

29 January 2018

Mr Patrick McClure AO
Chair
ACNC Act Review Panel
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Patrick

I write on behalf of the Australian Charities and Not-for-Profit Commission (ACNC) Advisory Board which was established by Chapter Six of the Australian Charities and Not-for-Profit Commission Act 2012 (the Act). The Act established the Advisory Board as separate from the Commissioner and the ACNC. Being separate, yet working closely with the Commissioner and ACNC, the Advisory Board has prepared this submission for consideration of your Review Panel.

Three substantive priorities

The Advisory Board has identified three substantive priorities for the Review Panel to consider in its deliberations.

1 – Act aint broke, question need to fix it

The Commission's enabling legislation was and remains widely supported by the charity sector. There have been few if any complaints about the Act. The Act continues to fulfil its initial original purpose, expressed as the Act's first object at s15.5(1)(a) to "*maintain, protect and enhance public trust and confidence*" in charities, mainly through operation of the charity register required by s15.5(2)(b)(i) and Division 40 and the ACNC's supervisory and regulatory activities.

As legislation, the Act was thoughtfully designed. It was informed by experience of the establishment of comparable international charity regulators. The Act's full potential is yet to be utilised, particularly its potential to regulate further not-for-profit entities other than charities.

With the Act having been embraced by those reliant on the ACNC's regulatory role, and with it enabling scope for the Commonwealth and States and Territories to refer further powers to the ACNC, there may be no need for amendment to the Act. In fact, caution in recommending amendments to the Act may be prudent. Legislative change creates uncertainty, and a subsequent burden of practice change by those impacted by new law. Opening up a well-functioning Act to parliamentary debate may also result in unforeseen legislative outcomes.

The Review Panel should accordingly adopt a high threshold to substantiate any recommendations for legislative amendment.

2 – The prioritisation and resourcing of the ACNC's legislated objectives

The ACNC legislation was enhanced during Parliamentary consideration of the Bill when the Government of the day added two additional objects to that of its first to "*enhance public trust and confidence.*" Indeed,

s15.5(1)(b) established object two being to “support and sustain a robust, vibrant, independent and innovative” sector, and s15.5(1)(c) established object three for the ACNC to “promote the reduction of unnecessary regulatory obligations.” These objects are, of course, intertwined—initiatives and work undertaken primarily toward one objective will naturally enhance the ACNC’s position *vis a vis* the other two.

However, a significant role performed by the Australian charities and not-for-profit sector is that of the implementation of government policy relating to many areas of public interest (for instance, in the provision of human services). Additionally, Australia’s governments are changing policy relating to funding provided for these services in a number of ways, including in the application of quasi-market funding arrangements that change the financial and operating risks faced by charities and not-for-profits. These risks relate to sustainability, competition, systems capacity, and change management capacity. While the policy changes are seen as a significant advance, such risks are important to acknowledge and consider as, while they are felt by the charitable and not-for-profit sector directly, governments and those reliant upon services also face them, the materialisation of which will increase costs to the former and reduce outcomes for the latter.

As such, while the Act does not specifically prioritise one object over another, ideally, the ACNC’s first and principle object should be that of supporting a robust sector. This focus will help support the transition of governments’ policy, reducing risk to the public purse and service users. The ACNC can enable this object through its related objects to maintain public trust and confidence and to reduce red tape. There is no need to amend the Act to place greater emphasis on s15.5(1)(b). Rather, the Review Panel could simply recommend that the ACNC give greater attention to this object.

The object of s15.5(1)(b) to support a robust sector has not been defined. Defining the object in the Act is unnecessary, whereas defining it in practice is relatively straight forward. A definition can be derived from the drivers of what makes for a “robust, vibrant, independent and innovative” charity and not-for-profit sector, and the reasonable role the ACNC might adopt in relation to addressing these drivers within Commonwealth constitutional limits. The table below illustrates key drivers and possible ACNC roles. Adopting these roles would be consistent with the subsections of s45.5, and will build on the work already being underway by the ACNC.

Driver	ACNC role
Access to sustainable income streams	<ul style="list-style-type: none"> • Capacity development of sector to manage government contracts and grants effectively • Capacity development of sector to build infrastructure requirements and enhance co-operative processes • Promotion of donor giving and philanthropy • Fostering of efficient resource use, consistent with s45.5(b)
Access to sustainable human capital	<ul style="list-style-type: none"> • Sector workforce development strategy: sub-sector level strategies in context of environmental needs and risks to public policy • Promotion of volunteering
Effective organisational management	<ul style="list-style-type: none"> • Governance capacity development, consistent with s45.5(d) • Managerial capacity development, consistent with s45.5(a)
Marketisation policy	<ul style="list-style-type: none"> • Sector transition strategy: sub-sector strategies in context of environmental needs and risk to public

	policy. This includes co-operation, managed consolidation and effective competition
Harnessing of new technologies	<ul style="list-style-type: none"> • Sector technology strategy
State and Territory regulatory and supervisory requirements	<ul style="list-style-type: none"> • ACNC enhance negotiations with states/territories to remove: duplication of regulatory requirements; regulatory inconsistencies; definitional inconsistencies • ACNC continue to negotiate with states/territories to enable report-once-use-often strategies (such as Standard Business Reporting)

The ACNC has implemented a number of initiatives designed to commence the process of responding to these challenges to the extent that it can within its current resource base. However, in practice, the ACNC's appropriation, first derived in 2012, only supports fulfilment of its object to ensure public trust and confidence through operation of the charity register. The appropriation does not support fulfilment of its second object to support and sustain charities. Nor is the ACNC sufficiently supported through either its appropriation, or with whole of government support, to make any meaningful reduction of sector red tape; greater uptake of the Charities Passport by Commonwealth departments and agencies would instantly contribute materially to the reduction of sector red tape. Given that annual charity sector revenue exceeds \$130 billion and in excess of 1.2 million Australians are employed through the sector, the current cost of sector regulation is modest and further investment can be justified.

The Review Panel should consider prioritising the ACNC's object to support a robust sector, whilst maintaining public trust and confidence and having greater capacity to reduce red tape. The Review Panel should assess current constraints in advancing the second and third objects, and recommend to Government action to empower the ACNC to achieve each of its objects. The Review Panel should outline options for the ACNC operationalise a role to support and sustain charities, and it should recommend the use of the Charities Passport by all relevant Commonwealth bodies.

3 – Single *one stop shop* Australian regulator for all not-for-profits, not just charities

The Act envisages the ACNC registering, sustaining, and reducing red tape for all Australian not-for-profit entities, in addition to charities.

Recognising not-for-profit registration and oversight and fundraising regulation remain roles of State and Territory law, the review of the Act offers, perhaps, the only opportunity in the foreseeable future for effort to be directed to seeking Federation agreement about the ACNC being the one stop shop for both charities and not-for-profit organisations. A one stop shop could be achieved either through referral of registration, oversight, and fundraising powers to the Commonwealth. Constitutional referral should be the primary goal. As a lessor but more achievable second goal, referral of administrative functions relating to registration and fundraising to the ACNC and retention of constitutional authority by States and Territories should be considered.

The Review Panel should embrace the rare opportunity to prompt referral of all registration, oversight and fundraising activities for both charities and not-for-profits to the ACNC.

Other relevant matters

The Advisory Board has identified several other matters relevant to the conduct of your review.

A - Complicated interaction with the Corporations Act

Charities limited by guarantee are subject to both the ACNC Act and those provisions of the Corporations Act not otherwise *turned off*. Uncertainty exists in relation to appointment of charity company secretaries, continued publication by ASIC of out of date charity director details, appointment of charity company auditors, publication of place of business address details, and practical uncertainty about application of director duties arising from application of an evolving common law (distinct from more static statute law that had previously been in place), and emerging law as the Commission's Five Governance standards are applied over time.

The Review Panel should investigate options to resolve uncertainties in the operation of the Corporations Law and the ACNC Act by considering procedural arrangements rather than substantive harmonisation between the two Commonwealth laws.

B – Suitability of responsible persons

Charity governance standard four (s45.20 of the ACNC Regulation) requires charities to take reasonable steps to ensure *responsible persons* meet certain conditions, such as not being disqualified from managing a corporation. However, drug, perjury, sexual assault, financial and other offences indicating a person is not suitable to be a *responsible person* to govern a charity are not captured.

The Review Panel should investigate options to more relevantly define conditions of *responsible persons* governing charities to ensure a person convicted of a serious offence is not in a position to govern an ACNC registered organisation.

C – Communication constraints on Commission investigations

s150-25 creates an offence for an ACNC officer to disclose ACNC held information other than to the entity to whom the information relates. The operation of this section prohibits the ACNC from:

- confirming an investigation or commenting publicly on matters under investigation;
- publishing investigation reports or disclosing reasons why a charity has been revoked; and
- publishing reasons for granting or refusing registration.

These restrictions materially inhibit the capacity of the ACNC to meet its objectives and reduces the opportunity for the sector to learn from real cases and outcomes. While appropriate protections should be retained, the ability to share information will enhance the public trust and confidence in the sector, and assist the sector to become more sustainable.

The Review Panel should consider the continuing rationale for the secrecy provision.

D – Constraints on what can be published on the register

s40-5(1)(a-f) details limited information that can be published on the charity register. There are no general provisions enabling the Commissioner to display other information on the register. For example, the Australian Company Number or Deductible Gift Recipient status of the charity cannot be published. Nor can a summary of information provided by the charity in its Annual Information Statement (AIS).

The Review Panel should consider the merit of freeing up constraints on information that can be published on the ACNC register.

E - Enhance the contribution of the Advisory Board.

Part 6 establishes the Advisory Board and sets out its role in advising the Commissioner. There is value in assessing potential other benefits of the Advisory Board, and expressly considering the potential for the Advisory Board to also provide advice to the Minister on matters relating to the charity and not-for-profit sector.

The Review Panel should consider the role of the Advisory Board in providing advice to the Minister.

The Review Panel should also consider the current constituency of the Advisory Board to ensure broader representation at both a geographical and functional level.

F – Extend the reach of the “basic” charity concept

s205.35 establishes the concept of a Basic Religious Charity (BRC), and allows exemptions from certain ACNC obligations where a BRC is not engaged in significant economic activity. The concept arose to avoid unreasonable regulatory burden on small and unincorporated religious communities.

The operation of s205.35 has not been controversial, and the review panel should affirm the continued operation of the provision.

G – Requirement to notify of breach

s65.5(1)(e) requires a registered entity to notify the ACNC where it has breached any provision of the Act. This requirement was well intentioned, yet it risks perverse outcomes in that the duty to self-report is a disincentive for continuous improvement (particularly in relation to the Governance Standards). The Corporations Act contains no such self-reporting burden, but rather empowers the corporate regulator to prosecute and seek remedy for breaches of the Corporations Act in similar ways to the ACNC enforcement powers established Part 4-2 of the Act.

The Review Panel should consider the continuing need for s65.5(1)(e).

Next steps

At a time of your choosing, I invite your publication of this submission. I also look forward to discussing this submission with you further when the Review Panel meets with the Advisory Board in Melbourne in mid-February.

Best wishes for the conduct of your review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tony Stuart', written over a horizontal line.

Tony Stuart
Advisory Board Chair