



21 May 2015

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Mr Alex Hawke MP
Chair
House of Representatives Standing Committee on the Environment
Parliament of Australia
PO Box 6021
Canberra ACT 2600

Dear Mr Hawke

Submission to the Inquiry into the Register of Environmental Organisations

Thank you for your invitation to make a submission to the House of Representatives Standing Committee on the Environment's inquiry into the administration, transparency and effectiveness of the Register of Environmental Organisations (REO).

I am pleased to make this submission to outline the role of the Australian Charities and Not-for-profits Commission (ACNC) as relevant to REO-listed organisations, and to make several recommendations for efficiency improvements and reduced administrative burden for regulated organisations, the Department of the Environment and the ACNC.

Sincerely

Susan Pascoe AM
Commissioner

Australian Charities and Not-for-profits Commission

Submission to the House of Representatives Standing Committee on the Environment *Inquiry into the Register of Environmental Organisations*

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Summary

The Australian Charities and Not-for-profits Commission (the ACNC) welcomes the opportunity to provide this submission to the House of Representatives Standing Committee on the Environment's *Inquiry into the Register of Environmental Organisations*.

This submission addresses the Inquiry's terms of reference, as relevant to the ACNC's role and responsibilities as the independent national regulator of charities.

The ACNC has an interest in the administration, effectiveness and transparency of the Register of Environmental Organisations (REO) in relation to REO-listed organisations that are also registered as charities with the ACNC.

While registration with the ACNC also enables certain charities to be endorsed for deductible gift recipient (DGR) status by the Australian Taxation Office (ATO), issues related to the DGR status of REO-listed organisations are generally outside the scope of the ACNC's responsibility.

The ACNC is committed to working with the Department of the Environment (the Department) and other agencies to reduce the regulatory burden for charities and improve administrative efficiency in relation to registered charities. This submission therefore makes several recommendations to improve efficiencies in relation to the REO.

Recommendations

1. That consideration be given to ACNC registration being a prerequisite for listing of an organisation on the REO.
2. That the Department and ACNC further progress work on alignment options to reduce red tape in the administration of the REO and ACNC Register, including:
 1. closer alignment of registration processes,
 2. enhanced registration, with the ACNC satisfying the Department's requirements,
 3. a single point of reporting, to reduce administrative burden, and
 4. enhanced data-sharing arrangements.
3. That consideration be given to reviewing the administration of other DGR registers, with the objective of consolidating or aligning registration and reporting processes for the relevant agencies and registered organisations.

The role of the ACNC

The ACNC was established on 3 December 2012 by the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (the ACNC Act). The objects of the ACNC Act are to:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit (NFP) sector;
- support and sustain a robust, vibrant, independent and innovative Australian NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the Australian NFP sector.¹

The ACNC's responsibility currently extends to registered charities only. Broadly, the ACNC's role is to:

- determine the charitable status of organisations that apply to be registered charities, in order to gain access to Australian Taxation Office (ATO) tax concessions and, in some cases, deductible gift recipient (DGR) status (subject to ATO endorsement),
- administer an online register of charities, to provide information about charities to the public,
- monitor and enforce legal compliance by charities, including receiving complaints about registered charities and, where appropriate, reviewing, referring and/or investigating those complaints,
- provide education and advice to charities about meeting ACNC requirements, and
- reduce administrative burden (or red tape) for charities, including by harmonising regulatory requirements and sharing data with other government agencies.

The ACNC is headed by the ACNC Commissioner, who holds an independent statutory office.²

As at 19 May 2015, 56,557 charities were registered with the ACNC. Of these, the ACNC estimates that 445 were REO-listed organisations.

¹ Section 15.5(1) of the ACNC Act.

² Section 110-5 of the ACNC Act.

1. Definition of 'environmental organisation' under the Income Tax Assessment Act 1997, including under Subdivision 30-E

The definition of 'environmental organisation' under the *Income Tax Assessment Act 1997* (Cth) (the ITAA) is an organisation whose principal purpose is:

- a) *the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or*
- b) *the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.*³

There are similarities between this definition and some of the charitable purposes under the *Charities Act 2013* (Cth) (the Charities Act). There are also charitable purposes and disqualifying purposes that are relevant to environmental organisations that are registered charities and undertake advocacy work.

The following section identifies definitions of charitable purpose under the Charities Act that are relevant to environmental organisations registered as charities.

1.1 Charitable purposes generally

The Charities Act defines 'charity'⁴ and sets out 'charitable purposes'. A charity must pursue one or more charitable purposes to be registered with the ACNC.⁵ A charity's purpose is determined by having regard to its governing rules, activities and any other relevant matters,⁶ and the definition is interpreted with regard to the common law.

The charitable purposes under the Charities Act which are most similar to the REO definition of 'environmental organisation' are 'advancing the natural environment'⁷ and 'advancing education'.⁸ 'Advancing' includes protecting, maintaining, supporting, researching and improving.⁹

The requirement under the Charities Act for a charity to have a 'charitable purpose'¹⁰ is similar to the 'principal purpose' requirement under the ITAA for listing on the REO.¹¹ The key differences are that:

³ Section 30-265(1) of the ITAA.

⁴ Section 5 of the Charities Act.

⁵ Section 12 Charities Act s 12.

⁶ Note 1 to section 5 of the Charities Act.

⁷ Section 12(1)(j) of the Charities Act .

⁸ Section 12(1)(b) of the Charities Act.

⁹ Section 3 of the Charities Act.

¹⁰ Section 5 of the Charities Act.

¹¹ Under 30-265(1) of the ITAA.

- the environmental purpose must be an organisation's 'principal' purpose for it to be listed on the REO, whereas a charity may have multiple charitable purposes, and
- a REO-listed organisation may have purposes which are not 'charitable purposes' under the ACNC definition, whereas an ACNC-registered charity must have only charitable purposes.

1.2 Charitable purposes: Advancing the environment and advancing education

The ITAA definition of 'environmental organisation' encompasses environmental and/or educational purposes, both of which are captured in 'charitable purposes' under section 12 of the Charities Act.

The explanatory memorandum to the Charities Bill 2013 (Cth) (the Explanatory Memorandum) defines the charitable purpose of 'advancing the natural environment' to include, without limitation:

- *preserving native flora and fauna;*
- *rescuing and caring for native animals;*
- *preserving or rehabilitating habitats;*
- *promoting sustainable development and biodiversity; and*
- *protecting, preserving, caring for, and educating the community about, the environment.*¹²

It is not sufficient for an organisation to merely carry out activities in the name of advancing the natural environment. There must be an identifiable benefit that is of sufficient value and is not incidental to a non-charitable purpose. For example, an organisation providing a recreational experience in a natural environment is unlikely to be a charity for the purpose of advancing the environment if the educational benefit is relatively minor or incidental to the recreational experience.¹³

In relation to the charitable purpose of 'advancing education', the Explanatory Memorandum says, relevantly, that the purpose includes (among other things):

- *vocational training;*
- *research directed towards expanding human knowledge and made publicly available;*
- *less formal education aimed at the development of citizenship and core life skills...*¹⁴

A purpose is not charitable if it lacks any educational merit or has little or no value to the public.¹⁵ Education does not have to be free of values, however the information presented should be based on evidence and reasonable analysis. Where a charity's purpose is to promote a certain view, it may not be 'advancing education' if that view is not genuinely educational.¹⁶

¹² Explanatory Memorandum, [1.141].

¹³ Explanatory Memorandum, [1.142].

¹⁴ Explanatory Memorandum, [1.119].

¹⁵ Explanatory Memorandum, [1.123].

¹⁶ Explanatory Memorandum, [1.122].

1.3 Charitable purpose: Advocacy

A registered charity can undertake advocacy in furtherance or aid of another charitable purpose. The Charities Act defines the charitable purpose of advocacy as:

- (l) *the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:*
 - (i) *in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or*
 - (ii) *in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.*¹⁷

The definition reflects the position at common law in Australia, as determined by the High Court of Australia in *Aid/Watch v Commissioner of Taxation*.¹⁸ The High Court of Australia identified a public benefit to such advocacy in its contribution to public discussion, which informs voters as well as policy-makers. Prior to *Aid/Watch*, it had long been recognised that advocacy could be a legitimate means of fulfilling charitable objects or purposes, provided it was ancillary to a charitable purpose, and not a purpose in itself.¹⁹

A purpose of promoting or opposing a change to a law, policy or practice must be sufficiently connected with, operate consistently with, and attempt to further or protect another recognised charitable purpose for the purpose to be a charitable purpose.²⁰ For the purpose to be charitable, the means used and the ends to be achieved must not be inconsistent with the rule of law and the established system of government.²¹

1.4 Disqualifying purposes: political and illegal purposes

Under the Charities Act, the following 'disqualifying purposes' would prevent an organisation from being a charity:

- (a) *the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or*
- (b) *the purpose of promoting or opposing a political party or a candidate for political office.*

The Charities Act clarifies that activities are not contrary to public policy merely because they are contrary to government policy.²² In addition, the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing,

¹⁷ Section 12(1) of the Charities Act.

¹⁸ (2010) 241 CLR 539.

¹⁹ See, for example, *McGovern v Attorney-General* [1982] 1 Ch 321, 340, 343 and GE Dal Pont, *The Law of Charity* (2010), [12.20].

²⁰ Explanatory MemorandumStatement: Charities Bill 2013, [1.150].

²¹ *Explanatory Statement: Charities Bill 2013*, [1.149].

²² Note to section 11(a) of the Charities Act.

critiquing, comparing or ranking those policies) would not disqualify an organisation from being a charity.²³

The ACNC may consider an organisation to have disqualifying purposes if its activities disclosed a true purpose of engaging in illegal activity. This would require evidence of more than particular individuals being involved in illegal activity, that is, it requires evidence of a purpose of engaging in illegal activity.

An organisation may also have a disqualifying purpose if its purpose was to promote a particular political party or candidate. This requires more than assessing political parties or distributing information about the policies of political parties. If an organisation's affiliation with a political party is so extensive as to suggest that it is a main purpose to elect the party or candidate, this is likely to show a disqualifying purpose.

2. Requirements to be met by an organisation to be listed on the Register and maintain its listing

There are some broad similarities between the requirements for eligibility for, and maintenance of, registration with REO and the ACNC. As noted in the summary to this submission, 445 REO-listed organisations are registered with the ACNC. The table below compares the key requirements for registration with REO and the ACNC.

Requirement	'Environmental organisation' (REO)	Registered charity (ACNC)
Australian Business Number	Not a REO requirement (but required for DGR endorsement by the ATO).	Must have an ABN. ²⁴
Type of organisation	Must be a body corporate, co-operative society, trust or unincorporated body established for a public purpose. ²⁵	Must not be not an individual, a political party or a government entity. ²⁶ Can be any other legal structure, provided other requirements (such as not-for-profit character) are met.
Purpose	Must meet the principal purpose requirement for an 'environmental organisation'. ²⁷	Must only have and pursue 'charitable purposes' for the public benefit, or a charitable purposes incidental or ancillary to, and in furtherance or in aid of, a charitable purpose. ²⁸ Must not have or pursue a 'disqualifying purpose'. ²⁹

²³ Example to section 11(b) of the Charities Act.

²⁴ Section 25-5(3) of the ACNC Act.

²⁵ Section 30-260 of the ITAA.

²⁶ Section 5 of the Charities Act.

²⁷ Section 30-265(1) of the ITAA.

²⁸ Section 5 of the Charities Act.

²⁹ As defined in section 11 of the Charities Act.

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Not-for-profit character	Must not give profits, financial surplus or property to members, beneficiaries, controllers or owners (as appropriate). ³⁰	Must be a not-for-profit entity. ³¹
Membership	A body corporate or co-operative society must meet certain membership requirements. ³²	No membership requirements.
Public fund	Must maintain a public fund that meets certain requirements. ³³	No public fund requirements.
Annual reporting	Must provide the Department with statistical information about gifts made to the public fund each financial year. ³⁴ An organisation listed by name in the <i>Income Tax Assessment Act 1953</i> (Cth) does not need to report if it is a registered charity.	Must submit an Annual Information Statement to the ACNC. ³⁵
Transfer of surplus assets on winding up	The organisation's rules must provide that, on winding up, surplus assets are transferred to another REO-listed organisation. ³⁶	The simplest way for a charity to demonstrate that it is a not-for-profit entity is for its governing document to provide that, on winding up, surplus assets must be transferred to another not-for-profit organisation with similar purposes.
Other requirements	<ul style="list-style-type: none"> The Minister and Assistant Treasurer will have regard to the policies and budgetary priorities of the Commonwealth government' when deciding whether to list an organisation³⁷ (although there is no definitive list of these priorities or a requirement to conduct activities that are in line with government policy). Must not act as a mere conduit for the donation of money or property to other organisations, bodies or persons.³⁸ Must agree to comply with any rules that the Minister and Assistant Treasurer make to ensure that gifts made to the fund are used only for its principal purpose.³⁹ 	<ul style="list-style-type: none"> Must comply with the ACNC governance standards⁴⁰ (and any external conduct standards if made). Must keep certain financial and operational records.⁴¹ Must notify the ACNC of certain changes to the charity's name, address, governing documents or responsible persons, or entitlement to be registered as a charity.⁴² Must not be characterised by a decision by an Australian government agency under Australian law as engaging in, or supporting, terrorist or other criminal activities.⁴³

³⁰ Section 30-270(1) of the ITAA.

³¹ Section 25-5(3) of the ACNC Act.

³² Section 30-275 of the ITAA.

³³ Section 30-265 of the ITAA.

³⁴ Section 30-270(4) of the ITAA.

³⁵ Subdivision 60-B of the ACNC Act.

³⁶ Subdivision 30-270(3) of the ITAA.

³⁷ Section 30-280(4) of the ITAA.

³⁸ Section 30-270(2) of the ITAA.

³⁹ Section 30-265(4) of the ITAA.

As demonstrated, some registration requirements are aligned and there is no serious conflict between other requirements. Considering this, as well as the benefits of a single point of reporting, transparency of charity information reported to the ACNC and the ACNC's compliance powers in relation to registered charities (covered later in this submission), the inquiry may wish to consider whether registration with the ACNC should be a prerequisite for REO listing. It is noted that ACNC registration is required for organisations listed on the Register of Harm Prevention Charities and under the Overseas Aid Gift Deduction Scheme, but is not required for listing on the Register of Cultural Organisations. The ACNC is unaware of any administrative or other reason for this difference in requirements.

Recommendation 1

That consideration be given to ACNC registration being a prerequisite for listing of an organisation on the REO.

3. Activities undertaken by organisations currently listed on the Register and the extent to which these activities involve on-ground environmental works

In relation to the activities undertaken by REO-listed organisations that are registered charities, the information provided in response to the inquiry's first and second terms of reference may be instructive.

As noted earlier in this submission, a charity's purpose is determined by having regard to its activities, among other things.⁴⁴ It is an ongoing requirement that a charity's activities pursue its purposes.

⁴⁰ Division 45 of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth). Charities are also required to comply with any external conduct standards made under Division 50 of the ACNC Act. As at 18 May 2015, no external conduct standards have been made under Division 50.

⁴¹ Section 55-5 of the ACNC Act.

⁴² Section 65-5 of the ACNC Act.

⁴³ Section 25-5(3) of the ACNC Act.

⁴⁴ Note 1 to section 5 of the Charities Act.

4. Reporting requirements for organisations to disclose donations and activities funded by donations

In relation to reporting requirements for REO-listed organisations, there are two issues relevant to the ACNC:

- the duplication of REO and ACNC reporting requirements for REO-listed organisations that are also ACNC-registered charities, and
- the transparency of information that is reported.

In relation to these points, it is noted that the ACNC is tasked with promoting the reduction of unnecessary regulatory obligations on the sector and maintaining, protecting and enhancing public trust and confidence in the charity sector.⁴⁵

4.1 Duplicated reporting requirements

Currently, REO-listed organisations that are registered charities are required to submit a REO statistical return form in addition to an ACNC Annual Information Statement. Analysis of ACNC and REO data indicates that there are 445 of these registered charities on the REO.

A large volume of the information collected in the REO statistical return is also collected in the ACNC Annual Information Statement. The information that is collected by REO but not by the ACNC includes:

- the number of members of the organisation⁴⁶
- the amount received specifically from donations of money and property⁴⁷
- the organisation's environmental outcomes⁴⁸
- a description and the percentage of activities conducted outside Australia,⁴⁹ and
- the time taken to complete the REO statistical return form.

The ACNC has entered into data-sharing arrangements with a number of approved government agencies, to give those agencies access to information, including information provided in the Annual Information Statement, for the purposes of reducing red tape for charities. This is done chiefly through the ACNC's Charity Passport.

⁴⁵ Section 15-5(1) of the ACNC Act.

⁴⁶ The ACNC Annual Information Statement asks for information about the number of employees and volunteers a charity has in Section C: Resources and operating locations.

⁴⁷ Similar information may be captured in the ACNC Annual Information Statement Section E: Financial Information and/or in a charity's financial reports.

⁴⁸ Similar information may be captured in the ACNC Annual Information Statement Section B: Activities.

⁴⁹ Similar information may be captured in the ACNC Annual Information Statement Section C.

4.2 Transparency of financial and other information

Information provided to the ACNC in charities' Annual Information Statements is made publicly available on the ACNC Register.⁵⁰ This contrasts with information provided in REO statistical returns, which cannot be made publicly available.⁵¹

The public Register of charities is a key element in the ACNC's role in maintaining, protecting and enhancing public trust and confidence in the Australian NFP sector. In addition to making reported information available publicly, the ACNC uses this information in research publications, to provide the public, charity sector, government and others with accurate information about the Australian charity sector.

From the 2014 reporting period onwards, all charities are required to answer financial questions in the ACNC's Annual information Statement. Medium and large charities are also required to provide financial reports. A summary of the financial information which is reported by charities and made publicly available on the ACNC Register is as follows.

ACNC financial reporting requirements

Charity size	Small	Medium	Large
Annual revenue	Less than \$250,000	\$250,000 or more but less than \$1 million	\$1 million or more
Financial data elements	9	12	15
Financial report	May provide voluntarily	Must provide reviewed or audited financial report	Must provide audited financial report

5. Administration of the Register and potential efficiency improvements

The REO was established in December 1992, almost exactly 20 years before the establishment of the ACNC. Any review of the REO may wish to consider this significant change in the regulatory environment for REO-listed organisations.

In addition to the issues of eligibility of organisations for registration and this submission's recommendation that ACNC-registration be considered as a prerequisite for REO-listing (above), there is potential to address overlap or duplication of the administrative processes of the ACNC and the Department including:

- registration processes, and
- reporting and other ongoing requirements.

It is noted that these issues are also relevant to other DGR registers.

⁵⁰ Section 40-5 of the ACNC Act.

⁵¹ This is due to the taxpayer confidentiality provisions found in Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (Cth). These confidentiality provisions apply to 'protected information' obtained or generated in the process of administering the REO.

Registration processes

Applications for registration as a charity are decided by registration analysts on delegation from the ACNC Commissioner. The considerations taken into account in registering applications are outlined elsewhere in this submission. This independent process of a statutory authority contrasts with the requirement for approval by the Minister for Environment then the Assistant Treasurer prior to entry on the REO.

A streamlined registration process is currently in place for entities applying for registration with the ACNC and the REO. The ACNC's registration form allows registration applicants to indicate an intention to apply for any of the four DGR registers, including REO. Threshold eligibility questions are included which, if satisfied, trigger the transfer of the applicant's registration data to the REO to be considered for listing. This means that REO administrators then need only to ask charities for any additional data not already collected by the ACNC. The ACNC is currently consulting with the DGR registers on the design of the next version of the registration form to further streamline registration processes. This process could be further enhanced to enable the ACNC to determine charitable status and REO requirements at the same time.

Reporting and other ongoing requirements

As covered earlier in this submission, the ACNC requires registered charities to:

- report financial and other information annually by submitting an Annual Information Statement, and
- notify the ACNC of changes to certain details, for example to the charity's name, address for service, governing documents or responsible persons, or entitlement to be registered as a charity.⁵²

These requirements for registered charities, along with the ACNC's capacity to share data with other approved government agencies through the Charity Passport, mean that the ACNC could share charity information with the Department, as well as any other agencies administering DGR registers. This would reduce reporting and notification requirements for regulated organisations in line with a 'report once, use often' approach.

Recommendation 2

That the Department and ACNC further progress work on alignment options to reduce red tape in the administration of the REO and ACNC Register, including:

1. closer alignment of registration processes,
2. enhanced registration, with the ACNC satisfying the Department's requirements,
3. a single point of reporting, to reduce administrative burden, and
4. enhanced data-sharing arrangements.

⁵² Section 65-5 of the ACNC Act.

Recommendation 3

That consideration be given to reviewing the administration of other DGR registers, with the objective of consolidating or aligning registration and reporting processes for the relevant agencies and registered organisations.

6. Compliance arrangements and the measures available to the Department of the Environment and the Australian Taxation Office to investigate breaches of the Act and ministerial Guidelines by listed organisations

The regulatory powers available to the ACNC in relation to potential breaches of ACNC legislation by certain registered charities⁵³ include:

- information gathering and monitoring powers: inspecting, copying and retaining documents and entering premises with consent or a warrant⁵⁴
- enforcement powers: warnings, directions, enforceable undertakings, injunctions and suspension and removal of a charity's responsible persons,⁵⁵ and
- revocation of a charity's registration, in certain circumstances.⁵⁶

The ACNC also has current memoranda of understanding (MOUs) with the Australian Taxation Office, Australian Securities and Investments Commission, Registrar of Indigenous Corporations and Tertiary Education Quality and Standards Agency. These MOUs cover information sharing, mutual assistance in the exercise of the agencies' functions and referral of compliance matters.

The ACNC's broader regulatory powers in relation to certain registered charities contrast with the more limited powers of the Department in relation to REO-listed organisations.

It is noted that currently, if a REO-listed organisation has its registration as a charity revoked for non-compliance with ACNC requirements, this would not necessarily affect its eligibility for DGR status under the REO regime. If recommendation 1 of this submission were adopted, all REO-listed organisations would be subject to the ACNC's power to revoke charity registration in the case of a breach of ACNC legislation, and the full suite of ACNC regulatory powers would be available under the ACNC legislation where a REO-listed organisation was a 'federally regulated entity'.⁵⁷

⁵³ The ACNC's full suite of regulatory powers is available where charity is a 'federally regulated entity' as defined in s 205-15 of the ACNC Act.

⁵⁴ Part 4-1 of the ACNC Act.

⁵⁵ Part 4-2 of the ACNC Act.

⁵⁶ Division 35 of the ACNC Act.

⁵⁷ As defined in section 205-15 of the ACNC Act.

Conclusion

The ACNC's objects direct it to give attention to the public's trust and confidence in the NFP sector, to promote the sustainability of NFPs, and to reduce unnecessary administrative requirements. This submission has identified relatively simple measures to streamline requirements for environmental organisations and reduce red tape while potentially enhancing regulatory oversight.