



Australian Government



Australian
Charities and
Not-for-profits
Commission

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OUR REF: 2018/14

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

BY EMAIL: economics.sen@aph.gov.au

Dear Senator Hume,

ACNC Appearance before Committee on Wednesday 28 February 2018

At my appearance before your Committee on Wednesday 28 February 2018, Senator Jenny McAllister referred to comments I made while appearing before the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) on Friday 16 February 2018. My appearance before this Committee was in relation to the Committee's review of the Foreign Influence Transparency Scheme Bill 2017 (**FITS Bill**).

Senator McAllister made reference to an answer I provided to a question by Mr Julian Leaser. The below is the excerpt from the transcript of my appearance before the Parliamentary Joint Committee with this question and answer.

Mr LEESER: Do you, as part of your functions, ask, receive, publish or audit the source of income that charities receive?

Dr Johns: No we do not.

Mr LEESER: You don't have that power under the legislation?

Dr Johns: No.

Mr LEESER: When you say that you adequately regulate charities at the moment, what are the major regulatory functions of the ACNC? That is the nub of trying to test this proposition.

Dr Johns: The nub of it derives from the Charities Act and that will describe what a charity can and cannot do. So when we register a charity, we look at their documents and so on to see whether in fact they will be able to pursue charitable purpose and then, as part of the regime and a part of our regulations, we have a fairly well defined set of governance standards. Usually when we've had an inquiry or a complaint, we can go to the charity and say, 'Do you manage that well? Has someone transgressed in a particular way?' We then get into an investigation or inquiry with the charity.

At face value it would appear that I was stating that the ACNC does not ask for the source of income that charities receive. However, when taken in context of the entire discussion leading up to this point, a discussion to which Senator McAllister was part, it is clear that Mr Leaser and I were discussing whether the ACNC collects information on the geographical source of donations. Attachment A is a copy of the Hansard transcript of my appearance before the PJCIS and below is a summary of the discussion that led to the above excerpt.





- After an opening statement from myself, the Chair, Mr Andrew Hastie, asked a series of questions in relation to charities which have potential connections to foreign entities, seeking an estimate of the number of charities which could potentially be affected by the FITS Bill.
- Mr Hastie and I discussed examples of the types of charities which would have international linkages, and Mr Hastie mentioned the Barnabas Fund.
- I mentioned that the ACNC was most concerned with the definition of what it is to be influenced by a foreign entity.
- Senator McAllister then had a series of questions, asking if there could be a simultaneous obligation for a charity and an individual to have to register activities on behalf of a foreign principal.
- Mr Leeser then began his questions reflecting on the advice provided by Peter Jennings, that if charities were excluded from the Foreign Influence Transparency Scheme, then foreign principals would target Australian charities and seek to use them to influence Australian politics.
- This led into a discussion on how many charities have had their registration revoked for not pursuing their charitable purpose.
- After this conversation came Mr Leeser's question in the excerpt on page 1.

From the above summary, it can be demonstrated that when I responded to Mr Leeser, I was responding in relation to whether the ACNC asks, receives, publishes or audits the geographical source of income that charities receive.

In light of Senator McAllister's follow up questions at Senate Estimates on Wednesday 28 February, it would seem that the Senator did not understand that the source being considered was geographical. Senator McAllister failed to provide to your committee that context. I have therefore provided the following information to fully clarify the situation for Senator McAllister, your committee, and the records.

The ACNC does not require charities to report the geographical source of income to the ACNC. However, the ACNC does require financial information from charities. In fact, the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (**the ACNC Act**) clearly sets out (in Subdivision 60-C) that medium and large charities must provide the ACNC with annual financial statements. In addition to this, the ACNC also asks charities to provide annual aggregated sources of income in the Annual Information Statement. In the 2017 AIS annual income was categorized under the following headings:

- Revenue from government (including grants)
- Donations and bequests
- Revenue from providing goods or services
- Revenue from investments
- Other revenue/receipts
- Other income if applicable

As can be seen from the above, we do not ask charities for a breakdown of finances by geographical source.

I appreciate this opportunity to clarify for Senator McAllister the distinction between sources of income provided to charities, relating specifically to foreign donations, and the



ACNC's power to collect annual financial statements. I trust this is of use to the Senator in her deliberations, and to Hansard for its records.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Johns'. The signature is fluid and cursive, with a long horizontal stroke at the end.

The Hon Dr Gary Johns
Commissioner

JOHNS, Dr Gary, Commissioner, Australian Charities and Not-for-profits Commission

[10:14]

CHAIR: Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make an opening statement before we proceed to discussion.

Dr Johns: Thank you for the invitation to appear today. As you're probably aware, the charities commission was established in December 2012 by the Australian Charities and Not-for-profits Commission Act that year. The objects of the act are, first of all, to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; second, to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and, third, to promote reduction of unnecessary regulatory obligations for the sector. There are just over 55,000 charities regulated by the commission. Those charities deliver services, make grants and perform a wide range of other activities to advance health, education, welfare, religious and other charitable causes. Those charities range in size from very small—less than \$50,000 income—but they constitute nearly 40 per cent of all charities, through to the extra-large, with revenues exceeding \$100 million, which constitute just 0.3 per cent of all charities. Half of charities have no paid staff, and we estimate that the sector is supported by approximately three million volunteers. As you have the commission's submission to the inquiry on the Foreign Influence Transparency Bill 2017, I'll refrain from going into great detail in this opening statement. But I do want to draw the committee's attention to a few facts about the commission's role and the charity sector.

As you've been made aware, to be a registered charity, an organisation must have a charitable purpose. There are 12 charitable purposes set out in the Charities Act 2013. One of these is for the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state or territory, or another country as long as the advocacy is in furtherance of aid in one or more of the 11 other charitable purposes. A registered charity must not have a disqualifying purpose, and the meaning of 'disqualifying purpose' is set out in section 11 of the Charities Act and includes 'for the purpose of promoting or opposing a political party or a candidate for political office'.

However, it is not a disqualifying purpose to distribute information or advance debate about the policies of political parties or candidates for public office, such as by assessing, critiquing, comparing or ranking those policies. And an example of this is given in section 11 of the Charities Act. There is no current requirement in the ACNC Act or in its regulations for charities to disclose relationships with foreign entities. The Commonwealth Electoral Act 1918 requires entities to inform the AEC via an annual return where a donation over the disclosure amount has been received for the purposes of political expenditure. These donations may be from foreign entities, but the legislation is not specifically or targeting such information.

In relation to the bill, the ACNC has three main concerns, which are covered in detail in our submission. These concerns are, first, that the bill places an unnecessary regulatory burden on charities. And we believe that charities are already well-regulated and transparent. Second, the significant penalties for noncompliance as set out in the bill are likely to increase the difficulty for charities to attract qualified staff and directors, which poses a risk to individual charities and the sector as a whole. Third, the definition of undertaking an activity on behalf of a foreign principal is imprecise and extremely broad. This creates difficulties for charities in understanding their potential obligations and difficulties inherent in charities meeting the requirements of the bill. And the risks attached to noncompliance meant that it is likely that charities will be less inclined to engage in public discussion, which is an important element of charitable activity and purpose.

Rather than go into further detail, I'll stop there and allow you to focus your attentions on issues of most interest to you. Thank you.

CHAIR: Thank you for your time and for the submission. You said that there are 55,000-plus charities. Is that right?

Dr Johns: Correct.

CHAIR: I guess I'll cut straight to the chase. I refer to the part of your submission called 'Activities on behalf of a foreign principal', specifically paragraphs 13 and 14. You make the point that:

It is also possible that where a charity is part of a wider family of charities, such as an international aid organisation which has links to an international grouping of entities, the charity may be required to register under s 11(1)(e) or (f) should the group all decide to draw attention to the same transboundary issue, for example wealth and income inequality, or global environmental issues.

Of those 55,000 charities that are Australian, do you have a sense of how many would be affected by the FITS bill?

Dr Johns: That's a wonderful question, and I don't have an exact answer. We would take onto our annual information statement fairly broad information about the areas of charitable intent that the charities work in. So, it doesn't necessarily tell us what the international connections are. But if you take it by topic, almost every topic under the sun now, from education to health to foreign aid, has some sort of international linkage, has some sort of discussion going on at the United Nations. So, we really have to conclude that quite a large number of charities could potentially be international actors. We'd suggest that really a great number of charities could be caught up here, but I can't give a number.

CHAIR: Sure. I guess for the public record it would be useful if you could give an example of a charity that may well be caught up by this legislation.

Dr Johns: Not naming names, but universities—well, take an aid charity that is, say, Christian based; it will most often be a worldwide entity and started out that way, for 100 years. Many of these charities have international connections. This is not a new thing for them. And in the world in which we live there are constant cross-country connections. So, I'd say that a very large number of charities take account of their counterparts in other countries, have discussions with their counterparts in other countries, attend international conferences, invite foreign charity officials to Australia. It's a very deep and rich connection that we have between our charities sector and their international counterparts.

CHAIR: An example comes to mind, because I'm familiar with this organisation: the Barnabas Fund, which provides aid to the persecuted church in the Middle East. I think they're headquartered out of London, for example, but they have an operation here in Australia. Is that such a charity that may well be affected?

Dr Johns: Yes. The simple answer is yes, and we can get into some detail here. The part of the act that worries us most, I guess, is this broad definition of what it is to be influenced by a foreign entity. It's very broadbrush, so potentially many, many discussions could trigger the registration of a charity.

CHAIR: Thank you, Mr Johns. I'm going to hand over to Senator McAllister.

Senator McALLISTER: Thanks for your submission and for appearing. First of all, the Attorney-General's Department has indicated to this committee that they expect around 500 organisations or individuals to be liable should this legislation come into effect. Do you think that's a realistic assessment of the reach of the legislation given your knowledge of the charitable sector?

Dr Johns: This is the difficulty. We don't gather that sort of information, and I don't know how the Attorney-General's Department does. They may have a better feel for this than we. But we don't register those pieces of information, so I can't tell. But I think we could hazard a guess that it's a large number.

Senator McALLISTER: I want to ask you about something which hasn't been contemplated by this committee yet: the interaction between the obligation for organisations to register and the obligation for individuals to register. I suppose my question is: have you formed a view about whether a simultaneous obligation exists for the organisation to register its activities and then all persons associated with those activities also to register?

Dr Johns: Is that to register with us or with this new entity?

Senator McALLISTER: With this new entity.

Dr Johns: It seems to capture individuals as well as organisations. I can't be definitive on that, but it seems to do so.

Senator McALLISTER: We can clarify this with the department, but, if both an organisation and an individual are required to register, it follows then that both the organisation and the individual will incur the recordkeeping obligations that arise from registration.

Dr Johns: I think that may be right. It really is a matter for those people who've drawn up the bill, but keep in mind that, from our commission's point of view, we register and control organisations, not individuals. That really is the whole basis of our being. This is quite a new regime, of course. It's government's business, but, once you step down to individuals, it's quite a different term of engagement for registration.

Senator McALLISTER: A final implication from this: many of the organisations that register with the charities commission would conduct their activities using a mix of paid and volunteer labour. That's correct?

Dr Johns: Yes.

Senator McALLISTER: One of the consequences of this legislation may be that individuals volunteering with some of the charities that might be caught by this bill might then themselves as individuals undertaking activity on behalf of a foreign principal—say, in a modern slavery campaign or in support of the persecuted church—incur a registration obligation as a volunteer within a charitable organisation.

Dr Johns: I'm not the lawyer, but I thought there would be no doubt that that's so. My interest would arise to say Volunteer X is now, because of his or her actions, registerable under the new scheme. I don't know what implications that has for the charity that I register. I understand and agree with your point, but I'm not sure of the wash-back.

Senator McALLISTER: My concern would be that, if by volunteering for my local religious charity I subsequently incur a registration obligation and reasonably onerous recordkeeping obligations, I might be less likely to do so.

Dr Johns: Yes, I think that's fair comment.

CHAIR: Thank you.

CHAIR: I apologise, Dr Johns, for not calling you doctor. My sister did a PhD, and I know how much of a siege it is.

Dr Johns: I worked hard for that, you know!

CHAIR: Mr Leeser.

Mr LEESER: I'm interested in your appearance here today to test a proposition that was put to us by the charities sector that, effectively, they should be exempted from this regime. Some comments were made by the former senior public servant Peter Jennings, now head of ASPI, that if charitable organisations were given an exemption then people seeking to interfere with and influence decisions in Australia may well look to that particular sector in order to try to influence outcomes here. So my questions are really directed at looking at the propositions put by the charities sector that they're adequately regulated at the moment.

You mentioned in your opening statement that there's a percentage of charities that are not regulated by you. What percentage was that again?

Dr Johns: We don't know. There's an unknown number. For instance, it's not compulsory to register your charity with the commission. The reason, with great respect to ourselves if people register, is that they want tax advantages through the tax office, and you have to come through our gateway. So, Julian, I just don't know how many do not register with us.

Mr LEESER: I couldn't remember whether you said 40 per cent had or hadn't registered with you.

Dr Johns: No, that was a measure of the size.

Mr LEESER: The size of charities. So it's only charities that have deductible gift recipient status that would want to register with you as a matter of course?

Dr Johns: No. First of all, the inducement to register is that any charity may be given a number of tax advantages, one of which is deductible gift recipient status. So they come to us, and we register them by satisfying ourselves that they are charities under the Charities Act et cetera. Then, if they are on our register, the tax office themselves will grant or not grant various taxation advantages.

Mr LEESER: So why would a charitable organisation not want to register with you?

Dr Johns: There are certain requirements under our act whereby we pursue them if we think they're not pursuing their charitable purposes. There is a whole set of standards of governance that we would enforce if we were worried that a particular charity were, for instance, taking private benefit for some misdeed or whatever. In other words, some charities might measure the trade-off from tax advantages against scrutiny and decide to stay out, and I don't know how many stay out.

Mr LEESER: To date, how many organisations have your pursued for not pursuing their charitable purpose?

Dr Johns: Very few have reached a point where we revoke their charitable status. I think it's 42 over five years, though that's doubled in the last year. Keep in mind the commission commenced five years ago. It takes quite an amount of time to establish the register, find your feet and so on and so forth. I'd imagine that over time there will be more revocations.

Mr LEESER: To clarify: that's 42 charities that have had their status revoked or that's 42 that have been investigated?

Dr Johns: No, revoked.

Mr LEESER: How many have been investigated?

Dr Johns: A large number—in the hundreds.

Mr LEESER: Do you have a breakdown of either the investigations or the revocations by sector, as it were—whether it's homelessness, environmental or education?

Dr Johns: It's a very small number, so we actually note them by name, and you can find that on our website. There's no pattern, but I might say the reasons for revocation are the pretty tried and tested ones that an organisation is simply not competent to run the place or, as I say, the classic one where someone's taking a private benefit. Those are the key elements.

Mr LEESER: They are effectively governance type questions.

Dr Johns: They are governance, financial, misdemeanour, people at risk if they are vulnerable children or aged people where we believed they are not being properly cared for or looked after. Those are the key elements.

Mr LEESER: Do you, as part of your functions, ask, receive, publish or audit the source of income that charities receive?

Dr Johns: No we do not.

Mr LEESER: You don't have that power under the legislation?

Dr Johns: No.

Mr LEESER: When you say that you adequately regulate charities at the moment, what are the major regulatory functions of the ACNC? That is the nub of trying to test this proposition.

Dr Johns: The nub of it derives from the Charities Act and that will describe what a charity can and cannot do. So when we register a charity, we look at their documents and so on to see whether in fact they will be able to pursue charitable purpose and then, as part of the regime and a part of our regulations, we have a fairly well defined set of governance standards. Usually when we've had an inquiry or a complaint, we can go to the charity and say, 'Do you manage that well? Has someone transgressed in a particular way?' We then get into an investigation or inquiry with the charity.

Mr LEESER: To what extent other than the publication of the list of those charities that have actually been revoked has there been some broader transparency about your proceedings or about the status of these charities?

Dr Johns: That is a very good question because the secrecy provisions of the ACNC act are very strong and it means that I cannot explain to the public at large actions I have taken. I can simply revoke a charity and put them on a list. There is very little else I can say unless, on some occasions with the permission of a charity, I might make a statement about an arrangement I've entered into with a charity. But that is up to the charity; I don't have the power.

Mr LEESER: So you don't have the power to tell us about the sources of funds for the charity and you don't have the power to tell us about investigations you're making of charities other than those that have been taken off the register as it were?

Dr Johns: That's correct.

Mr LEESER: I want to look at section 11 of the act, which I have the disadvantage of not having in front of me. Your submission looks at what is and what isn't a disqualifying purpose. I wondered if I could explore that for a minute. It is not a disqualifying purpose to go around saying candidate X opposes certain environmental policies. Is that correct?

Dr Johns: That's correct.

Mr LEESER: But it would be a disqualifying purpose for the charitable organisation to hand out leaflets to say: 'You should not vote for candidate X because they oppose environmental policies'?

Dr Johns: That gets to the finer point of: are you advocating for or against a party or a candidate? You are welcome to hand out information and material if it were interpreted as let's call it blatant in favour or against a candidate or political party. I think you could well trigger our inquiries. You cannot be absolutely definitive here but there is a line you have to be wary not to cross.

Mr LEESER: It seems that you have to go quite a long way to actually reach that disqualifying purpose line. You basically have to physically stand on a polling station and hand out things that say, 'Do not vote for candidate X' or 'Vote for candidate Y'. If you were to stand there and say, 'Just for your information, candidate X or candidate Y believes this,' you would probably be fine.

Dr Johns: That's correct.

Mr LEESER: That to me, in the context of what we are looking at here, which is foreign actors trying to influence the course of the Australian government, is a problem. Let me take you to an example. Are you familiar with a document produced before the commission was established called 'Stopping the Australian Coal Export Boom'?

Dr Johns: I am.

Mr LEESER: That particular document, as you may know—I referred to it in questions to the peak body of the charity sector—was produced by a range of organisations, including Greenpeace. Is Greenpeace an organisation that your commission regulates?

Dr Johns: Yes.

Mr LEESER: That particular document was funded by, among other organisations, The Rockefeller Foundation—which made its money from Standard Oil—who just happened to disclose that they were funding the particular document, but they had no requirement to disclose that. That's correct, isn't it?

Dr Johns: That's correct, yes. In terms of the requirement to disclose—correct.

Mr LEESER: There you have a company or an organisation—a foreign organisation—trying to disrupt a major industry in Australia, trying to interfere with the coal industry in Australia. Surely Australians have the right to know that that is happening, and it is not too much regulation to have a transparency scheme of the sort proposed in this legislation imposed on organisations such as Greenpeace?

Dr Johns: I can't make comment on the government's intentions to do this. What I can comment on is to contrast the rules under which charities now operate, and, as you pointed out previously and quite rightly, charities can go a long way down the track to political activity. They can do just about anything as long as they don't explicitly say to vote for or against a particular candidate or party. And that's what charities are used to. Again, it's not my position to say whether that's good, bad or indifferent, but the new regime would introduce a different test of political activity, and that would trigger a registration on a different register. That's all I can say in that regard.

Mr LEESER: But it is true to say that charities can receive funds from foreign sources and can effectively campaign against Australian industries and your commission would have no sense of whether or not they were doing that?

Dr Johns: That's correct.

Senator WONG: I have one question following on from that and the early questions from Senator McAllister. Would it be possible for the commission to be empowered to require the disclosure of foreign donations to charities registered by it?

Dr Johns: Yes.

Senator WONG: Do you envisage any difficulties with that in relation to resources, legislative remit or any practical problems that might arise?

Dr Johns: 'Resources' is music to my ears; I'd always like more.

Senator WONG: I probably shouldn't have raised that, should I?

Mr DREYFUS: You're speaking to a former finance minister, Dr Johns.

Dr Johns: It's a good debate: you want to establish a separate register for, if you like, more explicit purposes; there is an existing register, so you could do some of what you want, in the existing register, under the ACNC. The answer to that is clear; it's yes. I don't perceive any great difficulties—except, of course, this glaring inconsistency in what we expect of charities in their political activity and the limits we place on them. To me, the issue—and this could be true for other sectors of course—is that we're setting them two sets of rules to look at, and I think that's very difficult for any—

Senator WONG: I suppose the alternative way of looking at that is: the mischief towards which this legislative framework is directed, some would argue, is not applicable to charities.

Dr Johns: It might be, but I don't know the extent. For instance, I think Mr Crosby gave evidence to your committee—sorry; it was another committee—where he suggested that a number of charities were not registering with the Australian Electoral Commission because they were spending a certain amount of money on political purposes. It does highlight the fact that there are probably charities who might be receiving foreign donations which are explicitly or implicitly for political discussion and we simply don't know about it, but at the moment it's not revealed. The question for a government is: how is it best revealed without running a cloak over everyone else or having a great deal of extra regulation that might be fruitless?

Senator WONG: Thanks very much.

Mr DREYFUS: Dr Johns, thanks for attending before the committee. You took up your job in January?

Dr Johns: December.

Mr DREYFUS: Sorry—December. Your appointment was announced on 7 December. I'm just checking. This is just to see when you started. Your appointment was announced on 7 December. When did you start?

Dr Johns: I think it was 11 December.

Mr DREYFUS: I'm checking only because you might not know what happened before you got there, but, on the other hand, you may have checked and that's why I will ask. A number of governmental organisations have told us that they were not consulted by the government before these bills were introduced to the parliament on 7 December. For example, the Information Commissioner, who appeared this morning, said that he was given 24-hours to comment. Was the ACNC given an opportunity to comment on the Foreign Influence Transparency Scheme Bill before it was introduced on 7 December?

Dr Johns: I'll have to check the record.

Mr DREYFUS: That's fine. Perhaps you could let the secretariat know whether you were or weren't consulted. It's a factual question.

Dr Johns: Sure. Put it this way: it was brought to my attention, and that probably means it was only brought to the attention of senior staff in very recent days.

Mr DREYFUS: Thanks very much. Perhaps you could let us know.

Dr Johns: Sure.

CHAIR: As there are no further questions, Dr Johns, thank you very much for appearing before the committee this morning.

Dr Johns: Thanks, Mr Hastie.

CHAIR: We'll get you a transcript before it goes public.

Dr Johns: Thank you.

Proceedings suspended from 10:47 to 10:59