SUBMISSION 61

WORLD VISION AUSTRALIA

Submission to the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills

This paper sets out the submission of World Vision Australia (**WVA**) to the Inquiry into the Australian Charities and Not-for-profits Commission (**ACNC**) Exposure Draft Bills, being the *Australian Charities and Not-for-profits Commission Bill 2012* (**Bill**), the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012* (**Consequential Bill**) and related draft explanatory material (**Explanatory Material**) released by the House of Representative Standing Committee on 11 July 2012.

This submission primarily addresses matters that are important and relevant to WVA as well as noting other matters of concern to the not-for-profit sector generally. WVA has previously been involved in consultation and provided submissions to both Treasury and the ACNC Taskforce on all recent public consultations in relation to not for profit (**NFP**) sector reform.

In a number of respects, this submission restates matters addressed in WVA's earlier consultations and submissions, which remain relevant.

Summary:

WVA strongly supports NFP sector reform on the understanding that the overarching aim of reform is to facilitate the vibrant operation of the NFP sector. WVA considers this aim will be facilitated by the establishment of a regulator, provided it is clearly and functionally independent of the Australian Taxation Office (**ATO**) and which can operate nationally with appropriate resources and powers to register, guide and educate NFP's and, only where necessary and in a proportionate manner, take action against NFPs. WVA also supports transparency and accountability and believes that the proposed ACNC register and public portal will enhance this.

WVA does not support the establishment of a single government-controlled "peak body" with functions only to educate and represent the interests of the diverse NFP sector, as such a body may have little ability to drive the harmonization of laws and government practice necessary for the sustainable success of this reform.

WVA sincerely appreciates and supports the efforts that have been made since the previous exposure drafts released in December 2011, especially those aimed at contextualizing the Bill and the Consequential Bill for the NFP sector.

We submit, however, that the Bill should be further reworked to better reflect the overarching aim of the reform as expressed in non-legislative material such as the Final Report: Scope Study for a National Not-for-profit Regulator released by Treasury in April 2011, fact sheets and ACNC Taskforce materials including its Implementation Report.

To this end, we request further changes to the Bill and further steps post-enactment as set out in the detailed response below and summarized in Appendix A.

Detailed response to the Bill:

1. Enshrining of coordination and co-operation with other regulators

1.1 WVA is pleased to see the requirement in the Guide (Division 10 of the Bill) for the Commissioner to cooperate with other government agencies. As previously submitted to Treasury, a fundamental measure of the success of the NFP reforms from WVA's perspective will be the decrease in:

(a) duplication of effort in reporting to and liaising with regulators and government departments with oversight over NFPs;

(b) where appropriate, the duplication of laws between existing state and territory legislation; and

(c) with the enactment of the new legislation at the Commonwealth level, the duplication of laws between state, territory and Commonwealth legislation.

1.2 This will require unprecedented co-operation amongst regulators and those government departments with oversight over NFPs. For WVA, as an overseas aid and development organisation which also works with Indigenous Australians, these are:

(a) the ATO (tax benefits and concessions);

(b) Australian Securities and Investments Commission (**ASIC**) (as WVA is a company limited by guarantee);

(c) Australian Agency for International Development (**AusAID**) (accredited agency of Commonwealth foreign aid funds);

(d) Department of Families, Housing, Community Services and Indigenous Affairs (**FaHCSIA**) and other Commonwealth, State and Territory government departments (grants for indigenous development work in Australia);

(e) Australian Council For International Development (**ACFID**) (peak body for agencies involved in overseas aid and development)[1]; and

(f) State fundraising regulators[2].

1.3 This will take some time to work out, as many aspects of the coordination between regulators and government departments will take place at practical, rather than legislative, levels.

1.4 In some cases, however, amendments to legislation will be required to achieve the goal that the ACNC be the "one-stop shop" regulator for the sector. WVA notes that the "consequential amendments" clauses of the Consequential Bill and related Explanatory Material remain "to be drafted". These will be key to the success of this reform and therefore WVA has some concerns that these have not been released yet for consultation.

2. Scope of the ACNC's powers and constitutional issues

2.1 WVA's preferred position is that NFP reforms should not be driven by tax considerations and that the ACNC will "cover the field" of NFP regulation. We note, however, that the voluntary nature of registration and constitutional issues will leave gaps in the Commissioner's ability to do this.

2.2 WVA notes that the Bill and the Explanatory Material have clarified the constitutional powers on which the Commonwealth relies for the establishment of the ACNC. Unfortunately, this has highlighted significant gaps in the Commonwealth's power to regulate NFPs. These gaps mean that the ACNC will or may lack the power to effectively regulate all registered entities.

[1] AusAID requires accredited agencies to be members of ACFID and comply with the ACFID Code of Conduct through contractual provisions in head agreements.

[2] There is only one territory regulator: ACT. WVA is exempt from the operation of the *Charitable Collections Act 2003* (ACT), as it is an accredited agency of AusAID.

Reliance on taxation powers

2.3 Key aspects of the Bill rely on the Commonwealth's taxation powers for their constitutional legitimacy. This includes the "gateway" registration provisions which:

(a) have an express object of being a prerequisite for access to tax concessions; and

(b) include the column 2 list of "subtypes" in clause 25-5 (5) of the Bill which appear to only be relevant to the granting of tax concessions.

2.4 WVA submits that registration with the national regulator should primarily be considered a "badge of honour" that demonstrates an entity's legitimacy and provides a level of quality assurance to the public[3]; it should not be primarily linked to access to tax concessions. To this end WVA recommends:

(a) removing the italicised sub-headings in clause 20-5 of the Bill; and

(b) removing column 2 of clause 25-5(5) of the Bill. Defining subtypes of charities can be achieved by other means at a later time.

2.5 While it is WVA's strong view that column 2 of clause 25-5(5) of the Bill should be removed, if it is retained, WVA supports the alternative position expressed by ACFID in its submission that overseas aid and development organisations be expressly recognised as a subtype of charity.

Reliance on corporations and territories powers

2.6 The gaps in the Commonwealth's powers to regulate NFPs are highlighted in Part 4-2 of the Bill where many of the ACNC's proposed enforcement powers are expressed to apply only to "federally regulated entities". This includes the ACNC's powers to give warnings, give directions, accept undertakings, seek injunctions and suspend or remove "responsible entities". While WVA has concerns about the need for these powers, the scope of their application also gives rise to

[3] In support of this we note, for example, the personal view of preeminent charity law practitioner John Emerson (Partner, Freehills) expressed during his presentation at the Melbourne Law School conference "Defining, Taxing and Regulating Not-for-Profits in the 21st Century" on 20 July 2012. Mr Emerson said that many of the entities he had advised over the years in relation to applying for deductible gift recipient status were looking for a "stamp of approval" - being more interested in having "regulatory endorsement" than in being able to offer tax deductibility to donors.

issues.

2.7 A core part of the definition of "federally regulated entity" in clause 205-15 of the Bill is that the entity be a constitutional corporation, being a financial corporation or trading corporation within the meaning of clause 51(xx) of the Australian Constitution. The scope of the Commonwealth's corporations power remains unclear and essentially requires an examination of a corporation's activities and purposes to determine whether it has a sufficiently substantial focus on trading or financial activities. Arguments have been made that the corporations power is limited to commercial organisations, not charitable bodies. There is, therefore, uncertainty about the extent to which the enforcement powers will be able to be used by the Commissioner at all.

2.8 In any event, it is unlikely that the Commissioner will be able to use these powers in relation to a large proportion of registered entities, for example, those which are unincorporated or those incorporated under State laws.

2.9 As some registered entities will fall within the Commissioner's powers and others not, this will continue the patchwork nature of regulation of the NFP sector currently in place. This is not a desirable outcome for the reforms.

2.10 We submit, therefore, that the enactment of Part 4-2 of the Bill be deferred pending further thorough consideration.

3. Entitlement to registration – governance and external conduct standards

3.1 Under clause 25-5(3)(b) of the Bill, an entity is only entitled to be registered if it is "in compliance with the governance standards and external conduct standards". There are several difficulties with making this requirement part of the entitlement to register.

3.2 First, the governance standards and external conduct standards have not yet been released for public consultation and no guidance has been given about when these are likely to come into effect. As the standards will not be formulated before the ACNC is established, it should be clarified in the Bill that compliance will not be required until regulations are made.

3.3 Secondly, clause 25-5(3)(b) does not take into account the gravity or significance (or lack thereof) of a non-compliance with the standards. It remains a prima facie risk that even immaterial non-compliance could result in a loss of entitlement to registration. WVA notes that this is inconsistent with a registered entity's duty to notify the ACNC of a “significant” contravention or

non-compliance with the standards (sub-clauses 65-5(2)(b) and 65-5(3) of the Bill.)

3.4 It is also understood that the standards are likely to be principles-based and therefore inherently open to interpretation and judgement as to whether they are being complied with. This also means there could be uncertainty as to whether an organisation has breached the standards (and therefore has to report this) and whether it is still entitled to be registered at that point.

3.5 WVA believes that the criteria for entitlement to registration need to be clear so that an entity's satisfaction of the criteria can be easily and objectively determined.

3.6 We therefore recommend that the requirement for compliance with governance standards be contained only in Chapter 3 of the Bill ("Responsibilities of registered entities. We comment on the external conduct standards in section 5 further below.

3.7 We also note that no other registration regime has such onerous outcomes as de-registration for failure to comply with governance standards. WVA cannot see a rationale for such an outcome, especially in the NFP sector where it is well-accepted that non-compliance is usually a matter of ignorance or under resourcing,

4. Reconsider provisions for revocation of registration

4.1 WVA notes that there have been some improvements made to the provisions for dealing with revocation of registration since the previous exposure draft but submits that further refinement is required.

4.2 As presently drafted, Division 35 of the Bill allows the Commissioner to revoke registration based on his or her "reasonable belief" of certain conditions being met, regardless of whether they are in fact met. WVA has several concerns about this:

(a) Although there is a list of matters the Commissioner must take into account in determining whether to revoke registration, these do not provide sufficient comfort that the power to revoke registration will only be used as a last resort measure (as stated in the Explanatory Material) as the listed matters are only required to be taken into account, not satisfied.

(b) The Bill continues to allow for revocation without the Commissioner giving any prior notice to a registered entity, rather than this being usually required.

(c) Revocations are also most likely to take effect prior to an entity having had the

opportunity to challenge the revocation under the objection mechanism.

(d) Additionally, in basing the revocation power on the basis of the Commissioner's "reasonable belief", it is not clear whether an entity objecting to a revocation decision must demonstrate that no reasonable belief was formed or that the Commissioner's actual belief was not reasonable. WVA suggests that the first approach is more appropriate.

(e) Revocation of registration is likely to have a serious effect on an entity as it may expose the entity to significant tax and other liabilities at the same time as removing access to funding sources (including funds which may be needed to challenge an incorrect determination of the Commissioner).

(f) It is also important for public trust and confidence in the sector that the effects on the public of the Commissioner's decisions are made clear, for example, where an entity's registration is revoked and it loses its deductible gift recipient status retrospectively or temporarily pending the outcome of an appeal or review process.

(g) While revocation may be intended to be a last resort in the majority of cases, the Commonwealth's limited constitutional powers underpinning the enforcement provisions and their resultant framing to cover only "federally regulated entities" may mean that most other methods of enforcing compliance are not available against non-federally regulated entities. Revocation is therefore likely to form a core part of the enforcement mechanisms against such entities.

4.3 It is therefore imperative that proper safeguards, including appropriate access to procedural fairness, are built into the revocation process to ensure it is only used where absolutely necessary. It is not sufficient that this power be subject to broad administrative discretion and limited recourse rights. WVA considers that the proposed revocation provisions fail to provide such safeguards.

4.4 WVA submits that the Bill should include the following:

(a) A requirement that the Commissioner provide a show cause notice to a registered entity setting out in full why the Commissioner is considering revocation of registration before revoking registration on a non-voluntary basis,. The drafting of the clauses in the Bill does not accord with their description in the Explanatory

Material. For instance, the Explanatory Material suggests that in all circumstances other than "very serious cases where the Commissioner believes the circumstances warrant more immediate action", the Commissioner is required to issue a show cause notice. In contrast, clause 35-20 of the Bill allows the Commissioner a discretion to provide a show cause notice ("...the Commissioner may give a written notice...") and only in circumstances where he or she considers the entity was not entitled to registration as distinct from where false and misleading information has been provided or there has been a contravention of or non-compliance with the legislation.

(b) A requirement that the Commissioner consider any response from the entity before making a decision to revoke registration The entity's response is not currently amongst the factors required to be considered by the Commissioner in making a decision to revoke (see clause 35-10(2) of the Bill). We note also that the drafting of the relevant clauses in the Bill does not accord with the description of the provisions in the Explanatory Material. For example, clause 35-10(5) of the Bill provides that the Commissioner is not required to have regard to the response if he or she considers "it is reasonable to do so" as opposed to only in the "certain very serious cases" described in the Explanatory Material.

(c) A requirement that the Commissioner set out in writing (and in detail) to the entity the grounds for any revocation decision.

(d) Revocation should not take effect until all avenues of appeal or review which an entity wishes and is able to take have been exhausted, unless there is a clear and demonstrated public interest in the decision taking effect earlier. It cannot be assumed that the Commissioner will always make a correct decision. Although they are not WVA's preferred position, there are also several alternatives that could be considered, including the following:

(i) Revocation only takes effect once an objection decision has been made or the time has passed for lodging an objection (which would represent the Commissioner's final consideration of the revocation decision).

(ii) An entity whose registration has been revoked not be limited to taking

action under the objection, review and appeal processes (which may take longer and be more restrictive than alternative processes). It is noted, for instance, that the proposed objection process allows the Commissioner at least 120 days to consider an objection before an entity can take further action.

(iii) Require the Commissioner to seek approval of the Court before revoking the registration of an entity, and therefore bear the burden of proving that the relevant circumstances allowing revocation exist in relation to the entity.

4.5 Further consideration should also be given to whether there is a clear need for retrospective revocation (that is, applying to a period prior to the entity being notified of a decision to revoke its registration) and the effects of the revocation on a member of a public who intends to claim a deduction for a donation made during the period. The circumstances in which revocation can be retrospective should be much more limited. Additionally, the retrospectivity should be limited in time to, for instance, no more than 2 years, in order to increase certainty for registered entities and donors whilst still allowing the Commissioner an appropriate period for review.

4.6 The giving of false and misleading information in an application for registration should not be a standalone ground, as this allows the Commissioner to revoke registration in circumstances where the entity otherwise remains fully entitled to be registered and where the "offence" may be the result of oversight or mistake.

4.7 If revocation is to take effect prior to an entity's rights to objection, appeal or review being exhausted, reinstatement of registration should be automatic and retrospective if it is ultimately determined that the revocation decision was wrong. In particular, clause 25-5 of the Bill and the accompanying note (which suggests that re-registration does not rescind an earlier revocation) should be reconsidered.

4.8 Ensuring that the Commissioner's powers of revocation are properly targeted and that rights of charities are properly protected is especially important in those instances where the Commissioner is not able to use his or her other enforcement powers (that is, for non-federally regulated entities). In those instances, the power of revocation may be the Commissioner's only possible course of action, rather than a last resort.

Core concept - contributions

4.9 As a matter of social policy, charitable activities have been traditionally viewed as properly outside the ambit of income taxation[4]. This social policy underpinning also highlights the fundamental flaw in the current view that government "contributes" to the sector though the granting of tax concessions; the income was not to be taxed in the first place.

4.10 We note this view represented in the core concept definition of "contribution" in clause 205-40 of the Bill. The core concept applies, for example, to matters the Commissioner must consider in deciding whether to revoke registration (clause 35-10(5) of the Bill) – such matters should instead focus on the proper application of an entity's assets and a consideration of the best interests of its beneficiaries.

4.11 WVA would prefer that Division 35 of the Bill be substantially amended to deal with the concerns we have expressed above. However, noting the proposed timeframe for the establishment of the ACNC, if this is not possible, we suggest that the following specific changes could be made to the Bill as proposed to deal with the most pressing of these concerns:

(a) amend clause 35-20(1) of the Bill so that the Commissioner must issue a show cause notice prior to any decision to revoke an entity's registration on any ground;

(b) remove clause 35-10(5) of the Bill; and

(c) remove the "Contributions" core concept in clause 205-40 of the Bill.

5. External conduct standards and counter-terrorism

5.1 The external conduct standards have been introduced into this Bill but were not a part of the first exposure draft, being previously raised only in the context of proposed governance requirements.

5.2 In our view, this Bill (and indeed tax legislation) is not the appropriate legislative instrument for such standards, given that they are designed to address the possibility of terrorism financing schemes. The appropriate place to include such a code is under the *Charter of the United Nations Act 1945* (Cth) or the *Commonwealth Criminal Code*, both of which are administered by the

[4] See, for example .Michael Gousmett's historical analysis "The Charitable Purposes Exemptions from Income Tax: From Pitt to Pemsel 1798 - 1891)" University of Canterbury (2009)

Attorney General, or the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) administered by AUSTRAC (**Counter Terrorism Laws**).

5.3 Including such standards in this legislation leads to the result that not only may an entity be found to be in breach of Counter Terrorism Laws and be subject to the relevant penalties, it could also lose its entitlement to be registered. Duplication of Counter Terrorism Laws could also mean that an entity loses its registration through the Commissioner's action, even if it has not contravened Counter Terrorism Laws. Such a result would not be the case for an entity in any other sector. It is difficult to understand the rationale for subjecting NFP entities to additional penalties in this way or for making the Commissioner an additional regulator in this area.

5.4 In addition, WVA notes that the two instances of terrorism financing in the NFP sector involved individuals and, in one case, a fictitious organisation[5]. In both cases, the persons involved did not access relevant Commonwealth benefits. Hypothetically, it can be safely assumed, therefore, that they would never have chosen to register with the ACNC and that such schemes would be beyond the regulatory reach of the Commissioner in any event.

5.5 We submit therefore that Division 50 should be removed from the Bill.

6. Extent and tone of enforcement powers

6.1 WVA appreciates the efforts that have been made to better target the ACNC's proposed enforcement powers since the first exposure draft.

6.2 WVA also appreciates the non-legislative material that has been produced by the ACNC Taskforce, including its Implementation Report, which explain the approach the regulator intends to take in practice. However, the legislation itself should still be drafted in a way that reflects those aims and intentions and is consistent with the regulator's intended practical approach to implementation.

6.3 WVA considers that the tone and structure of the enforcement powers continue to suggest a heavy-handed approach weighted against the interests of registered entities and responsible entities. Further efforts should be made to ensure that the powers are better targeted, fairer, not

[5] *R v Vinayagamoorthy & Ors* (Supreme Court of Victoria, March 2010) and *DPP (Cth) v Goldberg* 2001 184 ALR 387.

used to inappropriately interfere with an organisation's legitimate operations and do not impose undue costs on an entity in taking action against the ACNC.

6.4 In particular, WVA considers that:

(a) The principles of procedural fairness are not sufficiently protected in the Bill. For instance, the Bill does not require a warning or other notice to be issued before the Commissioner can issue a direction or suspend or remove a responsible individual. The Commissioner should be required to give notice and an opportunity to respond before a direction is made, unless there is a clear and demonstrated public interest requiring an immediate decision. This would allow relevant parties to take appropriate action (or avoid taking inappropriate action) before the formal powers are invoked.

(b) Where the Commissioner has made a decision to suspend or remove a responsible person, the Commissioner should also be required to provide notice to the entity or a different responsible person of the entity. Currently, notice is only required to be given to the responsible person in question.

(c) Placing the burden of proof in resisting any enforcement actions by the Commissioner on the entity is, in principle, neither "light-touch" nor proportionate regulation. As drafted, the Bill allows the Commissioner to exercise enforcement powers and then permits a dissatisfied entity to take action to complain, including bearing the burden of proving that the power should not have been exercised or should have been exercised differently. The case for this reversal of the burden of proof is not made out. Further, the burden of proof is not applied in a coherent manner throughout Part 4-2. For instance, the positioning of the suspension and removal powers at the end of Part 4-2 suggests that it is the most onerous and dramatic of the powers given to the Commissioner under that Part. Yet, unlike the preceding provisions in relation to injunctions which depend on an application for Court orders, the Commissioner may exercise those powers and the responsible entity bears the burden of proving that the Commissioner should not have done so. This is unnecessarily and inappropriately heavy-handed.

In contrast, in most instances, under the *Corporations Act 2001 (Cth),* ASIC must seek

a court order before a director can be disqualified from managing a corporation. WVA suggests this is a more appropriate model and can see no case for why a different approach should be taken in respect of registered NFP entities. The Commissioner could retain a power to temporarily suspend responsible entities where necessary to do so and pending court approval of removal action.

(d) A significantly shorter time period should be placed on directions before the Commissioner is required to reconsider the direction or take other action. WVA reiterates its concern that 12 months is too long and that a better model might be provided by ASIC's powers to give directions which have effect for up to 21 days, after which non-compliance must be adjudicated by a court. This would better achieve the purpose of directions as short-term measure.

(e) Some examples in the Explanatory Material suggest that directions could be used in ways that allow the Commissioner to inappropriately interfere in a registered entity's operations. For instance, Example 9.13 suggests that the Commissioner could give a direction that an entity not change its governing rules in a way that would render it ineligible for registration. As registration is voluntary this would not appropriate. Instead, the Commissioner should notify the entity of the likely effect of its actions so that the entity can decide for itself whether to proceed. It is also noted that, contrary to the suggestion in the example, a "duty to notify" obligation would not have arisen in the circumstances described because, as currently drafted, a duty only arises after a change has been made.

6.5 Furthermore, information generated by the Commissioner (such as warnings, directions, revocations of registration and reports of investigations) has the potential to inappropriately prejudice the public standing of registered entities. Consequently, WVA considers that such information should not be published on the ACNC register at all until all avenues of appeal and review have been exhausted. Alternatively, the Bill should provide that such information not be published at least until an entity has been given an appropriate opportunity to respond and the response (if any) should be published at the same time as the original information. The Commissioner should be required to remove such material where the information is ultimately determined to be incorrect and to publish a corrective statement.

6.6 WVA submits therefore that the enactment of Part 4-2 of the Bill should be deferred pending

further review.

7. Record keeping requirements and penalties

7.1 WVA notes that the record keeping requirements appear to have been broadened and extended since the previous exposure draft. The obligations continue to be vague and uncertain and would now seem to place an even greater compliance burden on registered entities. The drafting of the obligation in clause 55-5(1) of the Bill is particularly unclear given paragraph (b) and the final wording are both about what the requirement to keep records is intended to "enable".

7.2 The appropriateness of such vague obligations being the subject of a strict liability offence is highly questionable; strict liability offences are the antithesis of proportional regulation.

7.3 In addition, if a time limitation is introduced on the Commissioner's ability to retrospectively revoke an entity's registration, as suggested above in paragraph 4.5 above, this should be reflected in the time period for retention of records.

7.4 WVA submits that the strict liability reference be removed and that the penalty for non-compliance be reconsidered in the content of a review of the appropriateness of Part 7.3 generally.

7.5 While WVA appreciates that further changes have been incorporated into Part 7.3 to clarify application of penalties, we still question the necessity for a penalty regime at all in the context of the NFP sector where the vast majority of organizations seek to “do the right thing” and will be empowered to do so by the ACNC’s focus on education of the sector.

8. Special purpose reporting requirements

8.1 WVA questions the purpose of Subdivision 60-E of the Bill which allows the Commissioner to request special purpose reports from entities or classes of entities. Although a note to clause 60-70 of the Bill and an example in the Explanatory Material provides that this could be used if there is reason to believe that a registered entity has contravened the Act, the use of such reports is not actually limited in this way.

8.2 The Commissioner already has powers to determine the approved form for information statements and extensive information gathering powers in Part 4-1 of the Bill. We therefore question why these additional powers are required, particularly for individual entities. Further, there is an inconsistency between the contents of financial reports being determined by the

Government under regulations and the Commissioner having full discretion to determine the contents of the special purpose reports or additional reporting requirements under the Bill.

8.3 WVA submits that Subdivision 60-E of the Bill be removed.

9. Directors duties and liabilities

9.1 Division 180 of the Bill imposes obligations and liabilities of a registered entity on "covered entities" related to the registered entity. In WVA's view, the provisions in Division 180 are unclear in both their drafting and effect. Furthermore, in some instances, they appear to go beyond an appropriate balance between ensuring compliance and not discouraging individuals from participation in the NFP sector.

9.2 WVA notes that it can be difficult for NFPs to attract and retain appropriately skilled personnel, including in board positions. Any undue expansion of the liabilities of directors and staff of NFPs will only serve to increase this difficulty.

9.3 In particular, WVA is concerned as to the scope and effect of clause 180-5(1) of the Bill which purports to impose on "directors" of a "company" all obligations under the Bill that are imposed on the "company". In principle, this appears to be very broad, though it does not appear to extend to amounts payable under the Bill or offences under the Bill. The Explanatory Material does not elaborate on what is the intended scope or effect of this provision. WVA suggests that it be deleted.

9.4 As a matter of drafting, WVA notes that it is counterintuitive and likely to result in confusion to define:

(a) "company" to include both bodies corporate and unincorporated associations or bodies of persons; and

(b) "director" to include people in relevant positions in both types of "company" (as per clause 205-10 and the definition of "director" in clause 900-5 of the Bill).

We suggest that it would be more appropriate to use such terms in ways that are closer to their ordinary meaning.

9.5 We submit therefore that the enactment of Part 7-4 of the Bill be deferred pending further consideration.

10. Objections, reviews and appeals

10.1 The Bill contains objection, review and appeals provisions based on those contained in Part IVC of the *Taxation Administration Act 1953 (Cth)*.

10.2 WVA suggests that further consideration should be given to whether the proposed process appropriate to the Commissioner's decisions. For instance, the process is more prescriptive and limiting than might be the case with other administrative law remedies and, by requiring parties to adhere to an objection process, prevents dissatisfied entities from taking action before an independent forum for matters where time might be of the essence. For example, as noted above in section 4.4(d)(ii), a decision to revoke an entity's registration is likely to have an immediate and deleterious effect on the entity but the entity may be prevented from taking that matter before an independent forum such as the Administrative Appeals Tribunal or Federal Court for up to 120 days pending the objection process.

10.3 Similarly, where the Commissioner issues a direction under Division 85, it is likely that the direction will expire (or at least require review) before an entity has been able to pursue appropriate independent avenues of recourse.

10.4 It might also be the case that other concerned parties wish to take action, even though a more directly-affected party does not or is not able to do so. For example, the directors or members of an entity may wish to make objections or seek reviews or appeals on a decision to revoke the entity's registration where the entity's own access to resources is limited. Similarly, an entity may wish to challenge the suspension or removal of one of its responsible persons. While such parties may have standing under general administrative law principles, the proposed provisions in the Bill would not allow for this (other than to allow interested parties to join reviews or appeals).

10.5 Under the *Taxation Administration Act 1953 (Cth)* the Commissioner of Taxation's decisions are often presumed be valid, notwithstanding a defect in their making. WVA does not consider such an approach to be appropriate in the context of the NFP sector, particularly having regard to the way the Commissioner's powers have been formulated as broad-ranging powers (often constrained only by the matters that the Commissioner is required to have regard to before making a decision). This is an example of why it may not be appropriate to base the objection, review and appeal processes on those contained in the tax legislation.

10.6 Other factors which justify a Part IVC process in tax cases but which are not necessarily

applicable in the NFP context include the following:

(a) Given the pervasiveness of tax law, the likely volume of tax cases requires methods for dealing with dissatisfied taxpayers outside the context of a tribunal or court. The proposed legislation is unlikely to give rise to anywhere near that volume of reviewable decisions.

(b) The imperative of continued revenue for the functions of Government explains not only the process *Taxation Administration Act 1953 (Cth)* but also factors such as shifting the burden of proof and allowing decisions to take effect, notwithstanding reviews or appeals. In our view, there is no similar imperative in relation to the Commissioner's functions.

10.7 WVA notes that as the consequential amendments have not yet been drafted (or released for consultation) it is not clear whether recourse to administrative law under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) will be closed off as it is with many tax-related decisions. WVA submits that such avenues for review of the Commissioner's decisions should remain open.

11. Other methods to assist and educate NFPs

11.1 WVA maintains that an important element of the ACNC's role in relation to the sector is to educate and assist NFPs to cultivate and maintain good governance practices and compliance. Although the Bill now contains some appropriate limitations on the ACNC's powers compared to the first exposure draft, broad and potentially onerous powers of enforcement remain a central element of the Bill. On the other hand, the ACNC's educational and assistance functions are provided for in clause 110-10 on page 91 of the Bill.

11.2 WVA requests that further consideration be given to measures which could provide express mechanisms for assistance and educational measures which are less draconian and more cost-effective and facilitative than the proposed powers. These measures could include:

(a) the issue of binding public and private rulings (on a similar basis to the ATO); and

(b) the making of class order exemptions (on a similar basis to the ASIC).

Appendix A – Summary of World Vision Australia's submission

Requested changes to the Bill:

1. Remove italicized sub-heading references to "tax concessions" and "other concessions" in clause 20-5.

2. Remove column 2 of clause 25-5(5) (subtypes of "charity").

3. Remove requirement for compliance with governance standards from Chapter 2 (Registration) but retain in Chapter 3(Responsibilities of registered entities).

4. Amend clause 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.

5. Remove clause 35-10(5) (Commissioner's discretion to revoke absent show cause process).

6. Remove clause 205-40 (Contribution core concept).

7. Remove Division 50 (External Conduct Standards).

8. Defer enactment of Part 4-2 (Enforcement Powers) pending further consideration.

9. Remove strict liability offence in clause 55-5 (Record Keeping).

10. Defer enactment of Part 7-3 (Penalties) pending further consideration.

11. Remove subdivision 60-E (Special Purpose Reports).

12. Defer enactment of Part 7-4 (Application of Act to Entities) pending further consideration.

Requested next steps after enactment:

1. Draft consequential amendments.

2. Further consider scope and operation of revocation and enforcement powers.

3. Further consider appropriateness and scope of penalties.

4. Further consider review and appeal provisions.

5. Further consider mechanisms to assist educational measures.