



Australian Government

The Treasury

Australian Charities and Not-for-profits Commission (ACNC) regulatory powers

Introductory information

1. There are a range of regulatory powers and sanctions available to the ACNC Commissioner in the ACNC Bill. The regulatory powers and sanctions enable the ACNC Commissioner to respond appropriately to the facts of each case and to conduct regulatory oversight in an effective manner.
2. The regulatory powers and sanctions are based on the powers of existing regulators which oversee different entities and activities of the NFP sector, including the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC).
3. Ensuring that the ACNC has similar regulatory powers is essential for the ACNC to effectively take on the regulatory roles previously performed by these other regulators. Without the necessary powers the ACNC would not be able to take on the roles of these other regulators and therefore function as a one-stop shop regulator for the NFP sector.
4. The regulatory powers include information gathering and monitoring powers, the ability to give entities warning notices, the ability to issue directions, the ability to accept enforceable undertakings, the ability to apply for injunctions and the power to suspend or remove a responsible entity.
5. There are stringent statutory thresholds, including application and necessity clauses, which must be met before regulatory powers can be exercised by the ACNC Commissioner.
6. The 'application clause' constrains the provisions the ACNC Commissioner is able to enforce, and the types of entities the ACNC Commissioner is able to apply enforcement powers toward.
7. The 'necessity clause' ensures that the ACNC Commissioner can only use enforcement powers when use of the power is necessary to directly address the contravention.
8. The ACNC Bill also requires the Commissioner to consider a number of factors before using such powers, these factors include:

- the nature, significance and persistence of any contravention of the Act or non-compliance with a governance standard or external conduct standard;
 - what action the Commissioner, the registered entity, or any of the responsible entities of the registered entity, could take or have taken to address any such contravention or non-compliance or prevent any similar contravention or non-compliance; and the welfare of any members of the community that receive direct benefits from the registered entity.
9. See subsection 35-10(2) of the ACNC Bill for further details.
 10. In the first instance the ACNC will rely on education to encourage compliance with the new provisions. This approach was outlined in the ACNC Implementation Report and is reflected in the provisions of the Bill which require the Commissioner to consider the factors outlined above.
 11. In more serious cases the type of enforcement power used by the Commissioner will be determined by the kinds of actions which are required to address the contravention.
 12. The table below provides a high level comparison between the existing default regulator at the Commonwealth level, the ATO, and the ACNC. Some of the powers outlined below are based on other Commonwealth regulators, for example the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulation Authority (APRA), particularly where the ATO has no equivalent power.
 13. One of the findings of the *Scoping Study for a National Not-for-profit Regulator* was that the lack of proportional powers available to the ATO was unsuitable for the NFP sector, as it means that in some instances the only enforcement mechanism available (the revocation of charitable status and loss of access to tax concessions) is inappropriately harsh and disproportionate.

TABLE 1 — SUMMARY TABLE - COMPARISON BETWEEN THE ACNC AND EXISTING COMMONWEALTH REGULATORS

ACNC regulatory power	Reference	Comparison to other Commonwealth regulators
Information gathering	ACNC Bill — Division 70	<p>The powers of the ATO are much broader in this area and are not explicitly restricted to the collection of information for the administration of the tax laws</p> <p>There is no minimum threshold before the ATO uses these powers</p> <p>The ACNC affords stronger procedural fairness protections, including minimum time periods for entities or individuals to provide relevant and required information or documents</p> <p>The tax laws abrogate the privilege against self-incrimination without providing the protections afforded to individuals under the ACNC Bill</p>
Monitoring powers	ACNC Bill — Division 75	<p>The powers of the ATO are much broader in this area</p> <p>There is no minimum threshold that needs to be satisfied before the ATO uses these powers</p> <p>The ACNC affords stronger procedural fairness protections including minimum time periods for entities or individuals to provide required information, and provides the occupier of the premises with rights and protection (for example compensation for damage to electronic equipment)</p> <p>The tax laws abrogate the privilege against self-incrimination without providing the protections afforded to individuals under the ACNC Bill</p> <p>The ATO is able to use monitoring powers without the need for warrants. The tax laws do not clearly specify the rights,</p>

ACNC regulatory power

Reference

Comparison to other Commonwealth regulators

protections and responsibilities of occupiers and establish a framework which includes external oversight – the provisions that specify the rights, protections and responsibilities of occupiers adds detail and length to the ACNC Bill, however, these provisions are required to provide affected parties with adequate protection

Also note that the provisions which establish the monitoring framework in the ACNC Bill is likely to become the precedence for all monitoring power regimes to be included in future Commonwealth legislation

Ability to give entities warning notices

ACNC Bill
– Division 80

There is no general ATO equivalent power – the ATO has to use harsher enforcement mechanisms e.g. loss of access to tax concessions.

Charities regulators in overseas jurisdictions generally have the authority to issue warning notices and to publish these notices (for example, charities regulators in the United Kingdom and New Zealand). ASIC also has the power to issue public warning notices with the power broadly consistent with the proposed ACNC powers

Unlike these overseas regulators and ASIC, the ACNC Commissioner is required to give entities at least 14 days to respond to a warning notice prior to publishing the notice

Directions

ACNC Bill
– Division 85

No general ATO equivalent – the ATO has to use harsher enforcement mechanisms e.g. loss of access to tax concessions

ATO does have similar powers for self-managed superannuation funds

ACNC regulatory power	Reference	Comparison to other Commonwealth regulators
Ability to accept enforceable undertakings	ACNC Bill – Division 90	<p>APRA has similar powers for all its regulated entities which can include NFP ADIs and insurance providers. The threshold which APRA has to meet prior to issuing directions are less onerous, with APRA having the authority to issue directions in a broader set of circumstance (i.e. when APRA considers that the direction is reasonably necessary), and the authority to direct an entity to take a broader range of actions (i.e. anything else as to the way in which the affairs of the body corporate are to be conducted or not conducted).</p> <p>No general ATO equivalent – the ATO has to use harsher enforcement mechanisms e.g. loss of access to tax concessions</p>
Ability to apply for injunctions	ACNC Bill – Division 95	<p>This power is based on an equivalent ACCC power which are designed to encourage self-correction</p>
Power to suspend or remove a responsible entity	ACNC Bill – Division 100	<p>Same as ATO and APRA; provisions provide for the ACNC to apply to a court that ultimately issues and enforces injunctions.</p>
		<p>The ATO has broader powers in regard to ancillary funds (both charitable and non-charitable funds) and self-managed superannuation funds. The exercise of these powers can be triggered by a contravention of any Australian law, with no procedural fairness. The ACNC on the other hand can only use this regulatory power if it is required to directly address a contravention of the ACNC Bill.</p>
		<p>ASIC and APRA have similar powers</p>