with the financial information in its Annual Information Statement for that year.

The information would not be withheld indefinitely, because the potential detriment would reduce over time, as the information gets further out of date. The ACNC would discuss with Charity A an appropriate duration to withhold the information.

Charity A would need to submit a new withholding request for each financial year to have its financial reports and the financial information in its Annual Information Statement for that year withheld and would need to demonstrate that the threat to its profitability posed by its competitor still exists.

Note: if Charity A merely asserted a potential detriment based on hypothetical future events, without identifying the competitors that it believes may undercut its pricing or any evidence of such practices occurring within the industry in which it operates, the withholding request is unlikely to be approved.

## 2 – Reputational issues and administration expenditure

Charity B is a charity that operates a fund that distributes to worthy causes. Charity B incurs significant expenditure each year on collection expenses and other administrative costs. Charity B has applied to the ACNC to withhold its financial reports, 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*

Even if Charity B has voluntarily included information in its financial reports beyond what it is legally required to report and which itemises its expenses by function, the ACNC is unlikely to accept that the information of that nature in its financial reports would be commercially sensitive because it does not appear that disclosure of this information will commercially disadvantage Charity B if included on the Charity Register.

*b) Potential to cause detriment*

Even if the ACNC decided that the information was commercially sensitive, it would be unlikely that publication would be found to cause detriment to Charity B. The ACNC takes the view that those who access financial information understand the information, and that it is not prone to misinterpretation. Therefore, Charity B has not identified a potential detriment that is real and of substance.

*c) Decision*

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 promoting transparency and accountability through 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 takes the view that financial disclosure supports this object.

### 3 – Reputational issues and legal expenditure

Charity C is a charity undertaking charitable activities for children in need. Charity C's financial report reveals significant expenditure on legal fees throughout the year. The financial report contains a note which explains that these legal fees arose as a result of a dispute with a group of Charity C's members.

*a) Commercial sensitivity*

The ACNC would likely find that the information in the financial report which discloses the expenditure on legal fees and the note which explains the reason for the spending on legal fees is commercially sensitive information because the information may cause commercial harm to Charity C if it were to become known.

*b) Potential to cause detriment*

Publication of the information may cause detriment to Charity C, through damaging its reputation. Damage to Charity C's reputation may also negatively affect its ability to secure future funding through donations, causing financial detriment.

*c) Decision*

The ACNC would likely refuse to withhold the information, despite the potential for detriment. The ACNC takes the view that stakeholders and the general public have a right to know how registered charities' funds are being utilised. This would likely outweigh the potential detriment.

### 4 - Future transactions

Charity D has been accumulating reserves to purchase a new business venture to raise funds for its charitable purposes. It is about to enter into a tender process in relation to this venture. Charity D

has requested that the ACNC withholds information regarding this business venture and the related tender process, which is included in its financial report.

*a) Commercial sensitivity*

It is likely that the ACNC would consider the information relating to the ongoing tender process to be commercially sensitive. If other entities that wished to engage in the tender process were aware that Charity D intended to participate in the process, they could use the financial information published on the Charity Register about Charity D to estimate the tender it is likely to make, so that they can attempt to submit a more attractive tender to acquire the business venture. Therefore, this information could cause commercial harm to Charity D if it were to become known.

*b) Potential to cause detriment*

The ACNC would likely accept that publication would cause detriment to Charity D in the tender process, as its spending capacity would be revealed, potentially allowing other entities participating in the tender process to be able to submit tenders that are more attractive than Charity D's tender.

*c) Decision*

The ACNC would likely accept that the potential detriment to Charity D outweighs the public benefit in publication, as publication may jeopardise Charity D's chances to participate in the tender process on an even footing with other participants.

The ACNC would likely withhold the information until the tender process is complete and would arrange to publish it afterwards.

## 5 – Risk to ongoing viability due to funding model

Charity E has requested that the ACNC withholds its annual financial reports and the financial information in its Annual Information Statements from the Charity Register.

Charity E is a charity created and funded by major producers within a particular industry to reduce the environmental damage that occurs when consumers dispose of unwanted products and packaging produced by the industry. Consumers can drop off their unwanted products and packaging at designated collection points. The charity recycles the packaging so that it does not end up in landfill.

Charity E is funded by a levy imposed on each item sold by the producers which created the charity. Not all producers within the industry contribute to funding the charity. However, the charity will accept waste products from any producer, whether or not a particular producer contributes to funding the charity.

Charity E's constitution specifies that:

- all financial information must be kept in the strictest confidence;
- directors must not have any connection with any producer within the industry; and

- financial information must not be disclosed to staff members except for staff who need to know the information to be able to do their jobs.

If Charity E's financial information were published, it would be possible to work out the market share of each producer that funds the charity, based on how much of the levy to operate the charity is paid by each producer. It would also be possible to track fluctuations in the market for the producers' products. This information could be used to the detriment of producers which fund the charity by producers which do not fund the charity.

Furthermore, the producers which fund Charity E have agreed to do so on the basis that the charity's financial information remains confidential, due to the potential detriment to them that publication of the information could cause. If the information were to be published, the producers would withdraw their financial support for the charity, rendering it unable to continue to pursue its charitable purpose.

*a) Commercial sensitivity*

The ACNC would find that Charity E's financial information (its financial reports and the financial information provided in its Annual Information Statements) is commercially sensitive. Charity E has demonstrated that, in its unique circumstances, publishing its financial information on the Charity Register could threaten its ability to continue operating, as the producers who fund it would cease doing so if its financial information were to be published. Charity E has demonstrated that it has taken steps to ensure that the information remains confidential and has explained why those steps are necessary to ensure that it can continue to operate.

*b) Potential to cause detriment*

Charity E has demonstrated that publication of the information has the potential to cause detriment to it. This potential detriment is real and of substance. The charity has also demonstrated a logical connection between publication of the financial information and the detriment it has identified.

*c) Decision*

Although there is a public interest in publishing Charity E's financial information on the Charity Register to promote transparency and accountability, in this case that interest does not outweigh the potential detriment that the charity would suffer if the financial information were to be published. Publication of the information would threaten the charity's viability.

The ACNC would decide to withhold Charity E's financial reports, and the financial information in its Annual Information Statements, for as long as it continued to operate using the same business model (producer funded via levies on a voluntary basis).

## 6 – Risk to ongoing viability due to funding model

Charity F has requested that the ACNC withholds its annual financial reports and the financial information in its Annual Information Statements from the Charity Register.

Charity F is a small private hospital that provides healthcare in a remote area of Australia. It funds its services by negotiating funding agreements with the private health insurers that insure most of its patients. These funding agreements are renegotiated with the health insurers every three years.

Charity F has explained that funding negotiations between hospitals and private health insurers are subject to strict confidentiality. It maintains confidentiality over its financial information. It does not disclose its financial information to any of the health insurers and it does not have access to the funding agreements negotiated with other hospitals to use as guidance. If any of the health insurers were to become aware of Charity F's financial information, they would place increasing pressure on Charity F to agree to accept less money for providing services to patients. This would prevent Charity F from maintaining a modest surplus to enable it to maintain its facilities and protect it from financial crises.

### *a) Commercial sensitivity*

The ACNC would find that Charity F's financial information (its annual financial reports and the financial information provided in its Annual Information Statements) is commercially sensitive. Charity F has demonstrated that, in its unique circumstances, if its financial information became known, it would cause Charity F commercial harm. The charity has explained why it is important to keep its financial information confidential and that maintaining confidentiality of this information is widespread in its industry.

### *b) Potential to cause detriment*

Charity F has demonstrated that publication of its financial information has the potential to cause detriment to its bargaining position when it is renegotiating funding agreements with private health insurers. This potential detriment is real and of substance. The charity has also demonstrated a logical connection between publication of the financial information and the detriment it has identified.

### *c) Decision*

Although there is a public interest in publishing Charity F's financial information on the Charity Register to promote transparency and accountability, in this case that interest does not outweigh the potential detriment that the charity could suffer if the financial information were to be published. Publication of the information could threaten the charity's ability to continue to provide healthcare to patients.

The ACNC would decide to withhold Charity F's annual financial reports, and the financial information in its Annual Information Statements, for as long as it continues to operate using the same business model (funding via negotiation for payment for services by private health insurers).



## 7 – Risk to ability to participate in potential future activities to generate income

Charity G has requested that the ACNC withholds its annual financial reports from the Charity Register.

Charity G is a charity which provides vocational education to prepare people for careers in several industries.

Charity G has requested that the ACNC withholds its annual financial reports because it may wish to submit tenders for government contracts to provide additional vocational education courses in future. The charity submits that, if its annual financial reports are published on the Charity Register, its competitors in a future tender process will be able to use the information to ensure they can submit a more attractive tender for the work, to the charity's detriment.

Charity G confirms that it is required to submit its annual financial reports to its state regulator of co-operatives. The state regulator will supply copies of the charity's annual financial reports to any member of the public that pays the prescribed \$20 fee.

### *a) Commercial sensitivity*

The ACNC would find that Charity G's annual financial reports are not commercially sensitive information as they are already published in the public domain and able to be accessed for a fee. Charity G has not demonstrated that commercial harm to Charity G would result if the information in the reports were known.

### *b) Potential to cause detriment*

Even if the ACNC were to find that Charity G's annual financial reports were commercially sensitive, it would decide that any detriment to Charity G caused by publishing the information would not be real, actual or of substance. The reason for this is that Charity G is not engaged in any tender processes for government contracts. It has stated that it may decide to submit tenders for government work in future. Therefore, any potential detriment is purely hypothetical.

Furthermore, Charity G's annual financial reports are already lawfully in the public domain, because they are available from the state regulator of co-operatives. Therefore, the ACNC would not accept that publishing the annual financial reports on the ACNC Register would cause detriment to Charity G.

### *c) Decision*

The ACNC would decide to publish Charity G's annual financial reports on the Charity Register.

## Version history

Version	Date of effect	Brief summary of changes
Version 1 – Initial statement	11/01/2016	Initial statement endorsed by the Commissioner on 11/01/2016
Version 2 – Amendments	29/10/2024	Amendments made to enhance clarity