

Chapter 2

Australian Charities and Not-for-profits Commission Bill 2012

2.1 This chapter considers the provisions of the Australian Charities and Not-for-profits Commission Bill 2012 (the ACNC Bill). It is divided into the following sections:

- past inquiries into the not for profit sector that have recommended a national regulator;
- stakeholder consultations on the ACNC Bill including the recent inquiry by the House of Representatives Standing Committee on Economics (the House Committee) into the draft legislation;
- the provisions of the bill in its current form; and
- stakeholders' views on the bill, particularly the overwhelming support for a national regulatory system and the passing of the bills, but also various concerns with certain provisions.

Background to the bill

2.2 The ACNC Bill and the Australian Charities and Not-for-profits (Consequential and Transitional) Bill 2012 draw on successive reviews of the not-for-profit sector. Over the past two decades, several substantive inquiries have been conducted into the not-for-profit sector. These include the:

- 1995 Industry Commission inquiry report *Charitable organisations in Australia*;
- 2001 Committee for the Inquiry into the Definition of Charities and Related Organisations inquiry—*Report of the inquiry into the definition of charities are related organisations*;
- 2008 Senate Economics References Committee's *Inquiry into the disclosure regimes for charities and not-for-profit organisations*;
- 2010 Review into Australia's future tax system;
- 2010 Productivity Commission's inquiry report *Contribution of the not-for-profit sector*;
- 2010 Senate Economics Legislation Committee's *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010*; and
- 2011 Senate Economics References Committee inquiry report *Investing for good; the development of a capital market for the not-for-profit sector in Australia*.

2.3 These inquiries have all emphasised that the not-for-profit sector would benefit from national regulation. The 2001 *Report of the inquiry into the definition of charities and related organisations* recommended a national administrative framework for the not-for-profit sector. The 2008 Senate Economics Committee report and the three 2010 reports all recommended the establishment of a national regulator for the not-for-profit sector.¹

2.4 On 10 May 2011, as part of its budget proposals, the government announced that it would form a national charities and not-for-profits regulator. It was envisaged that the Australian Charities and Not-for-profits Commission (the ACNC) 'will initially be responsible for determining the legal status of groups seeking charitable, public benevolent institution, and other NFP benefits on behalf of all Commonwealth agencies'. Further, the government announced that the ACNC will operate 'a "report-once use-often" reporting framework for charities, provide education and support to the sector on technical matters, and establish a public information portal by 1 July 2013'. The ACNC will be an independent statutory agency and will report to the Assistant Treasurer.²

2.5 The government has allocated \$53.6 million over four years for the implementation of the ACNC and the consequent structural changes to the ATO. It is estimated that the introduction of a national charities and not-for-profits regulator would have the following fiscal impact:

Figure 2.1: Fiscal impact of the establishment of the ACNC³

	2010–11	2011–12	2012–13	2013–14	2014–15
Australian Taxation Office (\$M)	0.0	+9.6	+23.9	+10.0	+10.1
ATO – administered revenue	0.0	+8.0	+10.0	+10.0	+13.0

2.6 The federal government has recognised that state and territory legislation may operate concurrently with the proposed federal regime. It has announced its intention

1 Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012, paragraph 1.31–1.38.

2 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, the Hon Tanya Plibersek MP, Minister for Human Services and Social Inclusion, 'Making it easier for charities to help those who need it', *Media release 077*, 10 May 2011.

3 Australian Charities and Not for-Profits Commission Implementation Taskforce, *About*, <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=about.htm> (accessed 31 August 2012).

to work with the states and territories through the Council of Australian Governments (COAG) to achieve national coordination.⁴

2.7 On 13 April 2012, COAG agreed to establish a Not-for-profit Reform Working Group to advise COAG on regulatory reform options including:

- the adoption or application of a Commonwealth statutory definition of charity;
- a nationally consistent approach to fundraising regulation;
- legal, governance and reporting regulations for the not-for-profit sector; and
- approaches to harmonise the test for determining the non-charitable activities of charities.⁵

2.8 In July 2012, COAG reaffirmed its commitment to reducing regulatory compliance costs for the not-for-profit sector. However, it did not finalise recommendations for reform, instead requesting additional advice on reform options.⁶

Stakeholder consultations

2.9 On 21 January 2011, the government released a consultation paper *Scoping Study for a National NFP Regulator*. It sought public comment by 25 February 2011.⁷ Over 160 submissions were received.⁸ Exposure draft legislation was released for public comment on 9 December 2011.⁹ The initial 42 day consultation period, which included the Christmas and New Year break, was extended to 27 January 2012.¹⁰ This was followed by targeted consultations on revised draft legislation in May 2012 with

4 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, the Hon Tanya Plibersek MP, Minister for Human Services and Social Inclusion, 'Making it easier for charities to help those who need it', *Media release 077*, 10 May 2011.

5 Council of Australian Governments, *Communiqué 13 April 2012*, <http://www.coag.gov.au/node/313> (accessed the August 2012).

6 Council of Australian Governments, *Communiqué 25 July 2012*, <http://www.coag.gov.au/node/431> (accessed the August 2012).

7 Treasury, *Consultation Paper – Scoping study for a national NFP regulator*, <http://archive.treasury.gov.au/contentitem.asp?ContentID=1934> (accessed 31 August 2012).

8 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.63.

9 Treasury, *Exposure draft – Australian Charities and Not-for-profits Commission Bill*, <http://archive.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2263> (accessed 31 August 2012).

10 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.64.

select representatives of the not-for-profit sector including the Charities Consultative Committee, the Clubs Consultative Forum and the NFP Sector Reform Council.¹¹

2.10 To support the establishment of the ACNC, in July 2011 the government established the Australian Charities and Not for Profits Commission Implementation Taskforce. This taskforce, chaired by Ms Susan Pascoe AM, is responsible for stakeholder consultations regarding the implementation framework for the ACNC.¹² These consultations have included a series of forums attended by approximately 1600 people.¹³

House of Representatives Economics Committee's review of exposure draft bills

2.11 In July 2012, the House Committee was referred the exposure drafts of the ACNC Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012. The House Committee sought to 'investigate the adequacy of the bills in achieving policy objectives and, where possible, identify any unintended consequences'.¹⁴ Its inquiry focused on three broad policy areas: namely, the capacity of the ACNC to reduce red tape; the liability of directors, trustees and management committees for the conduct of not-for-profit entities; and procedural fairness.¹⁵

2.12 The House Committee reported in August 2012. It was largely supportive of the bills, concluding that '[t]he Bills should pass'.¹⁶ However, the committee argued there was scope to refine the technical details of the bills and the accompanying the Explanatory Memorandum (EM). The committee's 11 recommendations, and the government's response to each, are listed in Appendix 3.

11 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.68.

12 Australian Charities and Not for-profits Commission Implementation Taskforce, *About*, <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=about.htm> (accessed 31 August 2012).

13 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, paragraph 1.69.

14 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, paragraph 1.119.

15 A summary of the committee's findings against each broad policy area is provided in paragraphs 2.156–2.159 of the committee's report.

16 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, p. iv.

Committee view

2.13 The committee (the PJC) commends the work of the House Committee in reviewing the exposure drafts of the bills. As Appendix 3 shows, the government adopted the recommendations of the House of Representatives Economics Committee. The PJC's particular interest as part of this inquiry is to elicit stakeholders' support for these amendments to the exposure draft.

Provisions of the ACNC Bill

2.14 The Australian Charities and Not-for-profits Commission Bill 2012 would establish the ACNC to establish and maintain a register of not-for-profit entities.¹⁷ The provisions of the bill would commence at the later of 1 October 2012 or the day the Australian Charities and Not-For-Profits Commission (Consequential and Transitional) Bill 2012, if passed, receives Royal Assent.¹⁸

Objects of the Act

2.15 Proposed section 15-5, Division 15, Part 1-2 would establish objects for the ACNC legislation. The objects specify that it is intended that the establishment of a national regulatory framework overseen by the ACNC will:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- promote the reduction of unnecessary regulatory duplication applying to the Australian not-for-profit sector.

Interaction with other Commonwealth legislation

2.16 The objects clause, proposed section 15-5, makes clear that is intended that registration with the ACNC will be required for not-for-profit entities to access 'certain Commonwealth tax concessions' and other exemptions, benefits and concessions.¹⁹ This intention is confirmed in proposed section 20-5, which would outline the objects of registration of not-for-profit entities. Accordingly, while

17 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 7.

18 Proposed section 5-10, Australian Charities and Not-for-profits Commission Bill 2012.

19 Proposed subsections 5-10(3)-(4), Australian Charities and Not-for-profits Commission Bill 2012.

registration is voluntary it is necessary in order to obtain and, for some entities, retain tax concessions.²⁰

Registration of not-for-profit entities

2.17 Chapter 2 of the bill would establish the parameters under which an entity may be registered with the ACNC. An entity may be registered if it:

- is a not-for-profit entity;
- is compliant with governance standards and external conduct standards;
- has an Australian Business Number (ABN); and
- has not been determined by an Australian government agency that the entity has engaged in or supports terrorist, or other criminal, activities under Australian law.²¹

2.18 The committee notes that a definition of 'not-for-profit entity' is not included in the Dictionary in Part 8-2 of the bill, or in Part 8-1 which defines concepts central to the bill. The dictionary also does not include a note to guide the reader to where the definition is located in the bill. The EM provides the following explanation of not-for-profit entity:

A NFP entity is generally an entity that is not operating for the profit or gain of its individual members, whether these gains are direct or indirect. This applies both while the entity is operating and when an entity winds up.

Additionally, a NFP entity is one that does not provide any private benefit, directly or indirectly, to related parties such as a trustee, member, director, employee, agent or officer of a trustee, donor, founder, or to an associate of any of these entities (other than reasonable remuneration of the services provided or reimbursement of related costs).

However, the fact that a NFP entity may make a profit does not negate its NFP status so long as any surplus is applied to the NFP purposes of the entity and profit does not accrue to the benefit of identifiable members either directly or indirectly.²²

2.19 In addition, the entity must operate as a 'charity'. While not directly defined, the bill lists seven subcategories of 'charity':

- an entity with a purpose that is the relief of poverty, sickness or the needs of the aged;

20 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraph 3.10.

21 Proposed subsection 25-5(3), Australian Charities and Not-for-profits Commission Bill 2012.

22 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraphs 3.33–3.35.

- an entity with a purpose that is the advancement of education;
- an entity with the purpose that is the advancement of religion;
- an entity with another purpose that is beneficial to the community;
- an institution whose principal activity is to promote the prevention or the control of diseases in human beings;
- a public benevolent institution; and
- an entity with a charitable purpose described in section 4 of the *Extension of Charitable Purposes Act 2004* (provision of childcare services).²³

2.20 The EM to the bill notes that initially, only charities may be registered. However, 'the bill establishes a regulatory framework that can be extended to all NFP entities in the future'.²⁴

2.21 The bill would require entities to apply, in the unspecified 'approved form', to the Commissioner of the ACNC for registration.²⁵ The Commissioner would have 60 days in which to consider the application, and an additional 28 days if requesting further information.²⁶ The bill does not expressly provide applicants the right to withdraw their application. However, if the Commissioner has not considered the application within the allowable timeframe, the entity may notify the ACNC that the entity wishes the application to be treated as having been refused. The EM explains that this is intended to ensure that entities 'have recourse if a decision is not made in the set time and ensures that entities can have the decision reviewed where appropriate'.²⁷

2.22 Where an application satisfies the statutory criteria, the Commissioner would be required to register the entity.²⁸ However, the Commissioner has discretion to revoke registration where s/he reasonably believes that the entity:

- was not entitled to registration when registered;
- provided false or misleading information;
- has or is more likely than not to contravene a provision of the bill when passed;

23 Proposed subsections 25-5(1) and 25-5(5), Australian Charities and Not-for-profits Commission Bill 2012.

24 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 7.

25 Section 30-10, Australian Charities and Not-for-profits Commission Bill 2012.

26 Section 30-15, Australian Charities and Not-for-profits Commission Bill 2012.

27 Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012, paragraph 3.75.

28 Proposed section 30-20, Australian Charities and Not-for-profits Commission Bill 2012.

- has or is more likely than not to contravene a governance standard or an external conduct standards;
- the entity has a trustee in bankruptcy or a liquidator; or
- has requested the revocation.

2.23 The bill does not define 'more likely than not'. However, it would require the Commissioner to take account of the nature, significance and persistence of any contravention of statutory requirements, governance standards or external conduct standards.²⁹ The EM argues that there is a high threshold to satisfy before registration could be revoked:

This ground only covers the situation where there is a substantial or significant likelihood of a contravention or non-compliance and would not extend to a situation where there was only a small chance of the contravention or non-compliance occurring.

In determining whether an entity is more likely than not to contravene a provision of this law or is more likely than not to comply with governance standard or external conduct standard, the ACNC Commissioner must have sufficient, reliable and accurate evidence which clearly indicates that there will be a contravention.

A mere suspicion, rumour or possibility of a likely contravention or likely non-compliance is insufficient with a ACNC Commissioner to take action.

In addition, a 'reasonably believes' test needs to be satisfied which ensures that the ACNC Commissioner will only revoke registration for likely contraventions where a reasonable individual, provided with a set of information available to the ACNC Commissioner, would conclude that it is more likely than not that a registered entity will contravene a provision of the Bill.³⁰

2.24 Decisions of the ACNC Commissioner regarding registration and revocation of registration may be appealed to the Commissioner and, subsequently, to the Administrative Appeals Tribunal.³¹

The Australian Charities and Not-for-profits Register

2.25 The bill would authorise the creation of an Australian Charities and Not-for-profits Register maintained by the ACNC.³² The register would be available for public access and would disclose details of the names, contact details, ABN, charity type,

29 Proposed section 35-10, Australian Charities and Not-for-profits Commission Bill 2012.

30 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraphs 3.89-3.93.

31 Proposed section 30-35; proposed section 35-20, Australian Charities and Not-for-Profits Commission Bill 2012.

32 Division 40, Part 2, Australian Charities and Not-for-profits Commission Bill 2012.

date of registration, and the governing rules of each registered entity. The register would also disclose the information statements provided by registered entities, with the exception of any information classified as not-for-publication, and financial reports and audit reviews provided to the ACNC. It would contain information potentially adverse to an entity, including warnings and directions issued by the Commissioner, enforceable undertakings, injunctions, and suspensions and removals from the register.³³ The bill would also authorise subordinate legislation to restrict the kinds of information that may be included on the register.³⁴

Record keeping and reporting obligations

2.26 The bill would also impose recordkeeping and reporting obligations on registered entities. Registered entities would be required to keep written, readily accessible financial records and records that correctly outline its operations.³⁵ Failure to do so would be a strict liability offence.³⁶ The EM provides the following definition of strict liability:

Strict liability is a legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent.³⁷

2.27 This definition departs from the definition of strict liability in the Criminal Code. As outlined in section 6.1 of the Criminal Code, a strict liability offence does not contain any fault elements (intention, knowledge, or recklessness). A person commits the offence if undertaking the prohibited physical activity regardless of whether the person did so intentionally, knowingly or recklessly.³⁸ Commonwealth criminal law policy dictates that strict liability offences should be used only in limited circumstances:

The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).

The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and

33 Proposed section 40-5, Australian Charities and Not-for-profits Commission Bill 2012.

34 Proposed section 40-10, Australian Charities and Not-for-profits Commission Bill 2012.

35 Proposed section 55-5, Australian Charities and Not-for-profits Commission Bill 2012.

36 Proposed subsection 55-5(6)-(7), Australian Charities and Not-for-profits Commission Bill 2012.

37 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraph 6.19.

38 Section 6.1, the Criminal Code.

where there is adequate justification for doing so. This justification should be carefully outlined in the explanatory material.³⁹

2.28 The EM provides the following justification for imposing a strict liability offence to regulate the record-keeping practices of registered not-for-profit entities:

The use of strict liability penalties is consistent with the Commonwealth guide for framing offences. Strict liability penalties provide a strong incentive to adopt measures to comply with the requirements. In this case, imposing strict liability is an effective way of ensuring compliance with an obligation to keep financial records.⁴⁰

2.29 In contrast, administrative penalties would apply to registered entities that failed to meet the reporting obligations under proposed Division 60 of the bill. Registered entities would be required to provide annual information statements, annual financial reports audited by an approved auditor, and additional information where required by the ACNC Commissioner.

2.30 The bill would impose a graduated reporting framework under which reporting obligations would differ between small entities, medium entities, and large entities. Small registered entities would be classified as an entity with annual revenue of less than \$250 000; medium registered entities would be those with annual revenue of greater than \$250 000 but less than \$1 million; and large registered entities would be those with annual revenue of \$1 million or more.⁴¹ Treasury advised that 'the majority of entities will fall within the small tier'.⁴²

Figure 2.2: Small, medium, and large entities

Tier	Charity population %	Cumulative total %
Small registered entity Revenue up to \$250 000	78	78
Medium registered entity Revenue between \$250 000 and \$1 million	11	89
Large registered entity Revenue greater than \$1 million	11	100

Source: Treasury, *Submission 31*, p. 10.

39 Commonwealth Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, September 2011, p. 22.

40 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraph 6.20.

41 Clause 205-25, Australian Charities and Not-for-profits Commission Bill 2012.

42 Treasury, *Submission 31*, p. 10.

2.31 While all registered entities would be required to provide annual information statements in the approved form, Treasury advised that the ACNC Commissioner would have the discretion to issue separate forms for small, medium, and large registered entities.⁴³ Similarly, small entities would not be required to provide financial reports, medium entities would be required to provide financial reports that can be reviewed, while large entities would be required to provide audited financial reports.⁴⁴

2.32 In addition, registered entities would be required to notify the ACNC Commissioner of changes to details affecting their registration, including any instances of the entity failing to comply with governance standards.⁴⁵ Failure to notify the ACNC Commissioner would be subject to an administrative penalty.

Governance standards and external conduct standards

2.33 The bill would also impose on registered entities obligations to comply with governance standards and external conduct standards.⁴⁶ In proposed section 45-5, the bill states that the purpose of introducing governance standards is to 'give the public confidence that registered entities manage their affairs openly, accountably and transparently, use their resources effectively and efficiently, minimise the risk of mismanagement and misappropriation, and pursue their purposes'. The governance standards will be contained in regulations.⁴⁷

2.34 The bill would also introduce external conduct standards to govern the activities of registered entities. Proposed section 50-5 of the bill notes that external conduct standards are intended to 'give the public confidence that funds sent outside Australia by registered entities are reaching legitimate beneficiaries, being used for legitimate purposes, and not contributing to terrorist or other criminal activities'. Treasury advised that the standards are expected to be modelled on the Financial Action Task Force's Recommendation 8.⁴⁸

Information gathering, monitoring and enforcement powers

2.35 The bill would also confer on the ACNC powers to compel the production of documents and other information, and powers to monitor the operations of registered

43 Treasury, *Submission 31*, pp 9–10.

44 Treasury, *Submission 31*, p. 9.

45 Division 65, Australian Charities and Not-for-profits Commission Bill 2012.

46 Part 3-1, Australian Charities and Not-for-profits Commission Bill 2012.

47 Clause 45-10, Australian Charities and Not-for-profits Commission Bill 2012.

48 Treasury, *Submission 31*, p. 8. Further information regarding Recommendation 8 is provided in Chapter 3 of this report.

entities.⁴⁹ The EM provides the following rationale for the entry, search and seizure powers:

For the NFP sector's regulatory framework to function and remain effective the ACNC needs to be able to access the latest available information through appropriate information gathering and monitoring powers.

Without these powers the ACNC would be unable to gather information beyond that contained in information statements and financial reports, and would be unable to investigate fraud and whether public funds are being used to promote charitable purposes.⁵⁰

2.36 The proposed powers include issuing notices requiring an entity to provide the Commissioner documentation, or to attend and give evidence before the Commissioner. An entity would commit an offence subject to 20 penalty units for failing to comply with such a directive.⁵¹

Enforcement powers administrative sanctions

2.37 In addition to criminal sanctions, registered entities would be liable to administrative sanctions and to a broad range of enforcement powers available to the ACNC Commissioner.⁵² The enforcement options available to the ACNC Commissioner include written directions regarding the conduct of the organisation and individuals within the organisation.⁵³ The bill specifies that the enforcement options may only be exercised in relation to 'federally regulated entities'.⁵⁴ Other enforcement options include the issuance of enforceable undertakings.⁵⁵

2.38 Part 7-3 of the bill would also impose administrative penalties on registered entities for providing false or misleading statements to the ACNC Commissioner. As the penalty is not a criminal sanction, a registered entity may be subject to an administrative penalty regardless of whether the entity intentionally, knowingly or recklessly provided false or misleading information.

49 Part 4-1, Australian Charities and Not-for-profits Commission Bill 2012.

50 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, paragraphs 8.7–8.8.

51 Proposed section 70-5, Australian Charities and Not-for-profits Commission Bill 2012.

52 Part 4-2, Australian Charities and Not-for-profits Commission Bill 2012.

53 Proposed sections 85-5 and 85-10, Australian Charities and Not-for-Profits Commission Bill 2012.

54 Proposed section 85-1, Australian Charities and Not-for-profits Commission Bill 2012.

55 Division 90, Australian Charities and Not-for-profits Commission Bill 2012.

Support for the ACNC and the ACNC Bill

2.39 There is strong support within the not-for-profit sector for national regulation. The diverse sector is essentially united in its support for a national regulatory system. The introduction of the ACNC is supported by animal welfare groups,⁵⁶ social welfare organisations,⁵⁷ healthcare providers,⁵⁸ international aid organisations⁵⁹ and religious entities.⁶⁰

2.40 The Australian Council of Social Services noted in its submission that the sector has 'long championed' the introduction of a national not-for-profit regulator.⁶¹ Indeed, the Department of the Prime Minister and Cabinet has argued that the establishment of the ACNC is the result of the sector's long-term advocacy for national regulatory consistency.⁶²

2.41 The strength of the sector's support for a national regulatory system is also reflected in some concern that this opportunity must not be missed. As the National Roundtable of Nonprofit Organisations stated in its submission:

[t]here are now more than 12 million words on 39 000 pages on the public record in the case for and the nature of necessary and desirable not-for-profit regulatory reform in Australia. Once again, we are at the altar of the reforms we want and need and we ask the support of the national parliament and of the states and territories to deliver for us better and smarter regulation. We do not want to be jilted yet again.⁶³

2.42 There is an expectation across the sector that the proposed national regulation will increase administrative efficiencies and, accordingly, the operational effectiveness of not-for-profit organisations. The Community Council for Australia submitted that 'over time the proposed ACNC will significantly reduce redtape, duplication and compliance costs'.⁶⁴ Mission Australia emphasised that these benefits were the basis of its support for national regulation:

56 RSPCA, *Submission 46*, p. 1.

57 See, for example, Anglicare Sydney, *Submission 32*, p. 2.

58 See, for example, Catholic Health Australia, *Submission 20*, p. 1.

59 See, for example, Australian Council for International Development, *Submission 41*, p. 4.

60 See, for example, Anglican Church Dioceses of Sydney, *Submission 28*, p. 1.

61 Australian Council of Social Services, *Submission 10*, p. 1.

62 Department of the Prime Minister and Cabinet, *Submission 43*, p. 1. See, for example, The Smith Family, *Submission 1*, p. 2.

63 National Roundtable of Nonprofit Organisations, *Submission 14*, p. 3.

64 Community Council for Australia, *Submission 11*, p. 1.

We strongly support the removal of this [regulatory] duplication and our support for the ACNC has been largely predicated around reducing this compliance burden.⁶⁵

2.43 Several submitters argued that national reform is necessary to ensure the ongoing effectiveness of the not-for-profit sector. They claimed the reforms are necessary to promote the sector's 'long-term sustainability'⁶⁶ and 'vibrant operation'.⁶⁷ The Institute of Chartered Accountants Australia (ICAA) noted the capacity for national regulation to improve the sector's operation, stating it is 'very supportive of the regulator approach to improving the operation of the charity sector'.⁶⁸ Philanthropy Australia highlighted the sector's expectation that national regulation will encourage increased transparency:

[W]e strongly support the principles of an independent and dedicated regulator to deliver smarter regulation, reduce redtape and improve transparency and accountability within the sector.⁶⁹

2.44 The outcome of greater transparency was also the focus of the Not-For-Profit Sector Reform Council. As the Chair of the Council, Ms Linda Lavarch told the committee:

[t]he benefit of having a national regulator runs at a number of levels. At its highest and most conceptual level, it is about having a national focus on the potential to overcome the state and territory overlays of regulation that bedevil us in our federal system...The next layer is in relation to the public trust and confidence in the sector, and in my view that comes from accountability and transparency. If a large portion of the sector is totally unregulated, then it could well be argued that that is a huge potential for a devastating breach of public trust and confidence.⁷⁰

2.45 Submitters to this inquiry contrasted the expected benefits from a national regulator with the shortcomings of the current system of disparate Commonwealth, state and territory regulations. As Mr David Ward of Philanthropy Australia told the committee:

The current arrangements are so fragmented that the commencement of reform is absolutely needed...I am on a small not-for-profit run by

65 Mission Australia, *Submission 12*, p. 4.

66 Not-For-Profit Sector Reform Council, *Submission 39*, Attachment A, p. 4.

67 World Vision Australia, *Submission 29*, p. 1.

68 Ms Kerry Hicks, Head of Reporting, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 3 September 2012, p. 31.

69 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 18.

70 Ms Linda Lavarch, Chair, Not-For-Profit Sector Reform Council, *Proof Committee Hansard*, 3 September 2012, p. 17.

volunteer boards which was volunteers only up until recently. It is required to produce audited financial statements, has ASIC reporting requirements, has ATO reporting requirements, is technically regulated by one state attorney-general, has six state fundraising licences and files information to seven separate agencies.

At the other extreme there are charitable funds, claiming in excess of \$1 million franking credit refunds annually, in cash, from the ATO—totally legitimately, I would add—which are currently not required to produce financial statements, which are not audited and which report to no-one.

In our view, neither of these examples is satisfactory.⁷¹

Concerns with certain provisions

2.46 Submitters to this inquiry overwhelmingly supported the passing of the bills.⁷² However, some submitters argued that improvements could and should be made to the legislation.⁷³ These proposals related to the following issues:

- the fragmentation within a national system;
- the enforcement powers of the ACNC;
- the definition of a 'basic religious charity';
- the definitions of small, medium and large registered entities;
- directors' liabilities;
- the reporting thresholds; and
- the operational independence of the ACNC from the ATO.

Fragmentation within a national system

2.47 A number of submitters questioned whether the proposed legislation would produce a streamlined, cross-jurisdictional regulatory framework. Their argument was that the legislation in itself will not achieve this outcome. Rather, the optimal regulatory system will depend on the agreements reached between the Commonwealth government and the state and territory governments. This issue is also considered in chapter 3 of this report.

2.48 Several submitters argued that substantial work is required to ensure a truly national system. Anglicare Sydney, for example, noted that cross-jurisdictional regulatory harmonisation will require 'a lengthy transition period'.⁷⁴ UnitingCare

71 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 18.

72 See, for example, Mr Ward, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 1; The Smith Family, *Submission 1*, p 3; YWCA Australia, *Submission 8*, p. 2.

73 See UnitingCare Australia, *Submission 4*, p. 3; The Smith Family, *Submission 1*, p. 3.

74 Anglicare Sydney, *Submission 32*, p. 4.

Australia commented that the COAG process entails 'complex and lengthy negotiations'.⁷⁵ YWCA Australia argued in its submission:

[M]uch work will need to be done to ensure that the object of reducing red tape and streamlining regulation is achieved. We look forward to the Australian government and state and territory governments working together to achieve a truly one-stop shop for the sector...⁷⁶

2.49 Philanthropy Australia told the committee that creating the ACNC is an important (but incomplete) step towards creating a single national framework. Mr Ward told the committee that the goal of this single framework:

...will not be fixed overnight with the creation of the ACNC. However, we believe it is the best chance of being fixed. Before the states even consider referring responsibilities, there must be an authority to refer its responsibilities to.⁷⁷

2.50 A different view was put by the Australian Catholic Bishops Conference. It argued that in the absence of agreements with the states and territories, the ACNC legislation will increase the regulatory burden on the sector. The Conference called on the government to obtain a commitment from the states and territories on a national system.⁷⁸ Its concerns were shared by Mission Australia, which also called for 'more concrete evidence' to demonstrate that the establishment of the ACNC will lead to a national system.⁷⁹

2.51 The committee was informed that Treasury and the ACNC will work closely with the states and territories as the ACNC framework is implemented.⁸⁰ The Department of Prime Minister and Cabinet confirmed that jurisdictional collaboration is continuing, with jurisdictions agreeing to several work programs to ensure a coordinated regulatory approach.⁸¹

The enforcement powers of the ACNC

2.52 The committee received evidence that the proposed regulatory powers of the ACNC are inappropriate and beyond what is required to effectively regulate the sector. World Vision Australia submitted that 'the tone and structure of the

75 UnitingCare Australia, *Submission 4*, p. 5.

76 YWCA Australia, *Submission 8*, p. 2.

77 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 18.

78 Australian Catholic Bishops Conference, *Submission 17*, p. 8.

79 Mission Australia, *Submission 12*, p. 4.

80 Mr Paul Ronalds, First Assistant Secretary, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 7.

81 Department of the Prime Minister and Cabinet, *Submission 43*, p. 4.

enforcement powers continue to suggest a heavy-handed approach weighted against the interest of registered entities and responsible entities'.⁸² Similarly, the Fundraising Institute Australia argued that 'the Bill emphasises the investigation of NFPs and enforcement of compliance with the Bill by criminal sanctions, rather than risk management and education for charities and NFPs'.⁸³ Drawing on research undertaken by the Australian and New Zealand Standard of Risk Management, the Institute advocated that the ACNC prioritise sector support and education, rather than a punitive enforcement approach:

Less than half the survey participants have had risk management identification and training. This fact indicates an area where the ACNC has the opportunity to provide practical guidance and assistance, in particular to smaller, under-resourced NFPs, who would benefit from risk management guidance being included in the ACNC information portal and possibly other education programs as well. An educational focus is more appropriate than an enforcement focus, as the survey showed that smaller NFPs pay less attention to formal risk management policy and practices because of budgetary constraints, rather than ignorance of compliance issues.⁸⁴

2.53 Anglicare Sydney expressed its concern that the powers 'appear to be more far-reaching than necessary', and in excess of those currently exercised by the ATO.⁸⁵ It stated:

[I]t is unclear to Anglicare Sydney what current situations in the sector justify the need for this degree of expansion, particularly in the light of Treasury's previously stated assumption that "charities operate for charitable purposes, and overwhelmingly most aim to comply with their regulatory requirements".⁸⁶

2.54 Treasury told the committee that the proposed enforcement powers are appropriate. It noted that the bill's powers and sanctions are modelled on those available to regulators, including the ATO and the Australian Securities and Investments Commission (ASIC), that currently oversee entities in the NFP sector. Treasury argued that continuity between existing enforcement powers and those proposed for the ACNC is required to ensure the successful implementation of a national, coordinated regulatory system:

Ensuring the ACNC has similar regulatory powers is essential for the ACNC to effectively take on the regulatory roles previously performed by these other regulators. Without the necessary powers the ACNC would not

82 World Vision Australia, *Submission 29*, p. 15.

83 Fundraising Institute Australia, *Submission 21*, p. 5.

84 Fundraising Institute Australia, *Submission 21*, pp 5–6.

85 Anglicare Sydney, *Submission 32*, p. 5.

86 Anglicare Sydney, *Submission 32*, p. 5.

be able to take on the roles of these other regulators and therefore function as a one-stop shop regulator for the NFP sector.⁸⁷

2.55 Treasury further advised that it is intended that the ACNC will take a proportional approach in exercising its enforcement powers.⁸⁸ This was confirmed by Ms Pascoe of the ACNC Implementation Taskforce:

...the vast majority of the work that will be done by the new regulator in compliance will be in the areas of education and guidance. In other words, helping charities to meet their obligations. It further illustrates that the regulator has the power to take action for serious misconduct, if necessary. However, education and guidance are the foundations of the ACNC's approach and will play a key role in enabling charities to undertake best practice models.⁸⁹

2.56 While emphasising education, it was also evident that the ACNC will exercise coercive enforcement powers where necessary to deter, or to address, significant non-compliance with statutory requirements:

[T]here is a significant proportion of the bill dedicated to what is likely to be a highly unusual event. I suppose it is the serious fraud and money laundering and the real possibility of the use of a charity for the financing of terrorism. Where there is serious malfeasance, it is enabling some teeth for the regulator to deal with those rare events, which do occur from time to time.⁹⁰

Committee view

2.57 The committee considers that it is appropriate for the ACNC to be invested with powers to monitor and enforce the not-for-profit sector regulatory framework. The committee is satisfied that the proposed powers are appropriate and will facilitate a proportional response to non-compliance with regulatory requirements.

2.58 In relation to ASIC's exercise of its coercive powers, the committee has previously commented that it considers that regulators should exercise powers cautiously, giving due regard to individual rights and ensuring that the most appropriate power is utilised.⁹¹

87 Treasury, answer to question on notice, 3 September 2012 (received 3 September 2012).

88 Treasury, answer to question on notice, 3 September 2012 (received 3 September 2012).

89 Ms Susan Pascoe, Interim Commissioner, Australian Charities and Not-for-profits Commission Implementation Taskforce, *Proof Committee Hansard*, 3 September 2012, p. 3.

90 Ms Susan Pascoe, Interim Commissioner, Australian Charities and Not-for-profits Commission Implementation Taskforce, *Proof Committee Hansard*, 3 September 2012, p. 11.

91 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, August 2011, p. 11.

2.59 The committee commends the graduated enforcement approach and the emphasis on stakeholder education. Educating the sector will be crucial to ensuring the effective transition to the new regulatory system. The committee draws to the ACNC's attention guidance material available on the ASIC website, which ASIC has issued to educate stakeholders on the requirements of Australia's corporations law. The committee also highlights to the ACNC ASIC's *Information Sheet 151*, which details the parameters in which ASIC's enforcement powers will be exercised. This guidance will be particularly useful for incorporated associations, the oversight for which will be transferred from ASIC to the ACNC.

The definition of a basic religious charity

2.60 Several submitters commented on proposed section 60-60 of the ACNC bill providing an exemption for 'basic religious charities' from the annual financial reporting requirements.

2.61 Proposed section 205-35 sets out various conditions to qualify as a 'basic religious charity'. An entity cannot be a basic religious charity if it is a deductible gift recipient or if it receives grants from Australian government agencies in a financial year exceeding \$100 000.⁹² However, the EM does state:

An entity may still be considered a basic religious charity if it operates a fund, authority or institution as a separate entity that is a DGR, where the running of the DGR and all DGR funds are kept separate from the parent entity.⁹³

2.62 An entity cannot be a basic religious charity if it is a body corporate that is registered under the Corporations Act.⁹⁴

2.63 The EM notes that the governance standards will not apply to basic religious entities and the Commissioner cannot remove or suspend a Responsible Entity of a basic religious charity.⁹⁵

2.64 Moore Stephens expressed concern that the exemption does not extend to the lodgement of an annual information statement for a basic religious charity. These proposed information statements currently include financial information. Moore Stephens recommended that basic religious charities should be required to lodge a simplified annual information statement which does not include any financial information. The statement would simply confirm key details held on the ACNC register and a declaration by the religious charity in relation to compliance with the

92 Australian Charities and Not-for-profits Commission Bill 2012, proposed section 205-35, p. 149.

93 *Explanatory Memorandum*, p. 223.

94 Proposed section 205-35(2a).

95 *Explanatory Memorandum*, pgs 61 and 66.

external conduct standards. It argued that this arrangement would ensure that basic religious charities will not have onerous financial reporting obligations.⁹⁶

2.65 Australian Baptist Ministries argued that the bill should not exclude incorporated entities from the definition of a basic religious charity. It noted that at least 100 local Baptist congregations are incorporated associations and would therefore be subject to the annual financial reporting provisions. Australian Baptist Ministries argued that proposed subparagraphs 205-35(2–4) should be removed from the bill.⁹⁷

2.66 The Australian Catholic Bishops Conference argued that the exclusion of entities with DGR status from the definition of a basic religious charity should be reconsidered. The Conference noted in its submission that a large number of parishes have established School Building Funds which been endorsed as DGRs. It added:

The current drafting would mean that the apparently well-intentioned exemption in the Bill will not apply in practice because section 205-35(3) would disentitle such a parish from being a BRC [basic religious charity] simply because it operated a School Building Fund or some other DGR. The effect of Section 205-35(3) will be to increase red tape and the level of reporting above that which currently applies by requiring parishes which operate a School Building Fund to place the School Building Fund into a separate ABN if the parish is to be a BRC.⁹⁸

2.67 The Catholic Bishops Conference noted that in the bill, DGRs with annual revenue less than \$250,000—small entities—are not subject to financial reporting requirements. It proposed that the definition of a basic religious charity should be broadened to include DGRs with annual revenue of less than the threshold for medium registered entities (\$250 000).⁹⁹

2.68 Moore Stephens also recommended broadening the definition of a basic religious charity to include those that meet the small registered entity threshold of less than \$250 000 in revenue in a financial year. It noted that it is 'not unusual for churches or other religious institutions to undertake ancillary activities as part of their advancement of religion.'¹⁰⁰

2.69 The committee asked Treasury whether entities with both non-deductible gift recipient funds and operating a deductible gift recipient (such as a school building fund) can qualify as a basic religious charity. Treasury responded:

96 Moore Stephens, *Submission 30*, p. 8.

97 Australian Baptist Ministries, *Submission 13*, p. 4.

98 Australian Catholic Bishops Conference, *Submission 17*, p. 6.

99 Australian Catholic Bishops Conference, *Submission 17*, p. 7.

100 Moore Stephens, *Submission 30*, p. 10.

...when we put in the basic religious charities exemption and made a carve-out for those that operate DGR funds in house, effectively so that we can monitor them, we referred them back in the EM noting that if you want to retain your basic religious charity exemption you can avail yourself of a concession already existing within the tax law to shift what happens to a DGR fund in house to a DGR fund operated out of house. So there was no need to make amendments to the ACNC Bill or the tax law to give effect to that because it is already an option available within the existing tax law.¹⁰¹

Committee view

2.70 The committee believes that in large measure, the proposed provisions defining a basic religious charity are appropriate to satisfy the government's intent to minimise financial reporting requirements for those entities that meet this definition. However, it understands the anxiety of religious groups about the basic religious charity provisions in the bill and views these as legitimate concerns. Accordingly, the committee believes the bill should be amended to allow an entity that operates a school building fund with DGR status within the entity to be classified as a 'basic religious charity'.

Recommendation 2.1

2.71 The committee recommends that the definition of a basic religious charity in the Australian Charities and Not-for-profits Commission Bill 2012 be modified to enable an entity to retain their current status as a BRC in cases where they operate a school building fund with deductible gift recipient status within the entity. The committee recommends that the bill be amended to this effect.

Directors' liabilities

2.72 Following the recommendation of the House Committee, the government amended Division 180 of the ACNC Bill to remove any criminal liability for directors of incorporated charities. The revised provisions clarify that where there is a non-criminal contravention of the bill, a director of an incorporated charity is only liable for any amount payable by the body corporate where this arises from a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness.¹⁰²

2.73 There was unanimous support for this amendment among those submitters and witnesses that commented on the issue.¹⁰³ Some organisations, however, continued to have some concerns. The Australian Institute of Company Directors

101 Mr Chris Leggett, Manager, Philanthropy and Exemptions Unit, Department of the Treasury *Proof Committee Hansard*, 3 September 2012, p. 9.

102 Treasury, *Submission 31*, p. 22.

103 See Ms Anne Hampshire, Head of Research and Advocacy, The Smith Family, *Proof Committee Hansard*, 3 September 2012, p. 41.

(AICD), notably, argued that while the amendments represent a 'significant improvement' from the draft legislation:

...it is concerning to us that individuals overseeing unincorporated charities will still have the same obligations and will be liable for any and every amount payable by the unincorporated association under the Bill without exception and without access to defences.¹⁰⁴

2.74 AICD's concern is that liability for directors of unincorporated associations (even if they acted honestly and were not involved in a contravention) will provide a disincentive for people to volunteer. AICD recommended a carve-out for volunteer directors of unincorporated associations.¹⁰⁵

2.75 The Executive Council of Jewry, the Jewish Communal Appeal and the Jewish National Fund, argued that a director of an incorporated charity who serves on a voluntary basis should only be liable for their personal criminal actions. The Council emphasised that the importance of this arrangement given that 'a high proportion of directors of charities serve on a voluntary basis' and should be supported in their efforts.¹⁰⁶

2.76 However, Philanthropy Australia told the committee that it was comfortable with the amendments to the director's liability provisions. Mr Ward commended the work of the House Committee and the government's response, adding:

...those volunteering their time to be on not-for-profit boards should not be subject to greater penalties than those on the boards of commercial organisations. I think that change has been greatly welcomed, and it takes away one of the significant concerns about the second draft of the legislation.

...I think the view of most of the people involved in the not-for-profit sector...is that doing the right thing is paramount. Having some degree of regulation in fact often assists directors because they know they are filing returns and that there is a check that they are doing the right thing as far as the regulatory format is concerned.¹⁰⁷

2.77 Mr Ward added that directors themselves would expect that it is only correct that where there are actions of recklessness or gross negligence, directors should be held accountable for those actions. He noted that whether the directorship is for

104 Australian Institute of Company Directors, *Submission 24*, p. 4.

105 Australian Institute of Company Directors, *Submission 24*, p. 4.

106 Executive Council of Jewry, *Submission 16*, p. 2; Jewish Communal Appeal, *Submission 18*, Jewish National Fund, *Submission 25*.

107 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 19.

payment or whether on a voluntary basis, there should be a requirement to accept responsibility to ensure that the entity complies with the regulatory framework.¹⁰⁸

2.78 The committee asked Treasury to comment on the proposition that being a director of a not-for-profit agency will now potentially be more onerous than being a director of a for-profit organisation. Mr Chris Leggett, Manager of Treasury's Philanthropy and Exemptions Unit, responded:

I would have to say that we disagree with that statement. The amendments that we have made to the Corporations Act to shift responsibility for the ongoing running of these entities from the corps act and from the tax office's oversight into the ACNC have significantly reduced the obligations on existing company directors. There are far more safeguards within the ACNC bill over when the commission can take action and what penalties et cetera directors are liable for. They are significantly reduced from their existing Corporations Act and tax law requirements.¹⁰⁹

Committee view

2.79 The committee believes that the amendments to director liability provisions are appropriate and does not believe there should be a lesser standard of responsibility or penalty for directors that serve on a voluntary basis. The committee also highlights Treasury's point that there are more safeguards within the ACNC bill relating to directors' penalties and liabilities than those within the Corporations Act.

The reporting thresholds

2.80 Another issue of stakeholder concern with the ACNC bill relates to the reporting thresholds for entities based on their annual turnover (see Figure 2.2). Some submitters to this inquiry viewed these monetary thresholds as being too low and therefore too burdensome for not-for-profit entities to comply.

2.81 Moore Stephens, for example, argued that the bill's requirement for all Registered Entities with revenue greater than \$250 000 in a financial year to prepare a general purpose financial report is 'far too onerous' and costly. It explained:

...we remain concerned as to the number of entities that would be included in the financial reporting requirements as a result of the size criteria of revenue set for determining small, medium and large Registered Entities. Our analysis indicates that this will see nearly 50% of Registered Entities being classified as being medium or large and therefore will be required to comply in full with the onerous obligations of the Bill. Accordingly, we continue to be of the view that the size criteria for determining medium and

108 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 19.

109 Mr Chris Leggett, Manager, Philanthropy and Exemptions Unit, Department of the Treasury *Proof Committee Hansard*, 3 September 2012, p. 47.

large entities could be doubled to \$500,000 and \$2,000,000 respectively without having any impacts on the core aims of the Bill.¹¹⁰

2.82 Moore Stephens proposed that the minimum requirements of the financial reporting framework should be more clearly defined in the bill itself, rather than left to the regulations.¹¹¹

2.83 The Independent Schools Council of Australia argued that from the perspective of the entities it represents, the thresholds for small, medium and large registered entities under the proposed legislation are too low. Specifically, it claimed that these thresholds are not reflective of the low risk profile of the independent school sector. The Council claimed that these thresholds may place not-for-profits that raise revenue through normal commercial transactions, and much less revenue from public sources, in the same category as entities that rely solely on grants and public donations. It estimated that in the independent schools sector, on average, schools receive around 40 per cent of their revenue from government grants and the remainder from other sources.¹¹²

2.84 The Chair of the Not-for-profit Sector reform Council acknowledged that the size of the thresholds would need to be a matter of review by the ACNC. Ms Lavarch told the committee:

Our continuing concern is over the level of the tiers for reporting. But we accept that the levels have been set in legislation and we ask that that be an ongoing review of whether those levels are being set—that the thresholds are at the right levels—and that will be something we have asked the ACNC to continue monitoring. We certainly welcome that there is a five-year review of the legislation and ask that that reports back against the reduction in red tape as well.¹¹³

2.85 The committee asked Philanthropy Australia if it could characterise the type of entity that would be over the \$1 million annual turnover threshold. Mr Ward responded:

For the members of Philanthropy Australia, which are foundations, to achieve a revenue of more than \$1 million means they probably have to have about \$20 million or so in funds. Therefore, having an audit and full reporting where someone is sitting on \$20 million is to our mind appropriate. In fact, we have had as one of our governance principles for a number of years that large foundations that are not required to report should in fact have audited financial statements when they reach a threshold level.

110 Moore Stephens, *Submission 30*, p. 7.

111 Moore Stephens, *Submission 30*, p. 7.

112 Independent Schools Council of Australia, *Submission 15*, p. 6.

113 Ms Linda Lavarch, Chair, Not-for-profit Sector Reform Council, *Proof Committee Hansard*, 3 September 2012, p. 15.

We have talked about between \$10 million and \$20 million in the past. From our sector's perspective, those thresholds are fine.¹¹⁴

...

The ones that will face increased burdens will be the larger foundations that now meet the thresholds for reporting requirements. As I said, charitable trusts with more than roughly \$20 million in their corpus will be required, and they are also the ones that are claiming the large amounts of franking credit refunds. They will be the ones which will now be required to file reports with the ACNC.¹¹⁵

Committee view

2.86 The committee believes that the proposed reporting requirement thresholds are appropriate. It emphasises the need for large entities—those with more than \$1 million in annual turnover and roughly \$20 million in funds—to have stricter reporting requirements than entities with less turnover and fewer funds. This is entirely logical and prudent. Accurate and detailed financial reporting requirements for entities managing considerable funds are a matter of good risk management. This noted, the committee does believe it is important that these thresholds are periodically reviewed.

Recommendation 2.2

2.87 The committee recommends that as part of the five year review of the operation of the ACNC, the annual reporting requirement thresholds are reviewed. This review should consider the evidence that existing thresholds have been fairly and appropriately set based on the need for transparency and risk-management on one hand with the compliance burden on the other.

2.88 The committee believes it is important to provide certainty to the schools sector regarding current requirements to lodge annual financial reports to Australian government agencies and how this relates to the financial reporting requirements of non-government schools in the Australian Charities and Not-for-profits Commission Bill 2012.

Recommendation 2.3

2.89 The committee acknowledges that schools are required to provide annual financial reports to the Australian Curriculum, Assessment and Reporting Authority as part of the My School website. This data is extensive and thus the Australian Charities and Not-for-profits Commission should accept that data as

114 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 20.

115 Mr David Ward, Treasurer and Council Member, Philanthropy Australia, *Proof Committee Hansard*, 3 September 2012, p. 21.

suitable to meet the annual financial reporting requirements in the ACNC Bill. The committee recommends that the Bill be amended to this effect.

The operational independence of the ACNC

2.90 Clearly, the not-for-profit sector endorses the creation of an independent regulator. Submissions to the House Committee's inquiry indicate that there are concerns within the sector with the suitability of the ATO retaining regulatory responsibilities.¹¹⁶ The Smith Family's submission to this inquiry also raised this issue:

[S]ome of the current arrangements of the sector are far from ideal. In particular, the ATO's dual role as determinator of charitable status and collector of government revenue is problematic.¹¹⁷

2.91 Chartered Secretaries Australia argued in its submission:

The sector itself supports a national regulator and has been clear in each inquiry that it does not support retaining the regulatory function within the Australian Taxation Office (ATO) because of a perceived conflict of interest in that the ATO would be acting as both a revenue raiser and regulator. The sector has clearly expressed its desire for a new, dedicated regulator in each inquiry.¹¹⁸

2.92 The extent to which the ACNC will operate independent from other Commonwealth regulators has been questioned. The Australian Council for International Development recommended that Chapter 5 of the ACNC Bill be amended to expressly articulate the independence expected of the ACNC Commissioner and ACNC staff.¹¹⁹

2.93 Treasury advised that the ACNC Bill as currently drafted supports the creation of an independent regulator:

The ACNC will be established as an independent statutory office structurally separate from the ATO. The bill ensures the independence of ACNC, for example, by requiring the ACNC to report directly to Parliament. The ACNC Bill also expressly provides that ACNC officers act independently of the ATO, such as when carrying out their duties under the ACNC legislation.

The structural separation will help to address any perceived conflicts of interest that currently exist with ATO's revenue collection role and its current role as the default NFP regulator. This, in turn, will ensure that the

116 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, p. 6.

117 The Smith Family, *Submission 1*, p. 2.

118 Chartered Secretaries Australia, *Submission 3*, p. 3.

119 Australian Council of International Development, *Submission 41*, p. 7.

public have confidence in the ACNC Commissioner's decision making processes.¹²⁰

2.94 While acknowledging that the ACNC will receive back-office and administrative support from the ATO, Ms Pascoe advised that the Commission will exercise its regulatory responsibilities independent of the ATO. The committee was further informed that administrative and staffing support from the ATO have been provided under a Memorandum of Understanding under which the Commissioner of Taxation has transferred authority over nominally ATO staff to the ACNC Commissioner.¹²¹

Committee view

2.95 The committee acknowledges stakeholder concerns regarding the independence of the ACNC. However, on the basis of evidence provided to this inquiry, it is not apparent that the administrative arrangements to support the operation of the ACNC will compromise the Commission's independence. The committee concurs with the view of the House Committee that 'the Bills will establish an independent, national regulator for the sector'.¹²²

Recommendation 2.4

2.96 The committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be passed.

120 Treasury, *Submission 31*, p. 6.

121 Ms Susan Pascoe, Interim Commissioner, ACNC Interim Taskforce, *Proof Committee Hansard*, 3 September 2012, p. 6.

122 House of Representatives Standing Committee on Economics, *Report on the exposure draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, p. 75.

