



AUSTRALIAN
COUNCIL
FOR
INTERNATIONAL
DEVELOPMENT

**Submission to the House of Representatives' Standing Committee on
Economics**

**Re: Inquiry into the Australian Charities and Not-for-profits Commission
(ACNC) Exposure Draft Bill**

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Act for Peace - NCCA	HealthServe Australia Inc
ActionAid Australia	Hunger Project Australia
ADRA Australia	International Centre for Eyecare Education
Afghan Australian Development Organisation	International Needs Australia*
Anglican Board of Mission - Australia	International Nepal Fellowship (Aust) Ltd
Anglicord	International Women's Development Agency
Archbishop of Sydney's Overseas Relief and Aid Fund	Interplast Australia & New Zealand
Assisi Aid Projects	Islamic Relief Australia*
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Australia Hope International Inc*	Lifestyle Solutions (Aust) Ltd*
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Australian Business Volunteers	Mahboba's Promise Australia*
Australian Conservation Foundation	Marie Stopes International Australia
Australian Doctors for Africa*	Mercy Works Ltd.
Australian Doctors International	Mission World Aid Inc.
Australian Federation of AIDS Organisations	Motivation Australia Development Organisation
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Australian Himalayan Foundation	Opportunity International Australia
Australian Lutheran World Service	Oro Community Development Project Inc.*
Australian Marist Solidarity Ltd	Oxfam Australia
Australian Medical Aid Foundation Ltd	Partners in Aid
Australian Red Cross #	PLAN International Australia
Australian Respiratory Council	Project Vietnam
Australian Volunteers International	Quaker Service Australia
Baptist World Aid Australia	RedR Australia
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CARE Australia	RESULTS International (Australia)
Caritas Australia	Salesian Society (Vic) Incorporated
CBM Australia	Save the Children Australia
Charities Aid Foundation*	Sexual Health & Family Planning Australia
ChildFund Australia	TEAR Australia
CLAN (Caring and Living As Neighbours)	The Salvation Army NSW Property Trust*
Credit Union Foundation Australia	Transparency International Australia
Door of Hope Australia Inc*	Union Aid Abroad-APHEDA
Emergency Architects Australia Ltd	UnitingWorld
Foresight Australia (Overseas Aid and Prevention of Blindness)	University of Cape Town Australian Trust*
Fred Hollows Foundation	WaterAid Australia
Friends of the Earth (Australia)	World Education Australia
Global Development Group	World Vision Australia
GraceWorks Myanmar	WWF Australia



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1. Introduction

1.1 The Australian Council for International Development (**ACFID**) is the peak body for Australian non-government organisations working in the field of international aid and development. ACFID has 82 members¹ operating in more than 100 developing countries.

1.2 ACFID has assisted the Australian international aid and development sector since 1965. ACFID's membership is supported by over \$850 million per year donated by over 2 million Australian households (2009/10). ACFID's members range between large organisations with hundreds of employees and with revenues in the hundreds of millions of dollars to very small organisations.

1.3 ACFID has operated a Code of Conduct since 1999 ('**the Code**'). All of ACFID's members, and approximately another 50 organisations, are signatories to the ACFID Code. The ACFID Code of Conduct is a voluntary, self-regulatory sector code of good practice that aims to improve international development outcomes and increase stakeholder trust by enhancing the transparency and accountability of signatory organisations. It was developed in 1997 and comprehensively revised in 2010. A key purpose of ACFID is to equip and encourage members to observe the highest ethical standards in all their activities, including strict observance of the Code.

- The Code sets out standards in the three areas of accountability:
 - i) Program Principles – including Obligations for effectiveness in aid and development activities (accountability to primary stakeholders, ensuring a quality approach, gender and environmental sustainability); Relationships with partner (roles and responsibilities, control of funds); human rights (rights of vulnerable and marginalised people, people with a disability and protection of children); and advocacy and emergency management.

¹ 71 members, 11 provisional members and 2 affiliates

ii) Public engagement – including Obligations on the signatory organisation to be ethical and transparent in marketing, fundraising and reporting.

iii) Organisation – including Obligations for governance, management, financial controls, treatment of staff and volunteers, complaints handling processes and compliance with legal requirements. A copy of the ACFID Code is **attached** to this submission.

1.4 This submission comments on the *Australian Charities and Not-for-Profits Commission Exposure Draft Bill (ACNC Draft Bill)* referred to the Standing Committee on Economics on 5 July 2012.

2. Overview of ACFID's position

2.1 ACFID has supported the establishment of a national, independent regulator with its, original, stated aim of the reduction in red tape which increases the effectiveness of the international aid sector, and the not-for-profit (**NFP**) sector in general.

2.2 However, ACFID is concerned that that stated aim has not been sufficiently reflected in the drafting of the ACNC Draft Bill and associated legislation. ACFID is particularly concerned about whether any agreement has been reached with the States and Territories which will remove the red-tape which each of them separately administers.

2.3 ACFID also remains very concerned that there will be significant and adverse consequences for many of the international aid organisations it represents because of a failure to specify in the legislation that charities, which assist in the relief of poverty etc to poor and disadvantaged people outside Australia, will be covered by the Statutory Definition of Charity (and the definition in the ACNC Draft Bill), be entitled to ACNC registration and will be eligible for relevant tax-exempt endorsements for their overseas work.

2.4 In these submissions, ACFID firstly addresses the issues specific to the overseas aid and development sector, and then touches on some general issues with the ACNC Draft Bill. ACFID makes the following recommendations with respect to each:

Recommendations specific to the Overseas Development Sector:

- a. **ACFID submits that column 2 of the table at proposed 25-5(5) should remain blank until the finalisation of the Statutory Definition of Charity.**
- b. **In the alternative, ACFID submits that a new sub-section (7) be inserted into proposed section 25-5 as follows:**

“For the avoidance of doubt, the description of subtypes of entities in column 2 of the table in subsection (5) includes entities which direct the specified purpose or purposes to entities within Australia and overseas.”
- c. **ACFID submits, further in the alternative, that a further subtype be inserted into column 2 of the table in subsection 25-5(5) which specifically includes entities with a purpose of overseas aid and development.**

- d. ACFID recommends that timely and careful consultation with the NFP sector occurs before the introduction of the governance standards and external conduct standards into regulation.
- e. ACFID recommends that the phrase, “ensuring that”, in 50-5(1), should be deleted and replaced with “requiring the not-for-profit sector to take all reasonable efforts to ensure that”.
- f. The phrase “ensuring”, in 50-10(2)(c), should be deleted and “addressing” be inserted in its place.
- g. ACFID requests the Committee to note that any external conduct standards introduced in regulations pursuant to Division 50 of the ACNC Draft Bill should not disrupt or discourage legitimate charitable activities, as recommended by the UN Financial Action Task Force.

General Recommendations

- h. ACFID submits that the Committee must include transitional provisions in the ACNC Draft Bill which ameliorate the duplication of reporting requirements until such time as each State passes complementary legislation and other Commonwealth legislation is amended.
- i. ACFID submits that the Committee should list further areas, such as the creation of a charitable legal entity at ACNC and the ability for certain ATO requirements to be administered by the ACNC for charities, which should be addressed by the ACNC Commissioner in order for the ACNC to truly become a “one-stop-shop” for charities.
- j. ACFID recommends that the “Objects of the Act”, at 15-5(2)(b), include a further sub-section as follows:

The function of simplifying the reporting requirement burden on the NFP sector across jurisdictions.
- k. ACFID recommends that Part 5-2, Division 110, includes a clear statement that the Commissioner is independent of Government and the ATO.
- l. ACFID recommends the insertion of the word “solely” in proposed 120-5(2).
- m. ACFID recommends the amendment of proposed 35-20(1) so that the Commissioner must issue a show cause notice prior to any decision to revoke an entity’s registration on any ground.
- n. ACFID recommends the deletion of proposed 35-10(5).
- o. ACFID submits that proposed 80-5 be amended so that written warnings can only be issued:
 - i. after consideration of the factors listed in proposed 35-10(2) (relating to seriousness and persistence etc, the entity’s actions etc);
 - ii. for present or past contraventions of the Act or non-compliance with standards;

- iii. with an invitation for the entity to provide any submissions to the ACNC about the alleged contravention or non-compliance within a period no shorter than 14 days;
 - iv. in relation to a likely future contravention or non-compliance, only where there may be immediate, significant and irreparable harm to the public or the entity.
- p. ACFID submits that proposed Subdivision 60-E be amended to:
- i. Include safeguards which protect entities when providing information etc which might be self-incriminating (in similar terms to proposed section 70-25);
 - ii. Not apply to assessments about taxation compliance (either by the deletion of sub-section 55-10(c) in the definition of “recognised assessment activity” or by specific exclusion in Subdivision 60-E);
 - iii. Include a statement that it is subject to Division 70;
 - iv. Ensure that entities cannot be penalised for any failure to provide information about a period when that information was not legally required to be kept at that time.

A. ISSUES AFFECTING THE OVERSEAS DEVELOPMENT SECTOR

3. Entitlement to registration – Chapter 2, Part 2-1 - must clearly include overseas aid organisations

3.1 ACFID’s primary concern with the ACNC Draft Bill is its failure to specifically mention the work of overseas aid organisations within the sub-types of charities, eligible for registration, listed in the table at 25-5(5). That is, the ACNC Draft Bill does not say that the delivery of the matters listed in column 2 to persons overseas entitles a charity to registration with the ACNC.

3.2 This concern has been heightened by the Treasury’s consistent omission of the category of Australian charities working for the eradication of poverty in developing countries in its discussion of the Statutory Definition of Charity and the “in Australia” requirement for tax exempt bodies. The result of the latter proposal by Treasury, the “in Australia” requirement, will be the loss of whole of organisation DGR endorsement etc for many of our members, including large, highly reputable and widely known, overseas aid organisations. This would severely affect the ability of overseas aid organisations to operate.

3.3 Despite assurances from Treasury officials on 14 July 2011 that ACFID and its members would not be adversely affected by any changes, this has not been reflected in the drafts or consultation papers which have been released on the “in Australia” test and the Statutory Definition of Charity.

3.4 While those proposals are not presently before the Standing Committee on Economics for consideration, they must be kept at the forefront of the Committee's mind when considering the ACNC Draft Bill. This is because the ACNC Draft Bill includes its own definition of Charity, by listing the sub-types of charity which will be eligible for registration with the ACNC.

3.5 The listing of sub-types seems, to our mind, unusual given a separate Treasury project is considering the Statutory Definition of Charity. There is a danger that, by progressing the Statutory Definition of Charity separately, there may end up being two different definitions of charity, in different legislation affecting the same charitable organisations, OR, the list of sub-types in the ACNC Draft Bill will be amended after introduction, causing confusion in the sector.

ACFID submits that column 2 of the table at proposed 25-5(5) should remain blank until the finalisation of the Statutory Definition of Charity.

3.6 In the event that the list of sub-types remains in column 2 of the table in 25-5(5), ACFID recommends that amendments be made.

3.7 As stated above, and in detail in our submission on the "in Australia" requirement, we are concerned that many of our members will lose their Public Benevolent Institution (PBI) status because they deliver aid overseas or they deliver aid both overseas and in Australia. This means that they will need to fall within a different sub-type in order to be eligible for registration as a charity with ACNC.

3.8 Our members are, by and large, entities with purposes listed in sub-types 1-5 in column 2 of the table at 25-5(5). We note that some of our members are environmental organisations, who have been given specific recognition by the ATO as charities, but their purposes might not neatly fit within the terms of the sub-types in column 2, apart from possibly sub-type 4.

3.9 ACFID's great concern is that, in the absence of a clear statutory indication otherwise, entities which direct the specified purposes overseas could be excluded from the definition of charity within the ACNC Draft Bill and, therefore, be outside the ACNC's regulatory framework.

In the alternative, ACFID submits that a new sub-section (7) be inserted into proposed section 25-5 as follows:

"For the avoidance of doubt, the description of subtypes of entities in column 2 of the table in subsection (5) includes entities which direct the specified purpose or purposes to entities within Australia and overseas."

3.10 If it is the case that there is some policy intention to differentiate between "in Australia" entities and those which deliver aid or other assistance overseas (as is suggested by the "in Australia" requirement in the proposed taxation amendments), an alternative way to ensure that overseas development entities still are regulated by the ACNC (but are differentiated from other entities) is to include a subtype specifically for the sector. This subtype could refer to entities that have been

declared an “approved organisation” by the Minister for Foreign Affairs under the Overseas Aid Gift Deduction Scheme or more generally to entities which deliver overseas aid.

ACFID submits, further in the alternative, that a further subtype be inserted into column 2 of the table in subsection 25-5(5) which specifically includes entities with a purpose of overseas aid and development.

3.11 In order for the reform process of the charitable sector to be legitimate and broadly supported by the public, it must not, inadvertently or covertly, exclude overseas aid organisations from the national framework of charitable regulation, including the benefits which come with that regulation. Parliament must ensure that the important work that the overseas aid sector does towards the eradication of poverty in the developing world is not undermined by a failure to specifically recognise the overseas component of their work in the definition of the sub-types of charity.

4. External conduct standards – Chapter 3, Part 3-1, Division 50 – must ensure they do not go too far

4.1 ACFID welcomes the decision to draft and finalise the exact terms of the governance standards and external conduct standards at a later time. ACFID has serious misgivings about the terms of some of those standards, as they were expressed in earlier versions of the ACNC Draft Bill. For this reason, it is very important that their introduction should not occur before there is careful consultation with the sector about the terms of the standards.

ACFID recommends that timely and careful consultation with the NFP sector occurs before the introduction of the governance standards and external conduct standards into regulation.

4.2 In particular, the external conduct standard addressing the prevention of misuse by terrorist organisations, as drafted in an earlier version of the ACNC Draft Bill, went well beyond existing Australian and international requirements in relation to preventing abuse or misuse of funding by terrorist organisations. It went beyond current AusAID requirements for international aid and humanitarian NGOs and the ACFID Code of Conduct. Currently, the Australian Attorney-General’s Department provides clear guidance on this issue, stating that NGOs should take “all reasonable effort” to ensure the entities they work with do not channel funding to terrorist organisations. The ACFID Code of Conduct for Australian NGOs reflects this Australian Government position and AusAID agreements with NGOs require that “best efforts” are taken in this area.

4.3 ACFID’s concern had been in the proposed external conduct standard which required entities to “ensure the identity, credentials and good standing... of recipients of the money and property that it expends outside Australia and...the in-country partners of the entity”.

4.4 While the standards have been removed from the ACNC Draft Bill, the use of the term “ensuring” remains in both proposed 50-5(1) and 50-10(2)(c) (which are the provisions providing for the enactment of external conduct standards) and raises the same concerns. It is much stronger than the current Australian and international requirements. External conduct standards which require an entity to “ensure” that the funds are received by legitimate recipients etc (50-5(1)) or “ensuring specified matters” (50-10(2)(c)), will mean that Australian aid and development agencies are subject to a strict liability test with subjective elements. It is a test without limits; it would not recognise any efforts taken by an entity or whether matters were outside of its control. Further, if terms, such as “legitimate”, are not carefully defined to include objective elements, it could be subject to subjective (and possibly differing) interpretations which make it difficult for entities to understand and meet their obligations.

4.5 ACFID submits that the ACNC Draft Bill should reflect the existing Australian and international requirements, rather than create a new, unworkable, obligation on the sector.

ACFID recommends that the phrase, “ensuring that”, in 50-5(1), should be deleted and replaced with “requiring the not-for-profit sector to take all reasonable efforts to ensure that”.

The phrase “ensuring”, in 50-10(2)(c), should be deleted and “addressing” be inserted in its place.

4.6 There is an international effort and approach which is guiding Australia’s efforts in relation to NFPs and counter terrorism, via the UN Financial Action Task Force “Special recommendation 9” which is a UN agreement on counter terrorism financing. Specifically, Recommendation 8 applies to NFPs:

VIII. Non-profit organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

(i) by terrorist organisations posing as legitimate entities;

(ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

(iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations. (p3)

4.7 However, ACFID would like the Committee to note in its report, and emphasise in relation to external conduct standards for entities subject to the ACNC, the Financial Action Task Force’s interpretative note:

“Measures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities.” FATF

Special Recommendations No 9 on Terrorist Financing [October 2008, p20]
(our emphasis)

ACFID requests the Committee to note that any external conduct standards introduced in regulations pursuant to Division 50 of the ACNC Draft Bill should not disrupt or discourage legitimate charitable activities, as recommended by the UN Financial Action Task Force.

B. GENERAL CONCERNS WITH ACNC DRAFT BILL

5. Original aim of reduction of red tape must be achieved

5.1 The Productivity Commission found that the not-for-profit sector contributes \$4.3 billion to the Australian GDP (4.1%) and was responsible for 8% of employment in 2006/2007.² Too much regulation reduces the effectiveness of the not-for-profit sector and will stifle the increasing contribution of the sector to the Australian economy. Reduction of red tape is not just for the benefit of the sector – it will also benefit the Australian economy. Reduction of red tape is the purpose of the *National Compact* with the sector.

5.2 With this in mind, it is essential that the introduction of national regulation of charities happens with the agreement of the States and Territories to remove their regulation for those organisations. Otherwise, it will just add a further layer of regulatory burden on the sector.

5.3 The present drafting of the ACNC Draft Bill does not reassure ACFID or its members that it will actually reduce red tape, for three reasons:

- (a) The drafting indicates that there is yet to be agreement with the States;
- (b) It does not deliver a “one-stop-shop” for the establishment of a charity or reporting by a charity;
- (c) The overall tenor of the ACNC Draft Bill remains, despite some positive amendments, enforcement oriented.

Transitional provisions must ameliorate duplication of reporting until States on board

5.4 Many provisions of the ACNC Draft Bill³ indicate that agreement of the States, referring certain powers to the Commissioner, has not occurred and may not ever occur. The Explanatory Materials do not give any indication as to whether this course is even intended, let alone if the States have given any in principle agreement. While we understand that the COAG NFP Reform Working group are looking at developing a national charity passport, there is no definite timetable in which this will occur. What this will mean is that there will be:

- (a) Differing powers of the ACNC, depending on the type of legal entity of the charity;
- (b) Differing regulation of charities, depending on their legal composition; and

² *Contribution of the Not for Profit Sector*, Productivity Commission Report, February 2010.

³ Eg Part 4-2 of the ACNC Draft Bill relates to the enforcement powers of the ACNC. The provisions only apply to a “federally regulated entity”, which is defined, at proposed 205-15, to include constitutional corporations and body corporates registered in a Territory. It, therefore, will not apply to all of the incorporated associations incorporated under State legislation, unless the States enact legislation conferring those powers on the ACNC.

(c) Continuing multiple compliance regimes that many entities must understand and meet.

5.5 For example, an incorporated association, registered in New South Wales, will still have to meet the annual registration, reporting, fundraising and other requirements of that State, as well as the reporting requirements of the ACNC. It will be subject to the powers of the ACNC Commissioner in relation to certain things, but enforcement powers would only be exercisable by the State's Office of Fair Trading. The ACNC Draft Bill also does not demonstrate, on its own terms, that companies limited by guarantee would be relieved of all of the obligations imposed by ASIC (in, for example, the *Corporations Act 2001*, including, for example, notification of change of office holders, change of address or governing document).

5.6 There looks to be a very real possibility that there will be *an increase in red tape* for charities with the introduction of the ACNC Draft Bill. This is contrary to the stated aim and the Committee must look at ways to ameliorate the duplication of reporting requirements by carefully drafting transitional provisions which cover the period until COAG agrees, and each State legislates, and other Commonwealth legislation is amended to truly deliver the ACNC as the one-stop-shop for reporting.

ACFID submits that the Committee must include transitional provisions in the ACNC Draft Bill which ameliorate the duplication of reporting requirements until such time as each State passes complementary legislation and other Commonwealth legislation is amended.

A one-stop-shop for establishing a charity requires more

5.7 ACFID feels it is prudent to draw attention to the fact that the ACNC Draft Bill does not deliver on the promise of the ACNC being a one-stop-shop for the establishment of charities. This, in effect, is because it does not provide for the creation of the legal entity under which a charity will operate; nor does it issue ABNs or DGR status.

5.8 A rudimentary example of the process of establishing a new charity is as follows: 1. I go to the legal profession to create the legal entity which will operate the charity and get my governing document. 2. The creation of legal entity requires my lawyer to register my entity with the Office of Fair Trading in my State (in the case of an incorporated association) or with ASIC (for a company limited by guarantee) 3. I go to the ATO and get an ABN 4. I go to the ACNC to get approval as a charity (they need my ABN) 5. Then I go back to ATO to get my DGR status 6. Then, in the case of an overseas aid organisation, I go to AusAID to get declared an "approved organisation" by the Minister for Foreign Affairs and then to the ATO for approval of the Overseas Aid Gift Deduction Scheme 7. Then, if I want PBI status, back to ATO 8. Then, if I want to fundraise, I have to go to each State's Office of Fair Trading for fundraising approval. But help, my governing document needs correcting....back to legal profession. Then back to ACNC, ASIC and ATO to re-lodge governing document, application for charity status and application for DGR status.

5.9 The complex maze that must be navigated has only been added to by the ACNC. There must be further amendments, including for the ability to create a charitable legal entity at ACNC and for many of the ATO tasks (such as ABN and DGR status) to be done via ACNC (even if the ATO retains the decision-making over that process). While ACFID does not suggest that the ACNC Draft Bill should be delayed for this to occur, it submits that the Committee should mention that there are further areas which must be investigated and addressed by the ACNC Commissioner.

ACFID submits that the Committee should list further areas, such as the creation of a charitable legal entity at ACNC and the ability for certain ATO requirements to be administered by the ACNC for charities, which should be addressed by the ACNC Commissioner in order for the ACNC to truly become a “one-stop-shop” for charities.

Objects of the ACNC Draft Bill should reflect the stated aim of red tape reduction for charities

5.10 ACFID has been expressing concern about the overt compliance tenor of the proposed legislation. ACFID congratulates Treasury for including, in the “Objects of the Act” at 15-5, a sub-section which includes, as a role of the ACNC, the guidance and education of the sector. It is a welcomed addition.

5.11 ACFID remains of the view that, if the ACNC Draft Bill is to actually achieve a reduction in red tape, it must be a legislatively stated object of the ACNC Draft Bill.

ACFID recommends that the “Objects of the Act”, at 15-5(2)(b), include a further sub-section as follows:

The function of simplifying the reporting requirement burden on the NFP sector across jurisdictions.

5.12 This will ensure that the provisions of the ACNC Draft Bill will be interpreted by the ACNC, the government and the courts in a way that best achieves reduction in red tape.

6. Ensuring the Independence of the Commissioner – Chapter 5, Part 5-2

6.1 The Government’s initial statement about the ACNC was that the Commissioner will be “fully independent and report directly to Parliament via the Assistant Treasurer”.⁴ This element of independence has not, however, been explicitly stated within the ACNC Draft Bill.

6.2 We share the concerns of ACOSS that, given the practical back-office sharing arrangements with the ATO, the power to give information and documents to the ATO (Subdivision 60-E), and the historical and now differing role of the ATO in this sector, it is fundamental that there is a clear legislative pronouncement that the ACNC, and its Commissioner, is independent. There must not be any actual, or

⁴ See media release 077 issued on 10 May 2011 by the Assistant Treasurer and Minister for Financial Services and Superannuation.

perceived, direction or influence over the Commissioner by the ATO or others. A clear statement of independence should be inserted in Part 5-2, Division 110 of the ACNC Draft Bill.

ACFID recommends that Part 5-2, Division 110, includes a clear statement that the Commissioner is independent of Government and the ATO.

6.3 ACFID also suggests that the proposed 120-5(2), which is appropriately directed to the independence of ACNC staff, could also be strengthened by the insertion of the word “solely” before the words “subject to the directions of the Commissioner”, to avoid any doubt that they could be subject to other directions (from, for example, the Commissioner of Taxation) at the same time.

ACFID recommends the insertion of the word “solely” in proposed 120-5(2).

7. Revocation provisions require amendment – Chapter 2, Part 2-1, Division 35

7.1 ACFID welcomes some of the amendments made by Treasury in this part of the ACNC Draft Bill. However, ACFID has some concerns about some of the provisions relating to the process of revocation of registration, namely:

(a) The show cause notice, in proposed 35-20, and the process which follows, only applies to one of the grounds of revocation; and

(b) The drafting of proposed 35-10(5).

7.2 Proposed 35-20 sets out when the Commissioner must issue a show cause notice to an entity prior to revocation of their registration. It only contemplates a discretion in the Commissioner to give a show cause notice if revocation is to be based on the first of five possible grounds for revocation – the ground that an entity is not entitled to registration. ACFID submits that a show cause notice should be mandatory, whatever the basis for revocation.

7.3 Registration with ACNC will confer many benefits on a NFP entity, particularly financial benefits. Arguably, revocation of registration would affect the pecuniary or proprietary interests of entities and natural justice would necessitate notice and an opportunity to be heard prior to any decision to revoke an entity’s registration. This should be reflected in the ACNC Draft Bill.

7.4 This is supported by the legislative requirement in proposed 35-10(2) that the Commissioner must take into account certain matters. In the absence of a show cause notice and opportunity to respond, it is difficult to see how the Commissioner could be apprised of such information or how an entity could address those factors.

ACFID recommends the amendment of proposed 35-20(1) so that the Commissioner must issue a show cause notice prior to any decision to revoke an entity’s registration on any ground.

7.5 ACFID's concern is heightened by the current drafting of proposed 35-10(5). In its present form, it permits the Commissioner to revoke registration without regard to whether a show cause notice has been issued or a response has been given. The "reasonableness" requirement, it is suggested, is not sufficiently clearly attached to the not having regard to the lack of show cause notice – rather, it could be interpreted as applying only to the decision to revoke a registration. If the intention of the drafters is that the Commissioner can revoke a registration without regard to whether or not a show cause notice has been issued, if it is reasonable in the circumstances to have no regard to that fact, then the section should be re-drafted.

7.6 It is ACFID's position, however, that this sub-section should be removed altogether. Clearly, it should be relevant to any decision to revoke registration that an entity has given a response to a show cause notice and the terms of the response. It need not be followed, but it should be a relevant consideration to the decision of the Commissioner. It should also be relevant that an entity has not been given an opportunity to respond to allegations.

7.7 If Parliament wishes to reserve the right of the Commissioner to revoke registration without resort to a show cause process if there are urgent or other compelling reasons to act quickly, the exact circumstances in which that can occur should be clearly spelt out. The terms of 35-10(5) go far beyond that purpose and should be deleted.

ACFID recommends the deletion of proposed 35-10(5).

8. Power to issue and publish warnings needs amendment: Part 4-2, Division 80

8.1 Under proposed Division 80, the ACNC Commissioner is empowered to issue formal written warnings to entities if the Commissioner reasonably believes that the registered entity is in contravention of the ACNC Act, or non-compliance with a standard under the Act, or is likely to be in contravention or non-compliance.

8.2 The consequence of a warning being issued by the Commissioner is that the fact of the warning, and any details of the warning and the entity's response to it, will be published on the ACNC Register under proposed section 40-5(1)(f)(i).

8.3 This could have potentially serious ramifications for the entity in terms of continued public or government financial or other support for the entity. ACFID submits that this consequence is excessive in the following circumstances:

- (a) Where the contravention or non-compliance has not even occurred;
- (b) Where the contravention or non-compliance is minor; or
- (c) Where the entity has engaged in a dialogue with the ACNC about the contravention or non-compliance and is addressing it.

8.4 One of the objects of the ACNC, as set out in the objects clause of the ACNC Draft Bill, is to provide education and guidance to NFP entities. In order to achieve this

object, but also to maximise the NFP sector's long-term understanding of their obligations under the Act and their compliance with it, there must be able to be free flowing communication between entities and the ACNC. Entities must not be discouraged from seeking the advice or guidance of the ACNC about particular issues they face in complying with the Act and its standards. If a warning is issued by the Commissioner (and published on the ACNC Register) about every potential or actual non-compliance that is brought to the attention of the ACNC, this will greatly hinder the ACNC in achieving one of its objects. If the ACNC wants entities to voluntarily admit non-compliance and seek the ACNC's assistance with addressing non-compliance, warnings must not be the consequence of such frank disclosure.

8.5 ACFID submits that there must be an element of seriousness, or persistence, in the non-compliance or contravention to warrant a written warning. The criteria that the Commissioner must take into account before revoking registration (in proposed 35-10(2)) contain equally applicable considerations for the Commissioner before deciding whether to issue a formal written warning or just engage in positive confidential communication with an entity.

8.6 ACFID also submits that it is inappropriate for warnings to be issued for possible future contravention or non-compliance. ACFID is not aware of other regulatory bodies which can issue formal warnings, and publish those warnings, for potential breaches, as opposed to actual breaches (for example, the Aged Care Act only permits notices of non-compliance, which are published online, to be issued for past or present non-compliance: see s.67-2 of the *Aged Care Act 1997*). Any potential breach should be addressed by informal communication between the ACNC and the entity. If there are reasons submitted to the Committee for the ability to issue warnings for possible future contraventions, then, if submitted, they must not be issued except in circumstances of immediate and significant and irreparable harm to the public or the entity.

8.7 The warnings provision also falls short of other similar legislative schemes, in that it does not provide for a mandatory notice to the entity that they can provide submissions to the ACNC about the alleged contravention or non-compliance within a period no shorter than 14 days (see, again, for example, the *Aged Care Act 1997*).

ACFID submits that proposed 80-5 be amended so that written warnings can only be issued:

- (a) after consideration of the factors listed in proposed 35-10(2) (relating to seriousness and persistence etc, the entity's actions etc);
- (b) for present or past contraventions of the Act or non-compliance with standards;
- (c) with an invitation to the entity to provide any submissions to the ACNC about the alleged contravention or non-compliance within a period no shorter than 14 days;
- (d) in relation to a likely future contravention or non-compliance, only where there may be immediate, significant and irreparable harm to the public or the entity.

9. Additional reporting requirements must have safeguards – Subdivision 60-E

- 9.1 Proposed Subdivision 60-E allows the Commissioner to request, from an entity, further reports, statements or information for the purpose of enabling a “recognised assessment activity” to be carried out. The latter term is defined, in proposed 55-10, to include assessments of an entitlement to registration, compliance with the Act and standards or taxation compliance.
- 9.2 This power is, to our mind, greater than the power held by ASIC, at s.1274, which is limited to determining whether to refuse to allow the lodgement of a document. In many respects, it is a power to compel an entity to possibly provide self-incriminating information (about non-compliance) without any of the usual safeguards in place. The normal safeguards about the compulsion to give incriminating evidence must apply to this provision.
- 9.3 It also permits the compulsion of information about matters not within the province or control of the ACNC (ie taxation compliance) where potential criminal sanctions could flow. This seems inappropriate and certainly blurs the lines between the ACNC and the ATO. An information-sharing provision, which permits the ACNC to share information already held by it to another Commonwealth entity, is one thing. But, a provision which requires the ACNC to gather information and documents for a separate entity, when the ATO has its own powers, and where such information or documents are not subject to the usual safeguards, seems excessive. It should be excluded from Subdivision 60-E.
- 9.4 We note that there is another division in the ACNC Draft Bill which recognises the need for such safeguards when compelling the production of information and documents which relate to a provision of the Act (etc) which creates an offence or administrative penalty: see Division 70 and proposed sections 75-5 and 75-10 for definitions. Proposed 70-25 ensures that such information or documents are not admissible against the entity compelled. What has not been made clear in the ACNC Draft Bill is how this Division interacts with Subdivision 60-E. Arguably they do similar things, but there is no legislative clarity as to which takes precedence. There should be a clear statement that Division 60-E must be subject to Division 70. Of concern to ACFID is that information about taxation compliance, compellable under Division 60-E, which could result in criminal or other sanctions, does not fall within the terms of Division 70. If Subdivision 60-E retains the ability to compel information or documents relating to taxation compliance, proposed 75-5 should be amended to include a further sub-section encompassing offences under taxation legislation.
- 9.5 ACFID is also concerned to ensure that these provisions do not create retrospective penalties. An example where this might arise is as follows: the Commissioner requests further information, reports or documents, for a period in the past (noting that it cannot exceed 6 years after the relevant financial period) when that information was not ordinarily kept or cannot be located because it was not required by the Act or standards under the Act or any accounting policy at the time. If an entity is later requested to provide this information under proposed Subdivision 60-E, but cannot provide it, it should not be penalised for that failure, either for

contravention of the Act or for failure to lodge a document on time (under proposed 175-C). To be penalised for a failure to provide past information, when there was no legal requirement to keep it at the time, would amount to a retrospective punitive provision.

ACFID submits that proposed Subdivision 60-E be amended to:

- (a) Include safeguards which protect entities when providing information etc which might be self-incriminating (in similar terms to proposed section 70-25);
- (b) Not apply to assessments about taxation compliance (either by the deletion of sub-section 55-10(c) in the definition of “recognised assessment activity” or by specific exclusion in Subdivision 60-E);
- (c) Include a statement that it is subject to Division 70;
- (d) Ensure that entities cannot be penalised for any failure to provide information about a period when that information was not legally required to be kept at that time.