

Chapter 3

Consequential and transitional provisions and the governance and reporting framework

3.1 This chapter outlines the transitional and consequential provisions necessary to establish the Australian Charities and Not for Profits Commission (ACNC). These provisions are set out in the Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012 (the bill). In terms of the transitional amendments, the bill clarifies the initial registration process and ensures that the Commissioner has the discretion to reduce not for profit entities' reporting requirements. In terms of consequential amendments, the ACNC legislation will necessitate various changes to Commonwealth statutes. The bill ensures that agencies' responsibilities are not duplicated and that the ACNC assumes its role.

3.2 The latter part of this chapter considers the vexed issue of the form and the commencement date of the governance standards and reporting requirements for not-for-profit entities. These have been left to the regulations accompanying the bill. The government's position—which the committee shares—is to set the ACNC framework in place on 1 October 2012, consult properly on the form the regulations will take, and commence the governance and reporting obligations as scheduled on 1 July 2013.

3.3 However, several submitters and witnesses to this inquiry have expressed concern with this approach. Some argued that the ACNC bill itself should be deferred until the regulations are prepared. Others prefer passing the ACNC bill as planned but delaying by six months the start of the regulations.

Provisions of the Australian Charities and Not-for-profits (Consequential and transitional Amendments) Bill 2012

Transitional amendments

3.4 The intent of the bill is to provide a smooth transition to the new regulatory framework:

- Clause 5 of the bill provides for automatic registration of charities that are endorsed by the ATO unless the entity opts out within 6 months¹;
- Clause 8 of the bill relates to the provision of annual reports to the ACNC and allows grandfathering of existing substituted accounting periods applying to entities in certain cases

1 Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, section 5.

3.5 Part 4 of the bill deals with the issue of reporting. Subclause 10(1) of the bill states that the ACNC Commissioner *may* treat a statement, report or other document given under an Australian law to an Australian government agency (other than the Commissioner) by a registered entity as being an information statement or a financial report for a financial year given to the Commissioner under the ACNC bill.² Treasury noted in its submission that this provision enables the ACNC Commissioner to address potential reporting duplication during the process of establishing the regulator.³

3.6 This provision was made following the recommendation of the House of Representatives Economics Committee's recommendation in August 2012:

That the Commissioner have discretion to accept reports or material prepared for other agencies and levels of government as reports for the purpose of the reporting framework under the Bills. This arrangement should be time limited and be reviewed as the lodge-once use-often process is developed.⁴

3.7 Part 9, clause 16 of the bill states that the Minister must cause a review to be undertaken of the first five years of the operation of the ACNC Act and the ACNC Consequential and Transitional Act.

Consequential amendments

3.8 The bill's consequential amendments enable the ACNC to determine the charitable status of entities on behalf of all Commonwealth agencies. Treasury noted that consequential amendments to various Commonwealth Acts are needed to ensure the ACNC's registration applies across all Commonwealth agencies.⁵ The bill amends various Commonwealth Acts to ensure that charities are registered by the ACNC under their charitable status and that they may therefore access concessions, exemptions and benefits. The following Acts are among those that the bill amends:

- Divisions 30 and 50 of the *Income Tax Assessment Act 1997*;
- the *Competition and Consumer Act*;
- the *Do Not Call Register*;
- the *Fringe Benefits Tax Assessment Act 1986*; and
- *A New Tax System (Goods and Services Tax) Act 1999*.

2 Treasury, *Submission 31*, p. 13. Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, section 10.

3 Treasury, *Submission 31*, p. 13.

4 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. xiii.

5 Treasury, *Submission 31*, p. 13.

The need for coordination between the ACNC and ASIC

3.9 The bill also amends Commonwealth legislation to establish the ACNC. The bill clarifies the responsibilities of the Australian Securities and Investments Commission (ASIC) given that parts of ASIC's current role as the regulator of not-for-profit entities will be transferred to the ACNC. Specifically, while ASIC will continue to register companies including companies limited by guarantee, it will have limited oversight of the financial reporting and governance arrangements of those companies that choose to register with the ACNC.⁶ From 1 July 2013, the ACNC will conduct the financial reporting surveillance of companies registered with the ACNC. However, ASIC will retain the power to obtain information in respect of ACNC audits.

3.10 The bill also removes duplication in the ASIC Act with regard to:

- the requirement for entities to notify ASIC of changes to its details, given that this will now be provided to the ACNC;
- certain director's duties for entities registered with the ACNC, given that responsible entities will be subject to equivalent governance standards specifically for the not for profit sector;
- the financial reporting requirements in the Corporations Act, given that new reporting requirements are contained in the ACNC Bill; and
- procedural requirements of Annual General Meetings, given that these will be simplified and tailored for not for profit entities in the ACNC regulations.⁷

3.11 Importantly, particularly given this committee's purview, the bill contains a regulation making power which enables certain provisions of the Corporations Act relating to registered entities to be 'turned off' where there is overlap with ACNC reporting and governance standards. These standards will commence on 1 July 2013.

3.12 The committee is keen to monitor the interaction between ASIC and the ACNC as part of the committee's ongoing ASIC oversight role. Clearly, there will need to be ongoing dialogue and coordination between the two Commissions to ensure that:

- in the first instance, the governance standards, financial reporting obligations and procedural requirements that are currently overseen by ASIC are transferred to the ACNC;
- thereafter, both Commissions are aware of any changes in these governance, reporting and procedural requirements;
- ASIC has a clear understanding of the mechanism through which not-for-profits register (and deregister) with the ACNC; and

6 Treasury, *Submission 31*, p. 15.

7 Treasury, *Submission 31*, p. 16.

- arrangements are in place to allow ASIC access to the ACNC's audits.

Submitters' views on these provisions

3.13 Most submitters to this inquiry focused their comments on the provisions of the main ACNC bill (chapter 2) and the 'In Australia' bill (chapter 4). However, several submitters did comment on clause 10 of the consequential and transitional arrangements bill. Chartered Secretaries Australia, UnitingCare and the Independent Schools Council of Australia all welcomed the insertion of this provision.

3.14 Still, some submitters wanted greater assurance that there would be no duplication in reporting responsibilities between those of the ACNC and other government agencies. The Australian Catholic Bishops Conference proposed requiring the ACNC to use existing reports provided to other federal government agencies for the first three years of its operation.⁸ It put the following argument:

We could, I think, go a long way towards solving this red tape reduction by the change of one word in the transitional bill—the word 'may' to 'must' in section 10, relating to the discretion of the commissioner to accept the reports of other departments. Just by way of illustration, our schools sector was highly compliant and extremely seriously regulated in great detail. I gave evidence to the House committee and I had with me the 51-page explanatory memorandum that tells them how to put in the 26-page financial questionnaire for DEEWR. There are enormously detailed regulatory requirements on schools. Their concern is: will the ACNC replace any of that or simply be another point of accountability?⁹

3.15 World Vision Australia made a similar proposal, suggesting that clause 10 be amended to permit the Commissioner to treat any annual report—even those not required by law—as an information statement or report under the ACNC Bill.¹⁰

3.16 The Independent Schools Council of Australia argued that non-government schools should either be an exempt entity, or the Commissioner should have the power to exempt the schools from the duplicative reporting requirements for a five year period (coinciding with the review period).¹¹

3.17 The accounting firm Moore Stephens recommended that the proposed discretion to the Commissioner be replaced by 'a voluntary reporting regime during at

8 Australian Catholic Bishops Conference, *Submission 17*, p. 10.

9 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012, p. 23.

10 World Vision Australia, *Submission 29*, p. 4.

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

least the first three years of the Commission'. It argued that this will enable the ACNC to focus on the transition to an effective 'report-once, use-often' framework.¹²

3.18 The Bishops Conference also proposed to amend the provision of the transitional bill relating to the substituted accounting period. Father Lucas told the committee:

We believe that the current substituted accounting periods which charities already operate under should be grandfathered across the board. In the church context, where you have a multiplicity of accounts and different requirements, it is a simple practical matter for your auditors that you try and spread the audit over a June year-end and a December year-end. So most church, parish and diocesan accounts will have their DGR entities reporting on a June year-end and their other accounts on a calendar year. It spreads the workload, it spreads the audit requirements and I believe that there is no policy reason for not having a great deal of flexibility for substituting accounting periods.¹³

Committee view

3.19 The committee strongly supports Part 4, clause 10 of the bill, which allows the Commissioner to consider the existing reporting arrangements of entities such as the non-government schools sector and charitable indigenous corporations. In exercising this discretion, the bill rightly directs the Commissioner's attention to factors including the access that the Commissioner has to other reporting documents, whether a document contains the information required under the ACNC Act, and the processes that have been undertaken to verify the information contained in the statement. The committee believes that these provisions are well drafted and far more prudent than an outright requirement that the Commissioner must accept any reporting statement prepared for other government agencies.

Governance standards and reporting arrangements

3.20 Several witnesses to this inquiry expressed concern that the regulations relating to governance standards and reporting arrangements would not accompany the passage of the bill. They argued that the bill and the regulations should be considered as a package. Mr Paul Ronalds of the Department of Prime Minister and Cabinet identified two areas of disagreement among stakeholders in terms of the process for establishing the reporting and governance standards:

There was a significant push from the sector itself to establish the ACNC in the first instance and to then have a much longer period for consultation around those governance and reporting standards; however, that is not uniform. There are some within the sector who say: 'No. We essentially

12 Moore Stephens, *Submission 30*, p. 3.

13 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012, p. 23.

want it all perfectly built before we get started. Until we have seen the whole edifice, we don't want to support any of it.' I am caricaturing, but that would be a very broad part.

The second broad range of disagreements is in relation to the participation of the states and territories. Again, from the perspective of Prime Minister and Cabinet and the Office of the Not-for-profit Sector, we received significant input from the sector saying, 'No; we want the Commonwealth government to get its own house in order, to get started establishing the ACNC, to fix up the regulatory duplication at the Commonwealth level and to then work with states and territories over time to also minimise the regulatory duplication at that level.' Again, that view is not uniform in the sector. There are some who are saying: 'No. Until you have broad based agreement with the states and territories on comprehensive regulatory reform across all levels of government, you shouldn't be introducing the ACNC.'¹⁴

3.21 A sense of these disagreements was captured in the committee's evidence. The Institute of Chartered Accountants Australia (ICAA), for example, told the committee that governance standards and reporting requirements need to be available before the parliament passes the ACNC legislation:

We suggest incorporating transitional provisions within the current legislation to allow an extra six to 12 months for people to become aware of the requirements and to prepare to adopt those new governance and reporting requirements.¹⁵

3.22 The ICAA noted that the reporting requirements will apply to unincorporated bodies, including those that currently have no state requirements for reporting. The ICAA contended that given this inexperience, and the fact that the regulations have not yet been drafted:

[T]here should be a minimum 12-month period from the date that such regulations are issued until the date for implementation by entities. So incorporating a transitional provision which is based on governance requirements, say, to be applied 12 months from the date of the regulations, and the reporting requirements, again commencing 12 months from the date of regulations, I would have thought, would be quite feasible.¹⁶

3.23 The accounting firm, Moore Stephens, was also concerned that the ACNC bill contains no detail about governance and reporting standards. Mr Joe Shannon told the committee that:

14 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 4.

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

16 Ms Kerry Hicks, Head of Reporting, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 3 September 2012, p. 35.

...as an example, there is nothing currently in the bill on how the ACNC would link into the Australian Accounting Standards Board. We think that link is absolutely vital to make it work effectively in terms of the reporting regime. Currently there is no reference to that in the bill whatsoever, which we think is something very much lacking. Similarly to some comments that I heard earlier, we are concerned about the annual information statement. We do not know the detail around that and are concerned that it might indirectly include some financial information, so we would like to see the detail around that before we could really have clear comments.¹⁷

3.24 Father Brian Lucas, General Secretary of the Australian Catholic Bishops Conference, told the committee that the governance arrangements 'could perhaps be improved by mandating in the legislation high-level governance requirements'. He noted that in leaving these arrangements to regulation, there is uncertainty and 'the real risk that governance requirements will become very restrictive and prescriptive'.¹⁸

3.25 Other witnesses had a markedly different view. Mr David Crosbie of the Community Council for Australia had a pragmatic approach:

The issue here is how many ducks do we need lined up on the wall before we say that we have decorated. We are not going to get the ACNC up and operational—cutting red tape and having all the states and territories referring their powers, all the governance and finance reporting and everything else in place—in year one. Those people who expected to do those and any number of other tasks, which sound to me quite fanciful, have obviously never been involved in a regulatory environment or in simply maintaining an up-to-date, relevant and accurate database of over 50,000 organisations. Frankly, if in one year's time or even two years time we can have a single source of accurate, relevant and timely information about not-for-profit organisations in this country—information validated to a level that states and territories and other Commonwealth agencies will draw upon—up and operational and searchable as a one-stop shop for that information, we will have done remarkable work.¹⁹

3.26 Mr Crosbie proposed that initially, the governance and finance reporting should be kept to a minimum until adequate work is done with the range of diverse not-for-profit entities in the sector. He argued that building a scalable and proportional reporting system that caters to this diversity will take some time. Mr Crosbie

17 Mr Joe Shannon, Chairman, Not for Profit Group, Moore and Stephens, *Proof Committee Hansard*, 3 September 2012, p. 31.

18 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 3 September 2012, p. 24.

19 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, 3 September 2012, p. 42.

welcomed the fact that the ACNC would be given some time to achieve this task and added: 'I would much rather the ACNC was doing that than the Treasury'.²⁰

The government's position

3.27 Officials from Treasury and the Department of Prime Minister and Cabinet explained the government's decision to stagger the introduction of the legislation and the regulations. Mr Martin Jacobs from Treasury told the committee:

...there was certainly a clear message that the sector wanted additional time to be involved in consultation on the development of the financial reporting and governance regulations. So the government has announced a staged implementation of the ACNC, including that those reporting and governance arrangements would not commence until 1 July 2013 and that they would be subject to a detailed consultation process.²¹

...there is clear support from the sector for the establishment of the ACNC from 1 October this year and then to allow further time to develop those governance and reporting regulations.²²

3.28 Mr Ronalds drew the committee's attention to the often protracted negotiations between the Commonwealth and state and territory governments through the Council of Australian Government (COAG) process. He told the committee:

Our perspective is that it was much better to begin the regulatory reform process, to make the improvements at the Commonwealth level and to then work very constructively with the states and territories, and that is in fact what is going on. There has been significant work with the states and territories already about what could be done and it is certainly my firm view that, if the regulator is established on 1 October, the momentum will only build both from the sector and from our work directly with states and territories.²³

3.29 However, Mr Ronalds noted that while there are differences of view as to the specific reporting and governance standards, this should not be interpreted as a sign that the not for profit reform agenda has lost support. As he told the committee:

What I would say is that I do not think that there are any states that are not on board. All of the states and territories that I have been negotiating with have made that very clear, and in fact this is reflected in the COAG communiques for at least the last two COAG meetings. All states and

20 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, 3 September 2012, p. 42.

21 Mr Martin Jacobs, Acting Principal Adviser, Treasury, *Proof Committee Hansard*, 3 September 2012, p. 4.

22 Mr Jacobs, Treasury, *Proof Committee Hansard*, 3 September 2012, p. 4.

23 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 4.

territories are committed to red tape reduction and the significant benefits that can flow from a one-stop shop national regulator.²⁴

...

I think they are waiting for the bill to be passed before they put anything formally on the table. Obviously we have an extensive process around the governance and reporting standards that they are most interested in, but they have all formally signed on to participating in the process. Their willingness to participate in the process is very clear from the COAG communiques of the last two meetings. Once the bill is passed, assuming it is, I think you will see even more significant momentum from individual states and territories, and over time from all of them, to reform their own regulatory arrangements to make sure that they minimise any regulatory duplication.²⁵

Committee view

3.30 The committee strongly supports the timetable for the commencement of both the ACNC and the governance standards and reporting requirements. It is important that the ACNC commence as scheduled on 1 October 2012 and that it has as one of its first key tasks the negotiation of clear and effective governance and reporting requirements for the diverse not-for-profit sector. The accomplishment of this task will give the many stakeholders in the sector great confidence in the role and the expectations of the ACNC Commissioner.

Recommendation 3.1

3.31 The committee recommends that upon the establishment of the Australian Charities and Not-for-profits commission on 1 October 2012, the Commissioner promptly engages stakeholders to devise a set of governance standards and reporting requirements for the sector. These requirements must balance the need for probity and transparency with an acknowledgement of the time and cost that these arrangements may pose, particularly for smaller entities.

Recommendation 3.2

3.32 The committee recommends that the Australian Charities and Not-for-profits (Consequential and Transitional) Bill 2012 be passed.

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

25 Mr Paul Ronalds, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 3 September 2012, p. 8.

