National Roundtable of
Nonprofit
Organisations

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS

SUBMISSION TO THE INQUIRY INTO THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION EXPOSURE DRAFT BILLS

NATIONAL ROUNDTABLE OF NONPROFIT ORGANISATIONS LTD

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1. Introduction

The National Roundtable of Nonprofit Organisations Ltd ("NRNO") is an independent, non-partisan organisation with a diverse membership of peak bodies and national not-for-profit ("NFP") organisations. Based on the active engagement of member agencies representing more than 20,000 NFP organisations across Australia, the NRNO facilitates consideration of regulatory, taxation and sustainable financing issues and coordinates member engagement with the Australian community and public policy processes.

Together with many other NFP organisations, the NRNO has contributed actively to government Inquiries and Reviews. This submission reflects consultation with organisations represented by NRNO members, and has been drafted on the basis of the experience of the member organisations.

The NRNO has contributed submissions to a number of consultation papers and exposure draft legislation released by the Treasury Department and the Australian Charities and Not-for-profits Commission ("ACNC") Implementation Taskforce, in particular, the second exposure draft legislation regarding the "in Australia" special conditions, the ACNC Implementation Design Paper, and the Consultation Paper on the introduction of a statutory definition of "charity".

The NRNO welcomes the opportunity to comment on the exposure draft Bills.

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2. Matters Addressed

Firstly, the NRNO welcomes amendments that have been made following the release for public consultation of the exposure draft legislation to establish the ANC ACNC.

For example:

- To allow joint or collective reporting to the ACNC for certain lines of activity, in the ACNC Commissioner's discretion.
- To expand the category of individuals who can undertake a review of medium registered charities, and those that can undertake an audit of large registered charities.

3. Purpose of this submission

The NRNO recognises and values the government's leadership in establishing the ACNC. This is a significant reform for the Australian NFP sector, and has tremendous potential to reduce regulatory overlap and red tape and build a stronger NFP sector.

The establishment of a national NFP regulator has been recommended by many inquiries over a long period of time:

- The 2001 Report of the Inquiry into the Definition of Charities and Related Organisations;
- The 2008 Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations;
- The 2009 Australia's Future Tax System report;
- The 2010 Productivity Commission report on the Contribution of the Not-for-Profit sector;
- The 2010 Senate Economics Legislation Committee inquiry into the *Tax Laws Amendment (Public Benefit Test) Bill 2010*.

A national regulator has been the consistent recommendation of the sector itself and this is documented in a number of these enquiries.

The purpose of this submission is to bring to the Committee's attention a number of matters that will impact on the implementation of the ACNC, based on the experience of the NRNO's members. We have made a number of recommendations throughout this submission.

4. Issues Raised

We wish to comment on the following issues:

(a) Penalties;

(b) Guiding Principle;

(c) External conduct standards and Criminal Activities;

(d) Constitutional issues;

(e) Registration of charities;

(f) The "Opt-Out" mechanism;

(g) Public Trust and Confidence in NFP sector;

(h) Amending Governing Rules;

(i) Powers of the ACNC;

(j) Review mechanism; and

(k) Test case litigation program.

4.1 Penalties

Part 7-3 of the Bill sets out a regime of penalties for non-compliance. We support the introduction of a regulator with the ability to issue penalties for non-compliance as a deterrent and to hold to account those charities that do not meet the requisite requirements.

However, we **recommend** that consideration be given to the fact that some charities have been operating to date with very little, if any, regulation, for example, charitable trusts and unincorporated associations. Even incorporated associations have not faced the level of regulatory oversight that they will be subject to when the ACNC commences.

We **recommend** that:

- there be a transitional period during which the ACNC Commissioner be directed to exercise his or her discretion to remit a penalty, more generously to evidence the "light touch" regulatory approach.
- there be more clarity in relation to when the ACNC Commissioner may exercise his or her discretion under section 175-60 of the Bill to remit a penalty in whole or in part. For example, that decisions regarding the remission of penalties be made fairly and taking into account all the circumstances.
- that the ACNC Commissioner be required to exercise their power to remit the penalty in whole or in part if the entity would be subject to a penalty for the same action from another regulator. It is possible that a Victorian incorporated association, for example, would face a penalty payable to both Consumer Affairs Victoria and the ACNC for the same act or omission.
- the size of the penalties be reduced because they are higher than what some entities are currently subject to.

4.2 Guiding Principle

Section 15-10 of the Bill sets out a series of matters that the ACNC Commissioner must have regard to in performing his or her functions and exercising his or her powers.

We **recommend** the addition of a further matter, namely the need for reduction of red-tape and reduction of the administrative burden on not-for-profit entities.

The purpose is to ensure that this is enshrined as a guiding principle for the ACNC, given that these are some of the key justifications and benefits for the establishment of a national NFP regulator.

4.3 External conduct standards and Criminal Activities

The Bill states that to be entitled to registration as a type of entity that is a charity and as a sub-type of charity, the entity must meet a series of conditions, two of which are:

(i) That the entity must meet the external conduct standards; and

(ii) That the entity has not been characterised by an Australian government agency as engaging in or supporting terrorist or other criminal activities.

(a) Criminal Activities

At common law and under the statutory definition of charity consultation paper (released October 2011), a charity must be for the public benefit.

An entity found to be engaging in or supporting terrorist or other criminal activities would not satisfy the public benefit test and therefore would fail to meet the description of "charity entity type" under column 1 of item 1 of the table in proposed section 25-5(5).

We wholeheartedly support the intent behind the condition, being to hold charities accountable where they engage in such activities. However, it is duplicative and unnecessary to include this as a separate condition.

(b) External conduct standards

Division 50 of the Bill allows for the development of external conduct standards ("ECSs") which are to be set out in regulations. The ECSs are to deal with matters external to Australia, or that are closely related to, or have or will have a significant impact on a matter external to Australia.

The object of the Division is to bolster public confidence in the sector by ensuring that funds sent by NFPs outside Australia, reach legitimate beneficiaries, are being used for legitimate purposes, are not contributing to terrorist or criminal activity or that the activities of Australian NFPs do not contribute to terrorist or criminal activity.

Paragraph 5.54 of the Explanatory Memorandum ("EM") states that "Australian NFP entities in the past have sometimes provided support for terrorist and other criminal activities. Often they did so unknowingly but occasionally they did so deliberatively, whether to directly help the organisations conducting those illegal activities or as a means to achieving their legitimate ends."

The Government has not produced evidence of how widespread this issue is, so as to justify this provision and the proportionality of a response, particularly given that non-compliance with the ECSs triggers the ACNC's enforcement powers.

A paper published by the Australian Institute of Criminology in September 2011, *Misuse of the non-profit sector for money laundering and terrorism financing,* states:

> *"Money laundering and terrorism financing (ML/TF) risks to the Australian non-profit sector are thought to be low. However, the impact of such misuse is inevitably high."*
>
> *…*
>
> *"'Financial contributions through formal charitable donations' was listed by AUSTRAC (2010: 8) as one of three principal methods by which terrorism funds are raised in Australia. Nonetheless, there are few publicly available, documented examples of this kind of exploitation, or of NPOs being used in money laundering schemes."*
>
> *…*
>
> *"The potential risk to the Australian non-profit sector is credible but the actuality of exposure appears relatively low. This was the view of non-profit, law enforcement and academic participants at the AIC-held roundtables and what can be deduced from the publicly available evidence. There have been a small number of cases in which an Australian NPO was suspected of procuring funds for terrorist activities and just one case that proceeded to trial. The evidence for non-profit involvement in money laundering is equally slender. Risk, however, often determines response..."*

The EM also states that the ECSs are expected to be based on the requirements of the intergovernmental Financial Action Task Force's Special Recommendation VIII.

We commented on SR VIII in our submission to Treasury on the second consultation paper on the "in Australia" special conditions:

> *1.1 'We understand that the report which recommended that "Australia should give further consideration to implementing specific measures from the Best Practices Paper to SR VIII…" was published in November 2006. It made reference to some of the government enquiries that had taken place to date regarding the NFP sector and various proposals that had been made but had not yet been implemented.*
>
> *1.2 Two such proposals were the introduction of a new statutory definition of "charity" and a national charities commission. Since this paper was produced, the Australian Government has committed to proceed with both.*

1.3 The paper concludes by recommending that Australia give further consideration to the specific measures from the Best Practices Paper (BPP). The BPP dated 11 October 2002 recommends that nations implement a number of preventative measures – for example:

- *to encourage financial transparency by requiring NFPs to present a full program budget,*
- *to require independent auditing,*
- *to undertake programmatic verification particularly where there is a home office and field offices,*
- *to ensure that the Board of Directors of NFPs recognise their critical governance role,*
- *to ensure there is appropriate oversight – for example through introducing a charity commission and to ensure inter-agency cooperation.*

1.4 Many of these measures will be implemented as part of the Government's NFP reform package. For example, charities will be required to submit an annual information statement and financial information to the Australian Charities and Not-for-profits Commission. The Government has recently consulted on the implementation of governance standards for NFPs. If a review was conducted now or in the near future, we suspect that Australia's report card would be significantly improved.

1.5 In the BPP, we could find no indication that the FATR was encouraging member countries to limit the operations of NFPs to its jurisdiction. In fact, a number of the measures specifically contemplate that NFPs will operate overseas.

1.6 Finally, the Mutual Evaluation Report on Australia's performance states that:

1.7 "To date there have been no substantiated links between terrorist groups and non-profit organisations in Australia."

1.8 In light of this we submit that constraining the extent to which Australian NFP's operate overseas is a disproportionate response and is not justified on the basis of Australia's international commitments.'

We support the objective of the Bill and the ECSs in identifying charities that engage in criminal activity and ensuring that they are ineligible for registration to protect public confidence in the sector.

However, the same justifications were made for the introduction of the "in Australia" special conditions which are to be applicable to Australian tax concession entities.

It is evident that the ACNC in monitoring the ECSs and the Australian Taxation Office ("ATO") in monitoring the special conditions for tax concession entities, will be monitoring similar facts and making similar determinations.

It is our submission that it is duplicative and inefficient for both the ACNC and the ATO to regulate these issues. It is preferable for the ACNC alone to determine these issues. The ACNC as the national regulator of charities is best placed to undertake this assessment and ensure that Australia's international obligations are acquitted.

4.4 Constitutional Issues

Chapter 2 of the EM sets out the constitutional basis for the Bill. We wish to comment on the communications power and federally regulated entities.

(a) Communications power

Paragraphs 2.5 and 2.6 of the EM assert that the communications power set out in paragraph 51(v) of the Commonwealth *Constitution* support provisions in the Bill that:

- require the ACNC Commissioner to maintain the ACN Register which is the electronic database available via the internet;
- empower the ACNC Commissioner to obtain information to determine whether information submitted by an entity and included in the ACN Register is correct; and
- to empower ACNC officers to monitor whether such information is correct.

We question this reference to the communications power. *Halsbury's Laws of Australia* state with regard to this constitutional power:

> *"The object of section 51(v) of the Commonwealth Constitution (the 'Constitution') is to place under Federal authority the control of distant communication carried on according to a systematic plan, so that the*

power is read as extending to wireless broadcasting as a form of telephonic service. Similarly, the power will support Commonwealth regulation of television broadcasting and receiving and the establishment of a Commonwealth-owned television broadcaster.

It is also likely that the Commonwealth can use section 51(v) of the Constitution to regulate the internet. 'Other like services' has been interpreted flexibly, and characterised as having an inherent scope for expansion. This presumably demonstrates that later developments in scientific methods, such as the internet, were contemplated by section 51(v) of the Constitution in order to regulate developments in technology.

In general, the power will authorise the Commonwealth Parliament to legislate with respect to the organised communication of messages by an organised means from a distance.

The Commonwealth's power extends to the regulation of communications and the establishment of a government-operated communication service, to the control of the content of communication services, the corporate structure of the holders of television broadcasting licences, and a regulatory framework intended to promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services to the public."

It would appear that the purpose of the communications power is to support communications infrastructure and regulate communications, not to enable the introduction of a specific form of communication, in this case, a website.

We further query whether this puts in doubt the constitutional basis of the above provisions of the Bill.

(b) Federally regulated entities

The range of enforcement powers of the ACNC are to apply under the Bill only to federally regulated entities ("FREs").

The definition of FREs is set out in section 205-15 of the Bill, and for the sake of simplicity encompasses:

- entities that are established or operated in the Northern Territory or Australian Capital Territory; or

- entities that are constitutional corporations under paragraph 51(xx) of the Commonwealth *Constitution,* or a trust of which the trustee is a constitutional corporation.

Paragraph 51(xx) of the *Constitution* allows the Commonwealth of Australia to make laws in relation to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

The law relating to the characterisation of entities as trading corporations is unsettled.

The Not-for-profit Project of the University of Melbourne Law School in its submission to the Treasury Department to the Exposure Draft *Australian Charities and Not-for-profits Commission Bill 2012,* stated:

> "Another concern is that the meaning of 'trading corporations' in the Constitution remains somewhat unclear. The High Court's guidance in this area refers to a holistic examination of features to ascertain whether there is a sufficiently substantial focus on trading activities. This is unlikely to provide sufficient certainty to NFP entities as to whether they fall within the scope of the Bill.[1]
>
> Further, we note that there are presently some doubts about the width of the corporations power following comments by the High Court in the *WorkChoices* case.[2] As Professor George Williams, a constitutional law expert, has submitted in respect of the national tertiary education regulator, there is an argument that the power in respect to 'trading' corporations should be confined to commercial corporations (as was probably originally intended) and not to, for example, "literary or charitable corporations". In his view, it is arguable that not all universities are constitutional corporations, and this concern would only be stronger with respect to the smaller NFP entities that may be regulated under the Bill.[3]

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[1] Nicholas Gouliaditis, 'The Meaning of Trading or Financial Corporations: Future Directions' (2008) 19 *Public Law Review* 110.

[2] *New South Wales v Commonwealth* (2006) 81 ALJR 34.

[3] George Williams, *Tertiary Education Quality and Standards Agency Bill(s)* (Submission to the Senate Education, Employment and Workplace Relations Committee, 8 April 2011) <http://www.aph.gov.au/Senate/committee/eet_ctte/teqsa/index.htm>.

> In particular, we draw attention to the case of *Williams v Commonwealth of Australia* in the High Court (Case S307/2010), in which some parties argued for a narrower reading of the meaning of 'trading corporations'.[4] The case has been reserved for judgment and may well affect the scope of the current Bill."

Judgment in the case referred to above has now been issued.

These comments will be of little comfort to NFPs in determining whether the enforcement provisions of the Bill will apply to them.

It is critical that NFPs have clarity on this issue given the extensive and invasive nature of the enforcement powers which will apply if they are found to be an FRE.

4.5 Registration of charities

The Bill establishes a system whereby an entity can apply to be registered as a type of NFP (in the first instance, as a charity) and secondly, as a "sub-type".

We wish to comment on a few aspects of the registration system.

(a) Effective date

The Bill states at section 30-30:

> *"The registration has effect from a date specified by the Commissioner."*

We **recommend** that the Bill state that the effective date may be retrospective to the date of application.

The analogous provision in the *Taxation Administration Act 1953* (Cth), subsection 426-30(2) states:

> *"(1) The endorsement has effect from a date specified by the Commissioner.*
>
> *(2) The date specified may be any date (including a date before the application for endorsement was made and a date before the applicant had an *ABN)."*

[4] Argument was heard on 9–11 August 2011. The submissions and materials are available at <http://www.hcourt.gov.au/cases/case-s307/2010>.

We **recommend** that the equivalent of subsection 426-30(2) be replicated in the ACNC Bill.

(b) Charity Type and Sub-type

(i) Charity Type

The Bill establishes a regime whereby an NFP must apply to be registered as a type of NFP, in the first instance, as a "charity".

The Bill does not distinguish between charitable funds and charitable institutions.

At common law and in Division 50 of the *Income Tax Assessment Act 1997* (Cth), the terms "charitable fund" and "charitable institution" are used.

We **recommend** that column 1 of the table in section 25-5(5) of the Bill refer to the type as "charitable fund or charitable institution" for items 1 – 4. It is likely that items 5 – 7 will apply only to charitable institutions.

We submit that it would be duplicative to require the ACNC to enquire into whether or not an entity was a charity because it is for a charitable purpose, and then require the ATO to determine whether it is a charitable fund or charitable institution for the application of the *Income Tax Assessment Act 1997* (Cth).

The two enquiries are related. Requiring both bodies to review similar questions is likely to lead to process inefficiency, and may lead to inconsistent treatment or impact the decision-making independence of each authority.

(ii) Other charity sub-types

The Bill allows for a series of charity sub-types. The EM indicates that the first four are intended to cover the four Pemsel heads of charity.

Item 5 deals with health promotion charities. Item 6 deals with public benevolent institutions and item 7 deals with not for profit child care services.

We query why only two of a number of charities that are also deductible gift recipient ("DGR") categories have been specifically listed as charity sub-types.

Both health promotion charities and public benevolent institutions are DGRs and charities.

However, there are a number of other DGRs that are also charities, for example:

- ✓ Charitable services institutions;
- ✓ School building funds;
- ✓ Scholarship funds;
- ✓ Necessitous circumstances funds;
- ✓ Animal welfare charities;
- ✓ Public fund on the register of environmental organisations;
- ✓ Overseas aid funds;
- ✓ Harm prevention charities; and
- ✓ Public funds on the register of cultural organisations.

Is there a reason that the above entities do not also have the ability to register as separate sub-types? On what basis have health promotion charities and public benevolent institutions been singled out? The main difference we can identify is that they qualify for more generous fringe benefits tax concessions.

The first five entity types on the above list, like public benevolent institutions and health promotion charities, currently receive endorsement upon application to the ATO only. They are not required to apply to a Government Department in the first instance. Is there a reason that they are not specifically listed as an entity sub-type?

Furthermore, the registration and endorsement procedure going forward is not clear to us for a number of the above charity and DGR categories which are presently dealt with by application to a Federal Government Department and the ATO.

For example:

- ✓ An application by an entity to be listed as a public fund on the register of environmental organisations must first be made to the Department of Sustainability, Environment, Water, Population and Communities.
- ✓ An application for overseas aid funds status must first be made to AusAID.
- ✓ An application for endorsement as a harm prevention charity must be made to the Department of Families, Housing, Community Services and Indigenous Affairs.
- ✓ An application by an entity to be listed as a public on the register of cultural organisations must be made to the Office for the Arts in the Department of Prime Minister and Cabinet.

When the ACNC commences, will applications for the above categories be addressed to the ACNC in the first instance, where the ACNC will liaise with the relevant Government Department? Or will applications continue to be received by the relevant Government Department?

4.6 The "Opt-Out" Mechanism

The EM states in a number of places that registration is voluntary for charities, but if the charity wishes to access Commonwealth tax concessions and other support, registration is a pre-condition.

In practice, registration will not be voluntary. It is unlikely that existing charities that currently enjoy tax concessions, will be in a position financially to forego these benefits. A charity which is structured as a company and is currently income tax exempt, would be subject to income tax of 30% if it opted-out. Given that most charities are already operating in a difficult financial climate given world economic factors, it is highly likely that opting out would in fact affect the solvency of the charity.

Secondly, the EM provides at paragraphs 14.20 – 14.23 that to opt-out, a charity must submit a form to the ACNC Commissioner by 1 March 2012, and if they do so they are taken to not have been registered since 1 October 2012 and taken to have had their endorsement revoked by the Commissioner of Taxation from 30 September 2012.

Example 14.3 gives the example of a charity which exercises this right by lodging the form on 1 December 2012. The example states that the charity may be liable for tax

on the $1,000 of tax-free income it received between 1 October 2012 and 1 December 2012.

We strongly **recommend** that the date of effect of opting-out be the date the form is submitted to the ACNC. Before an entity can opt-out it must first have a clear appreciation of its obligations as a registered charity and the consequences if it fails to maintain the requisite standards. The entity must then ascertain the value of the benefits it is currently receiving. It must then undertake a cost/benefit analysis to determine whether it ought to opt-out in all the circumstances.

Given the limited timeframe between now and 1 October 2012, we are of the view that most charities would not be in a position to undertake this analysis before 1 October 2012. This is the case for large charities, let alone smaller ones. Our experience is that most charities are struggling to keep abreast of the rapid pace of reform.

It would be expected that the ACNC under its "education" function would inform and assist charities of these issues, but the ACNC will only commence operating on 1 October 2012. It is more likely that charities would eventually become aware of their ability to opt-out after 1 October 2012, but then be faced with a tax liability if they do so.

If the entity was endorsed as a DGR, it will have issued tax deductible receipts which were legitimately issued at the time, but are no longer valid. Would this mean that the charity would also have to inform donors and compensate them for any loss?

If the charity had access to fringe benefits tax concessions, similarly, it may have already provided benefits to its employees under employment contracts. It will have limited time between now and 1 October 2012 to reassess and potentially redraft employment contracts.

For the above reasons, we strongly **recommend** that if an entity chooses to opt-out, that the date of effect be as at the date the form is submitted.

4.7 Public Trust and Confidence in the NFP Sector

In deciding whether to revoke the registration of an entity, the ACNC Commissioner must take into account a series of factors, including the extent to which the entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the NFP sector (s.35-10(2)(e) of the Bill).

Further, this factor is also one of a series of factors the ACNC Commissioner must consider in determining whether to exercise his or her enforcement powers (paragraph 35-10(2)(e) of the Bill).

Consideration of whether or not public trust and confidence would be impaired is very broad in scope and is a subjective issue. One of the examples provided in the EM is as follows:

> *Example 8.2: Reduced poverty Inc is a registered charity established for the relief of poverty. The entity provides food and housing to the homeless in Sydney. The ACNC enters the premises of the entity under a monitoring warrant to monitor whether it continues to meet the requirements to be registered. ACNC officers receive concerns raised by beneficiaries of the charity suggesting that the food provided and cooking practices are likely to not meet health standards. If the public becomes aware of this potentially inappropriate practice it would affect public trust and confidence in the sector.*
>
> *ACNC Officers therefore take images of the entity's cooking facilities and a sample of the food provided to the homeless. Consistent with the ACNC's secrecy framework, ACNC officers pass this information on to the government agency which is responsible for local food safety inspections.*

We trust that the ACNC's educative function will inform charities of the extensive scope of the proposed enforcement powers. Most charities would not expect that the exercise of a monitoring power relating to its charity registration could affect its food handling accreditation.

4.8 Amending Governing Rules

Paragraphs 5.29 – 5.32 of the EM indicate that the Bill establishes a framework where entities seeking registration must comply with minimum governance standards which are to be set out in regulations. We **recommend** that the government continue to commit to public consultation in relation to the content of these standards.

Paragraph 5.32 indicates that the governance standards can introduce principles that an entity must meet about matters such as "ensuring that its governing rules provide for a specified matter". Similarly paragraph 5.52 anticipates that the ECSs which are to be set out in regulations, may require that an entity's governing rules provide for a specified matter.

If the result of the regulations is that entities must amend their governing rules, this will cause significant difficulties for:

(i) Testamentary trusts;

(ii) Entities established by Acts of Parliaments; or

(iii) Entities established by canon or church law.

(a) Testamentary trusts

Most charitable trusts are established by trust deed. However, some are established as testamentary trusts in the Will of the testator. The governing rules of the testamentary trust are set out in the Will.

The ability to change the terms of a testamentary charitable trust is very limited. Generally it involves application to court, and even then, it is not entirely clear whether a court would be able to amend the terms of trust to comply with new regulations.

We **recommend** that the legislature give this issue due consideration to prevent undue hardship and facilitate the charitable testamentary intentions of individuals.

(b) Acts of Parliament and Canon law

A number of church denominations are established by historical Acts of Parliament or canon law. The ability for these entities to amend their governing rules is beyond their control.

Again, we **recommend** that the legislature give consideration to this practical issue.

4.9 Powers of the ACNC

Under the Bill, the ACNC is to be given a series of enforcement powers, one of which is to issue directions to the registered entity.

Section 85-15 of the Bill contains the following provision:

> *"The registered entity has power to comply with the direction despite anything its governing rules or any contract or arrangement to which it is a party."*

In contrast, a direction does not apply if it would contravene a court order.

We appreciate that this power is intended to prevent unruly charities from using their governing rules as a shield against compliance.

However, if a charity was issued with a direction that contravened its governing rules, it would be faced with either contravening the direction (and incurring the resultant penalties), or possibly being in breach of trust, breach of contract, breach of directors' duties, and if it is an ancillary fund, possibly being in breach of legislative guidelines.

We **recommend** that if a direction would contravene an entity's governing rules, that the ACNC should first give a direction that the entity amend its governing rules, and then a second direction which is conditional on the entity having amended its governing rules.

Forcing an entity or its responsible entities to breach their duties and contractual obligations will undermine the objects of the Act to "maintain, protect and enhance public trust and confidence" in the Australian NFP sector (section 15-5(1)(a)).

4.10 Review mechanism

We **recommend** that the Bill contain a requirement that the operations of the ACNC be reviewed five years after its commencement. The purpose of this review would be to evaluate its progress and make changes in the light of experience, if considered appropriate.

We submit that a review mechanism is appropriate for significant legislation of this nature.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* contains provisions requiring a review of the Charter following four years of operation (section 44) and again following eight years of operation (section 45).

Similarly, the *Charities Act 2006* of England and Wales contains a provision requiring review after five years.

In the Australian context, given that the most significant reductions in red tape and regulatory duplication will occur when State and Territory Governments refer their powers to the Commonwealth, a review would enable assessment of progress in this regard, and if a referral of powers had not taken place, assess the extent of streamlining requirements at the Commonwealth level.

4.11 Test Case Litigation Program

Lastly, we wish to draw the legislature's attention to the fact that at present the Australian Taxation Office has a program referred to as the test case litigation program ("TCLP"). Under the TCLP, the ATO provides financial assistance to litigants for their legal costs to pursue litigation against the ATO where the matter is likely to clarify legal precedent and be in the public interest.

A number of the most significant and recent cases clarifying the law of charity have been funded in part by the TCLP, and include:

- *Commissioner of Taxation v Word Investments* [2008] HCA 55;

- *Victorian Women Lawyers Association Inc v Commissioner of Taxation* [2008] FCA 983;
- *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42; and
- *Commissioner of Taxation v Bargwanna* [2012] HCA 11.

A further case concerned whether or not an entity was an NFP and entitled to self-endorse as an income tax exempt entity, *Wentworth District Capital Ltd v Commissioner of Taxation [2010] FCA 862.*

Four out of the six cases referred to above were heard by the High Court of Australia.

We strongly **recommend** that the ACNC be provided with a budget to fund a test case litigation program. The limited resources of charities and NFPs limit their capacity to fund such litigation which is in the public interest and of significance in clarifying the law.

A test case litigation program will be necessary to test the scope of the ACNC Bill and provide funding for charities that seek a review of ACNC decisions under the Bill. A TCLP will also be all the more important if the Government enacts a statutory definition of "charity" as there is likely to be a need to clarify the boundaries of the statutory limbs of charity.

5. Conclusion

Once again, we welcome the opportunity to comment on these matters. The introduction of the ACNC is an historic and significant initiative. We trust that this submission will inform the wording of the Bill with the ultimate objective of ensuring that the NFP sector continues to be a strong and vibrant sector, which going forward will be closely regulated by an empowering and effective regulator. We look forward to further dialogue with the Government regarding these issues.

SUBMISSION 6