



30 May 2014

Our ref: EXT2014/76

Dr Kathleen Dermody,
Committee Secretary
Senate Economics Legislation Committee,
PO Box 6100
Parliament House
CANBERRA ACT 2600

(by email: economics.sen@aph.gov.au)

Dear Dr Dermody

Senate Economics Legislation Committee – Inquiry into Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

Following the hearings of the Committee on Friday 23 May 2014, we write to:

1. provide answers to the questions on notice from Senator Bushby
2. correct some of the key factual errors in the statements made at the hearings and in some of the submissions. We have also outlined some points where there was general confusion.

If there are further matters that we can assist the Committee with we would be pleased to do so.

1. Questions on Notice – ACNC Advisory Board remuneration

Question:

What are the remuneration and other entitlements of Australian Charities and Not-for-profits Commission (**ACNC**) Advisory Board members?

Answer:

Under section 140-15 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**), each general member of the ACNC Advisory Board is paid the remuneration determined by the Remuneration Tribunal. As at 28 May 2014:

- Remuneration Tribunal Determination 2014/03 sets an entitlement to an annual sitting fee of \$13,312 and a fee per meeting of \$615, and
- Remuneration Tribunal Determination 2013/16 (effective 1 September 2013, and prior to this, Principal Determination 2004/03) sets the travel allowance for official travel within Australia. The ACNC Advisory Board members are entitled to Tier 2





- travel rates. Despite this entitlement, the ACNC Advisory Board resolved in March 2013 to adopt the practice of the ACNC, and travel economy class on flights of less than 4 hours (unless economy fares are unavailable). Travel has been undertaken in accordance with this decision.

Question:

Outline which of these entitlements have been taken up by each member of the ACNC Advisory Board?

Answer:

The Chair, Robert Fitzgerald AM, and one member, Mr David Crosbie, have waived their annual fee and the meeting fees. Under Remuneration Tribunal Determination 2013/16, the ACNC Advisory Board members are entitled to Tier 2 travel rates. Despite this entitlement, the ACNC Advisory Board resolved in March 2013 to adopt the practice of the ACNC, and travel economy class on flights of less than 4 hours (unless economy fares are unavailable). Travel has been undertaken in accordance with this decision.

2. Clarification and errors in statements and submissions

It was apparent during the course of the hearing that there were several matters, mostly of a technical nature, that were answered incorrectly by witnesses and this may have caused confusion for the Senators. There are also some important factual errors or misunderstandings in some of the submissions.

To assist the Committee Secretariat and the Senators, we have provided a table (**Attachment A**) with clarification about some of these errors. We have not responded to comments largely based on opinion (or all of the errors in all of the submissions).

For your assistance some common areas of confusion are summarised below:

- **Voluntary system**

Registration with the ACNC is voluntary and there are entities which are charities that chose not to register with the ACNC. However, if a charity wishes to access Commonwealth charity taxation concessions or other benefits, it must register with the ACNC.

- **Role split between ACNC and ATO**

The ACNC determines charitable status. The ACNC Act provides that this includes determining Public Benevolent Institution (PBI) status, Health Promotion status, and Harm Prevention status.

The ATO determines DGR and other charitable taxation concessions and benefits.



- **Reporting obligations**

2013

Annual Information Statement

The Annual Information Statement (AIS) for all charities (including Basic Religious Charities) has 17 questions, with 3 additional voluntary ones. The question about volunteers only asks for an estimate. The 2013 AIS provides core, up-to-date information that helps provide a credible register of charities, essential given that many details contained in the data migrated from the ATO have been found to be incorrect (more than 5,600 paper 'change of details' forms have been received up to 28 May 2014 and over 5,500 pieces of mail have been returned unopened).

We have attached a PDF version of the (paper form) of the 2013 AIS (**Attachment B**) (note: approximately 87% of charities have lodged this information online).

Financial Reporting Requirements

There is no financial reporting for any charity for the 2012-2013 reporting period.

2014

Annual Information Statement

There are 3 fewer non-financial questions compared to the 2013 AIS. To save charities time, the majority of information will be pre-populated to the 2014 AIS from 2013 AIS.

Financial Reporting Requirements

Basic Religious Charities do not have to answer any financial questions or provide any financial reports.

Commencing 2014 medium and large charities are required to attach financial reports to their 2014 Annual Information Statements. It is voluntary for small charities to submit financial reports.

The 2014 Annual Information Statement contains financial questions and the number of questions asked depends on the size of the charity:

- Small – 9
- Medium – 12
- Large – 15

Medium charities are required to have their financial statements audited or reviewed. Large charities are required to have their financial statements audited.

The revenue limits for determining charity size were based on the revenue limits in the Corporations Act relating to size of companies limited by guarantee.



We would be happy to elaborate on the points of clarification or answer any other questions the Committee might have. Our experience of interpreting and administering the ACNC Act, related regulations and (complex) transitional and consequential provisions means we are well placed to clarify many of these issues.

We would also be pleased to share our more detailed analysis of the submissions, including how we estimated the number of organisations represented by them if that is of assistance.

Yours sincerely

Susan Pascoe AM
Commissioner

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Submission/ Hansard ref.	Name	Statement	ACNC comment
Submission 22	Logicca Pty Ltd	"[ACNC is] a government department with over 1,000 employees" (p.1 Submission 22)	As at 23 May 2014, the ACNC has 94.47 Full Time Equivalent employees
		"Now of these only 240 [out of 500 complaints in 15 months] appeared to the ACNC to require investigation and of these the ACNC is only able to give 2 examples of issues." (p.1 Submission 22)	<p>The ACNC is unable to comment on specific compliance cases. ACNC has published a summary of trends and issues to help support improved practice (via education, in line with the ACNC's regulatory approach). More than two examples have been given, see here.</p> <p>That does not mean there are only two issues being investigated. As at 23 May 2014, there are 92 open compliance cases.</p>
Hansard p.12 - 19	Mr Peter Hersh, Director, Logicca Pty Ltd	<p>Powers of auditors – 'switched off' Corporations Law provisions.</p> <p>Mr Hersh was concerned that a number of important controls in the Corporations Act have been 'switched off', and that this has diluted the authority of the auditor and their ability to do their work (a potentially important matter given the role of an auditor as a crucial 'check and balance').</p> <p>For example, refer p.12 Hansard - "... the auditor's legal authority to require the delivery of information has been eliminated...[then other changes in the powers given to auditors are listed]... It also stands in stark contrast to</p>	<p>While some provisions of the Corporations Act have been 'switched off', there are provisions that are 'turned on' in the ACNC Act to replace them. The ACNC is able to provide full details but have outlined below some of the specific issues raised by Mr Hersh.</p> <p>Section 312 of the Corporations Act – requiring an officer of a company to provide access to the books of the company and information requested by an auditor – has been switched off. The auditor had rights to access this information under section 310 which is also turned off. However, section 60-55 of the ACNC Act has broadly the same effect as sections 310 and 312. Section 60-55 requires the charity to give the auditor access to the books of the charity and all reasonably requested information. The auditor can therefore point to that section as evidence of his/her right to obtain required information (see benefit of being able to do this as raised by Mr Hersh on p. 12 of Logicca's submission).</p> <p>In addition paragraphs 60-30(3)(b) and 60-30(4)(b) of the ACNC Act require an</p>

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Submission/ Hansard ref.	Name	Statement	ACNC comment
		<p>the powers of the external auditors during the pre-ACNC era.”</p>	<p>auditor or reviewer to form a view about whether or not they have been given all information, explanation and assistance necessary to conduct the audit/review. Any deficiency, failing or shortcoming in respect of the information, explanation or assistance must be described in the auditor’s/reviewer’s report (paragraphs 60-45(3)(b) and 60-50(3)(b)). Consequently, if the directors of a charitable (ASIC incorporated) company do not co-operate with the auditor in a manner which affects the audit/review, there is a specific requirement for that fact to be publicised.</p> <p>Part 2M.4 of the Corporations Act (appointment and removal of auditors) still applies - a charitable company that wants to remove its auditor would follow the same process as it did prior to the establishment of the ACNC. Section 329 of the Corporations Act (removal or resignation of auditors) also still applies so that the requirement for ASIC’s consent still applies where an auditor wishes to resign.</p> <p>The auditor’s defence against defamation proceedings in the event of suspecting impropriety has not been eliminated. Section 329, Part 2M.4 of the Corporations Act applies where an auditor seeks ASIC’s consent to resign as auditor, and this section has not been switched off. The section still operates as a defence to the auditor in the circumstances outlined in subsection 329(7). For completeness, we note that Mr Hersh may also be referring to the general auditor protection in section 1289 of the Corporations Act. While some protections in that section relate to matters that are no longer relevant (for example, a statement in a director’s report), other protections still remain. Paragraph 1289(1)(a) (which has not been turned off) provides a qualified privilege in respect of ‘a statement that the auditor makes (orally or in writing) in the course of the auditor’s duties as auditor’.</p>
		<p>Harm prevention charities (HPCs) – “A technical error in the ACCN legislation resulted</p>	<p>DGR eligibility is determined by the ATO and is governed by Division 30 of the Income Tax Assessment Act (ITAA) 1997. What Mr Hersh described as a</p>

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		<p>in HPCs receiving advice that they would have to restructure to continue to receive their DGR eligibility” (p.12 Hansard).</p>	<p>“legislative error” appears to be a provision in Division 30, inserted as a result of consequential amendments made to the ITAA. This provision had unintended consequences for HPCs to the effect that both a harm prevention charity and its fund must register with ACNC in order to be eligible to receive Deductible Gift Recipient (DGR) status.</p> <p>The ACNC has worked closely with the ATO in order to minimise the impact the consequential amendments unintentionally created for HPCs, in order for the ATO to grant DGR status. Draft laws have been released for public comment that seek to remedy this apparently unintended consequence.</p>
		<p>“The requirement to disclose the attendance details at directors’ meetings has been eliminated” (p 12 Hansard).</p>	<p>This is consistent with the “principle rather than prescription” approach. However accountability to members (ACNC Governance Standard 2) makes it appropriate to provide these details, particularly if they are requested by a member or asked by a member at a general meeting.</p>
		<p>“The requirement for minimum notice periods prior to the convening of an AGM has been eliminated” (p.12 Hansard).</p>	<p>This is correct; however this subject matter would come within ACNC Governance Standard 2 (accountability to members). We consider this accountability requires a reasonable notice period prior to a meeting. As explained below (in reference to submission 37), the intention was to move away from applying, often overly prescriptive public company standards to, in particular, small charities. Using a principles-based approach gives charities greater flexibility to tailor how they comply according to their particular circumstances.</p>
		<p>“The maximum period after year-end that a company can now hold its AGM has been</p>	<p>It is correct to say that the requirement to hold the AGM within 5 months after the end of the financial year no longer applies automatically, but there is no ‘switch on’</p>

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		<p>extended to 12 months from five months” (p.12 Hansard).</p>	<p>provision that extends it to 12 months. Rather the ‘switch on’ is Governance Standard 2 (accountability to members) – discussed above. In this context the standard allows companies more flexibility to hold their meetings at a time that is appropriate for the charity.</p> <p>For example, a small charity with a 30 June year end may want to hold its meeting in, say, January (rather than by November) because of the availability of a free room/the availability of its auditor (who is busy with full fee paying clients in the ‘usual’ November AGM time) etc. Prior to the ACNC Act, the charity would have been required to seek ASIC’s approval and pay a fee every year (or incur greater costs associated with room hire etc.). There was also no guarantee that ASIC would grant (and continue to grant) the request. The more flexible ACNC governance standard has reduced red tape for this charity while still ensuring accountability to members.</p> <p>Members can vote to include a provision in the charity’s constitution that the AGM must be held within a specified time, and could report any extended delay in holding an AGM to the ACNC for investigation.</p>
		<p>“I know of a growing charity group whose affiliated entities were approved as health promotion charities by the ATO under the pre-ACNC regime. After the establishment of the ACNC, the commissioner recognised this group’s newly established entities as non-DGR-eligible charities, effectively denying them tax-deductibility status.” (p, 12 Hansard).</p>	<p>The implication of this statement is the ACNC is adopting a stricter approach than the ATO. We cannot comment on individual applications (and no details have been provided). However, the ACNC Act sets out review and appeal rights which this applicant could exercise. This is explained by the registration analyst over the phone and confirmed in the letter that is sent when any application (or part thereof) is refused.</p>

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Submission/ Hansard ref.	Name	Statement	ACNC comment
		<p>“The information on the ACNC register gives you current directors and what the charity thinks it does. It does not give you much more than that.” (p,13 Hansard)</p>	<p>The ACNC Register is being built and will contain more information as Annual Information Statements (AIS) are lodged – currently more than 28,000 AISs have been lodged. There are 17 questions and three further voluntary questions on the 2013 AIS, so there is more information than Mr Hersh has referred to (for example, any activities conducted overseas, charity size and where it operates). From 1 July 2014 (for medium and large charities) financial statements will also be included on the ACNC Register. More than 5,000 have already been lodged voluntarily. More than 22,000 governing documents are on the ACNC Register with more being supplied – to obtain this information from the ASIC register (which is only relevant to about 10% of charities) requires the payment of a fee.</p>
		<p>“Not direct links— I would question that. There is actually a link to the register where you need to do another search [between ACNC and ABR]” (p.15 Hansard).</p>	<p>There is a direct link from a charity’s entry on the ACNC Register to that charity’s entry on the ABR (providing details about any taxation concessions as determined by the ATO, which administers the ABR). It is one click through (no extra search on the name is required), just as you also click through to any uploaded documents such as the governing rules.</p>
		<p>“The way the AIS is designed prompts people to tick everything that they might cover. What I was trying to get at was that you may have a health promotion charity whose purpose is to look after the health of the general population and which has been approved as a health promotion charity. Under the legislation, a health promotion charity should not be assisting Aborigines, as an</p>	<p>Questions on the AIS relate to ‘recognisable assessment activities’. The ACNC asks charities what activities they undertake. If the answers show that the charity is engaged in activities that are incompatible with their charitable purpose(s), this is something the ACNC will consider. In line with our published regulatory approach, ACNC would not revoke a charity’s registration without working with the charity to see what was behind the information provided and giving the charity the opportunity to self-correct, or consider a subtype review.</p> <p>This description of health promotion charities is not correct. A health promotion</p>

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Submission/ Hansard ref.	Name	Statement	ACNC comment
		example, or should not be assisting women” (p.17 Hansard). See also comments made on p.18 Hansard.	charity is defined as “an institution whose principal activity is to promote the prevention or the control of diseases in human beings”. It receives specific DGR benefits as a result of having this status. There is nothing to stop a health promotion charity focusing on promoting the prevention or control of diseases that affect a particular section of the community, such as women.
Submission 37	Housing Industry Association	<p>“... the ACNC Governance are a significant divergence from existing corporate regulation” (p.5 Submission 37).</p> <p><i>This was also an issue seemed to cause some confusion for other witnesses at the hearing</i></p>	<p>The ACNC governance standards are consistent with ASIC requirements.</p> <p>The ACNC’s guidance on the governance standards indicates that if charities continue to adopt the practices and standards they had in place to ensure compliance with the Corporations Law (or, under state and territory based incorporated association regimes) they will meet the principles-based (core, minimum) ACNC governance standards. The ACNC governance standards are designed to provide charities greater flexibility; so charities can tailor <u>how</u> they comply according to their particular circumstances. On our website we state : “The ACNC’s approach to implementing the governance standards is based on two main points:</p> <ul style="list-style-type: none"> - minimum standards – these standards set out minimum requirements for governance of your charity. They do not cover all aspects of governance. The ACNC provides tools and resources to promote good governance practices beyond these minimum standards - principles-based standards – we will generally apply the standards as a set of high-level (general) principles, rather than as precise rules. In other words, your charity can generally choose how to comply, as long as it can demonstrate, should it be required to do so, that this is appropriate taking into account its situation such as: <ul style="list-style-type: none"> o size o purposes o reach (local, national or international)

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			<ul style="list-style-type: none"> ○ activities ○ the people and causes it helps (such as vulnerable people) ○ who its members are ○ source of funding (public donations or government funding), and ○ existing governance systems and processes.”
<p>Submission 58</p>	<p>Catholic Health Australia</p>	<p>“..the ACNC Advisory Board, despite having members of genuine experience and capability, has not developed a public voice” (p.6, Submission 58)</p>	<p>Under section 135-15 of the ACNC Act, Advisory Board’s function is, at the request of the ACNC Commissioner, to provide advice and make recommendations to the Commissioner in relation to the Commissioner’s functions under the ACNC Act.</p> <p>The ACNC Advisory Board:</p> <ul style="list-style-type: none"> - meets in a different jurisdiction for each meeting with a view to meeting in each state and territory at least once every 2 years - prior to its meetings, holds a sector consultation forum to hear from key sector bodies about the performance of the ACNC and any related issues - publishes a meeting summary on the ACNC website after each of its meetings - has published a statement about what it considers to be principles of good charity regulation (referred to in several of the submissions).

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Submission/ Hansard ref.	Name	Statement	ACNC comment
		<p>“A key design flaw of the ACNC is its generalist approach, which ignores the reality that a large charitable hospital with thousands of employees may have little in common with a small voluntary sporting club” (p.7, Submission 58)</p>	<p>Although they are usually not-for-profit organisations, very few sporting clubs fall within the definition of a charity (promoting sporting activities is not a charitable purpose) and, therefore, are not registered with the ACNC.</p> <p>The ACNC’s guidance and education has a strong focus on small volunteer-run charities as they are least able to afford professional advice and services. Also, current AIS data suggests that about 70% of charities are small. For larger more complex charities the ACNC provides direct stakeholder engagement and assistance – such as bulk lodgment processes, face-face to meetings with peak and governing bodies.</p> <p>Red tape reduction working groups were established for sub-sectors – education and social services, with others planned prior to the current uncertainty about ACNC’s future (see ACNC submission, p.16).</p>
<p>Submission 72 Hansard p.32 - 37</p>	<p>Dr Nicole Den Elzen, Executive Officer, Association of Australian Medical Research Institutes</p>	<p>Where there are changes to governance or changes to business, need to figure out who to report to – ASIC or the ACNC (p.35, Hansard)</p>	<p>Once a company is a charity registered with the ACNC their common reporting obligations (such as changing directors, and from 2014 annual reporting) are to the ACNC (not ASIC). Registration and de-registration (winding up) and other less common matters (such as removing an auditor or raising funds through a debenture offer) need to continue be reported to ASIC (as the corporate regulator). Guidance on this issue is available on both ACNC and ASIC websites (see Submission 154).</p>

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Submission/ Hansard ref.	Name	Statement	ACNC comment
		<p>“Incorporated entities are now reporting to both their state government as well as the ACNC, and the majority of them have two pieces of state legislation governing them as well as the ACNC Act. The financial reporting they have to do has slightly increased. All of them already had to provide audited financial statements each year because they are all large public companies limited by guarantee or large incorporated entities, but now they have to provide an additional amount of information to the ACNC as well.” (p.32 and 35 Hansard).</p>	<p>These entities have always reported to state and territory governments if they are incorporated associations and they conduct charitable fundraising activities that fall within the particular (and varied) state and territory-based requirements. However, the ACNC has agreed to accept financial reports lodged with state and territory governments as meeting the ACNC’s reporting requirements for the 2014 financial year (Schedule 1 – Part 4, section 10 of the ACNC (Consequential and Transitional Provisions) Act 2012). This means that a charity that is an incorporated association in, for example, Victoria can meet its requirements under the ACNC Act by lodging the same report as it lodges with Consumer Affairs Victoria (there is no fee to lodge with the ACNC).</p> <p>From 2014 onwards, large public companies limited by guarantee will only need to provide audited financial statements each year to the ACNC, not to ASIC.</p>
<p>Submission 76</p>	<p>Australian Catholic Bishops Conference</p>	<p>“The premise of the ACNC was that it would be a single reporting point for charities, with cooperation from other Commonwealth, State and Territory agencies. Co-operation has not been secured and this object is to be fulfilled.” (p 3, Submission 76)</p>	<p>The ACNC is the reporting point for charities that are companies (either registered with ASIC or under the Corporations Law and Aboriginal & Torres Strait Islander Corporations (CATSI) Act). ACNC has also reached an agreement with the Office of the Registrar of Indigenous Corporations to accept reports lodged with ORIC as meeting ACNC requirements. The South Australian Government has produced a draft Bill to harmonise regulation and there is an express commitment to cease the regulation of charities from the ACT government (see submission 109 and page 19 of the ACNC submission).</p>
<p>Submission 102</p>	<p>Financial Services Council</p>	<p>Mr Bragg suggested that a charitable trust established by a will should be viewed in the same way as all other types of will trusts, such</p>	<p>Once a charitable trust is established, the property of that trust must be used to promote its charitable purpose(s) – a charitable trust has no beneficiaries, unlike a</p>

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Submission/ Hansard ref.	Name	Statement	ACNC comment
<p>Hansard p 38 - 43</p>	<p>Mr Andrew Bragg, Director and Ms Eve Brown, Senior Policy Manager</p>	<p>that any regulation of charitable trusts established by a will would equate to regulation of a private arrangement.</p> <p>“What somebody does with their money and their assets after they die is essentially a private decision and a private arrangement” (p.39, pp.40, 42 Hansard and Submission 102, page 1 and Attachment 1, p.2-3)</p>	<p>private trust whose trustees can be monitored and sued by the trust’s beneficiaries.</p> <p>The property of a charitable trust is ultimately protected by the Crown, through the Attorney-General, indicating that it is not a private arrangement as the Crown does not protect the property of other types of will trusts. In addition, a charitable trust necessarily exists for public, rather than private benefit.</p> <p>Registration with the ACNC is voluntary and there are entities which are charities that chose not to register with the ACNC. However, if a charity (including a charitable trust) wishes to access Commonwealth charity taxation concessions or other benefits, it must register with the ACNC. The income from charitable trusts registered with the ACNC would be income tax exempt, (i.e. public revenue foregone).</p>

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		<p>The director of a publicly listed company can potentially be removed from office by the Commissioner in the absence of a proper court process that ensures due process and the application of the rules of evidence (p.38, also repeated on p.42 Hansard, and Submission 102 p.1, attachment 1 p.6 and attachment 2, p.6-10)</p> <p>“...the suspension, removal and replacement provisions in the ACNC Act grant powers to the commissioner that go well beyond the powers of any other federal regulator.” (Hansard, p38; submission p1, attachment 1 p6, attachment 2 p)</p>	<p>As already canvassed in the discussion between Senator Siewert and Ms Brown (Hansard, p42), and briefly in response to Senator Bishop’s questions (Hansard, p.39), the FSC’s concern is solely about the appropriateness of the ACNC’s power in relation to suspending and removing directors, and the potential for those powers to be misused, rather than the ACNC’s actual use of those powers. The ACNC’s view is that, in addition to the ACNC’s regulatory approach, there are is one other important safeguard that protects responsible persons from any arbitrary exercise of the ACNC’s power.</p> <p>While it is true that a discretionary decision made by government would not be conducted in exactly the same way as a court process, it is important to note that administrative law requirements apply to all decision-makers. These administrative law requirements protect those who may be affected by government decisions from an abuse of power and an abuse of proper process. Fundamental principles of administrative law, and the ACNC Act’s reviews and appeals process, operate to ensure that decisions are properly made by the Commissioner.</p> <p>Administrative law principles (in particular natural justice requirements) apply to all government decision-makers, and are over and above ordinary legal requirements – they do not need to be enshrined in each piece of legislation authorising decision-making to bind the decision-maker. In some circumstances they can be removed by legislation, but they have not been removed in the ACNC Act. Therefore, these requirements bind all ACNC decision-making.</p> <p>In the case of a decision that may adversely affect a person’s interests such as suspending or removing a responsible person, some administrative law requirements (e.g. the opportunity to be heard and respond to any adverse material) are considered to apply to a higher standard to the decision-maker .</p>

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Submission/ Hansard ref.	Name	Statement	ACNC comment
			<p>The ACNC's decision-making policy, which is publicly available on the website, sets out the administrative law requirements that bind ACNC decision-makers.</p> <p>Any decision made by a government decision-maker can be challenged in court on the grounds of natural justice (i.e. the decision was not made properly and did not follow administrative law requirements) – however, a court would not consider the merits of a decision (only the process by which the decision is made), so that the effect of a court order would generally be for the decision-maker to make a new decision by following the proper process.</p> <p>In the case of a decision to suspend or remove a responsible entity, the ACNC Act gives that responsible entity the right of a formal internal review by a different decision-maker (ss100-10(10) and 100-15(7)). The ACNC Act has also broadened a court's power to review the ACNC's decision to suspend or remove a responsible entity, such that a court can consider the merits of the ACNC's decision, as well as make a new decision (Division 170). We also observe that a Director of a public company may be removed by its members without the need for a court process.</p> <p>In relation to the ACNC's suspension and removal powers, the Explanatory Memorandum to the ACNC Act shows that the Government clearly intended that it was appropriate for the ACNC to have investigatory and supervisory powers over charitable trusts given sector support and that 'state Attorney-General only have supervisory powers'.¹</p>

¹ See paras 9.209 and 9.210 Explanatory Memorandum to *Australian Charities and Not-for-Profits Commission Bill 2012*

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			<p>The Explanatory Memorandum to the ACNC Act found that making the suspension/ removal power regulatory rather than judicial is warranted given:</p> <ul style="list-style-type: none"> • the regulator’s approach is more likely to be proportionate, timely and more cost-effective • the regulator will be subject to appropriate review and appeal processes. <p>This is in line with ‘international best practice’ e.g. Australian Prudential Regulation Authority (APRA) has suspension and removal powers of trustees of most superannuation funds (Note: APRA used to have the power to disqualify, but in 2008 that was changed to a requirement to obtain a court order for disqualification), and ATO has power to disqualify trustees from self-managed super funds (see Part 15, Division 3, Subdivision A of the Superannuation Industry (Supervision) Act 1993) and charitable ancillary funds.²</p>
kSubmission 102 p.4		The position for charitable trusts in UK is different from Australia’s (and therefore requires a different regulatory model).	The submission does not make it clear how the ‘market’ in England and Wales is different from that in Australia. However, there is a common concept of trustee and charitable trust in both jurisdictions making it appropriate that there is a reasonable transparency of the purposes, operations and financials of charitable trusts.
Submission p.5		Because charitable institutions and charitable trust funds are both required to report their income, there is essentially ‘ double reporting ’ of the same income.	<p>The ACNC does not consider this to be ‘double reporting’ but rather reporting by two registered charities for the purposes of administering the ACNC Act, including to find any irregularities (e.g. funds released by the trust, and receipt by relevant institution).</p> <p>There is also a difference in the way these funds are recorded by a charitable</p>

² See paras 9.211 - 213 Explanatory Memorandum to *Australian Charities and Not-for-Profits Commission Bill 2012*

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Submission/ Hansard ref.	Name	Statement	ACNC comment
			<p>'institution' and a charitable 'trust', where the charitable trust distributes all or part of its funds to a charitable institution, such that it is not the 'same income'. The charitable trust would be required to report on its income and how much of that income was distributed (as a grant, donation or expense) to the charitable institution. In contrast, the charitable institution would be required report on all of its income, including income it has received from a charitable trust.</p>
<p>Submission p.6</p>		<p>"The ACNC regime imposes specific governance standards on the trustees of charitable will trusts that are similar, though not the same, as the governance standards imposed by the Corporations Act on licensed trustee companies in relation to their delivery of all other traditional trustee company services. This results in separate governance requirements for the delivery of exactly the same service." (p38 Hansard)</p> <p>Professional trustee companies and public trustees are subject to higher duties than governance standards. This will leave to confusion as to the appropriate duty or actions (Submission p6)</p>	<p>The ACNC governance standards are clearly intended to be minimum standards. The ACNC is unclear how any other duties 'conflict' as they are all broadly similar.</p> <p>It is not uncommon for concurrent duties to apply (depending on which role a body corporate is playing). Where the governance standard requirements are lower, duty-holders clearly need to meet any higher standards under other law (and this will be assumed to meet the ACNC requirements).</p> <p>The ACNC guidance clarifies any confusion by stating this explicitly, and adds that to the extent people 'already have similar obligations under the common law or under legislation, the ACNC will interpret the duties [under the governance standards] in line with existing interpretation.</p>
<p>Submission p.7</p>		<p>There is a duplication between sections 601UAA and 601UB of Chapter 5D of Corps Act (which applies to all licensed trustee</p>	<p>The ACNC acknowledges that some trustees of charitable trusts may be subject to duplicate obligations under the Corporations Act (which all apply to trustees of any trust), and the governance standards. Parliament intended to eliminate this</p>

ATTACHMENT A to letter dated 30 May 2014

Submission/ Hansard ref.	Name	Statement	ACNC comment
		companies, not just of charitable trusts) and the governance standards	<p>duplication for charitable companies by 'switching off' directors' duties for directors of registered charities, so these provisions wouldn't apply.</p> <p>While it is not the ACNC's role to comment extensively on policy, we note that a similar legislative provision could be made in relation to trustee duties under the Corporations Act, where the trustee is acting for a registered charitable trust.</p>
Submission p.7		The ACNC governance duty to disclose conflicts of interest is problematic because it is common business practice for trustee companies and public trustees to invest trust funds in their own branded products.	<p>The duty is for disclosure, not prohibition. The governance standard also specifies a number of ways that the conflict of interest can be disclosed (section 45.25(3) ACNC Regulation) to meet this duty – these include disclosing to the members of the charity, or to the Commissioner.</p> <p>The ACNC guidance states that we will interpret this duty in accordance with other laws (including any PAF trust deed that permits this if payments are at arms-length and market rates). If there is still confusion, the ACNC is happy to work with trustee companies to produce tailored common sense guidance about how this duty might apply</p>
Submission, Attachment – legal advice, p. 15		There is no requirement for the reasons for removal to be made public	This is not accurate. Subparagraph 40-5(f)(v) ACNC Act sets out that the ACNC Register must contain 'details including a summary of why the matter arose, regarding any response by the relevant registered entity and the resolution (if any) of the matter' for each suspension or removal undertaken. There is some very limited discretion to withhold or remove this information from the register, but it is a very confined discretion. As above, there are clear due process safeguards.

ATTACHMENT A to letter dated 30 May 2014

Submission/ Hansard ref.	Name	Statement	ACNC comment
<p>103 Hansard p.30</p>	<p>Universities Australia</p>	<p>The MOU is for a limited period and therefore, ability to accept TEQSA reports as meeting ACNC reporting requirements is only temporary (p.30 Hansard).</p> <p>Where there are changes to governance or changes to business, it is necessary to figure out who to report to – ASIC or the ACNC (p.35 Hansard).</p>	<p>The ACNC accepts TEQSA reports as meeting all ACNC reporting requirements under Schedule 1 – Part 4, section 10 of the ACNC (Consequential and Transitional Provisions) Act 2012. This is a transitional provision that applies up to and including the 2014-2015 year, which may be extended via regulations.</p> <p>The MOU between TEQSA and the ACNC provides that beyond the 2014-2015 year, the ACNC will enter into other information sharing arrangements to minimise regulatory duplication wherever possible. It is not the MOU that is temporary, but the transitional (legislative) provision. The ACNC is committed to entering into subsequent agreements to reduce the reporting duplication beyond this date (as reflected in the MOU).</p>
<p>118 Hansard p. 36-37</p>	<p>Neuro- science Research Australia, Mr Roewen Wishart, Foundation Director</p>	<p>“... once you go outside the periodic annual reporting and get to things like the change of constitution... [still have to go to ASIC]”, p.36 Hansard</p>	<p>For changes to the constitution you need to notify the ACNC not ASIC. There is no fee for the ACNC (there was a fee for ASIC). Registration and de-registration (winding up) and other much less common matters (such as removing an auditor or raising funds through a debenture offer) need to be reported to ASIC. Guidance on this issue is available on both the ACNC and ASIC websites (see ASIC submission 154).</p>
<p>120</p>	<p>Fundraising Institute of Australia</p>	<p>“Charitable fundraising regulation reform is under active consideration by the Consumer Affairs Forum (CAF)... CAF will be considering an options paper at its</p>	<p>Fundraising reform has been on the agenda of the Council of Australian Governments Not-for-Profit Reform Working Group since 2009, with progress flagged as ‘Red – milestones not met’.</p> <p>It is our understanding that the Council on Federal Financial Relations have agreed</p>

ATTACHMENT A to letter dated 30 May 2014

Submission/ Hansard ref.	Name	Statement	ACNC comment
		forthcoming meeting in June 2014".	new Terms of Reference that do not include the Not-for-Profit Reform Working Group which had been responsible for considering options to harmonise charitable fundraising. We believe these new Terms of Reference will be considered by the COAG at its next meeting (rather than considering an options paper).

ATTACHMENT B to letter dated 30 May 2014

2013 Annual Information Statement



CHARITIES

Important information:

- All registered charities are required to complete this statement.
- This statement must be lodged no later than six months after the end of your financial year.

Instructions for completing this statement

- Please ensure you complete all relevant sections of this statement. Failure to complete all sections might mean the ACNC cannot accept your statement, and you will be required to re-submit it.
- Please complete this statement in conjunction with the associated guidance notes.
- Print clearly, using a pen only.
- Use BLOCK LETTERS.
- Place an (X) in the relevant boxes.
- Do not use whiteout or covering stickers.

! All of the information you provide on this statement (apart from the details of the ACNC contact person and the details in Section E: Declaration) will be published on the ACNC Register. You can request that information be withheld from the ACNC Register. Before you submit this statement, refer to the guidance on acnc.gov.au for more details on when information may be withheld, and instructions about how to request that information be withheld.

Lodging this statement

Make a copy of your completed statement for your records.

Post to:

Australian Charities and Not-for-profits Commission
GPO Box 5108
MELBOURNE VIC 3001

Email it to:

advice@acnc.gov.au

Fax it to:

1300 232 569

Section A: Charity information

1 What is your organisation's Australian Business Number (ABN)?

<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
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2 What is your charity's legal name?

<input type="text"/>
<input type="text"/>
<input type="text"/>

3 Please provide details of any other names your charity is known by (such as a trading name).

<input type="text"/>
<input type="text"/>
<input type="text"/>

4 What is your charity's address?

! Please provide your charity's email, postal and business address. Both the email and business address will appear on the ACNC Register. Please provide the details you wish the public to use to contact you.

Email address:

<input type="text"/>
<input type="text"/>

Postal address:

<input type="text"/>
<input type="text"/>

Suburb or town

<input type="text"/>

State/territory

<input type="text"/>

Postcode

<input type="text"/>

Country (if not Australia)

<input type="text"/>

CHARITIES

Business address:

Suburb or town

State/territory

Postcode

Country (if not Australia)

5 What is your charity's contact and address for service?

! Provide the details of the contact person and the address that you want the ACNC to send all correspondence to, including legal documents. We refer to this as your "address for service". This address can be the same as your postal and/or business address. The address for service will appear on the ACNC Register, but the contact person's details will not.

Title

Given name

Other given names

Family name

Date of birth

 / /

Daytime phone number

Mobile phone number

! If you provide an email address below, the ACNC will treat this as your primary address for service and send all correspondence to this email address. The email and postal "address for service" will be published on the ACNC Register.

Address for service email address:

@

Address

Suburb or town

State/territory

Postcode

6 Does your charity have a financial year ending 30 June?

Yes

No

On what date does your financial year end?

Day Month

 /

Refer to the guidance note about what to do if you haven't already applied for a substituted accounting period.

7 Based on your revenue for the last financial year, is your charity:

Small Medium Large

Size	Revenue estimate for the last financial year
Small	Revenue less than \$250,000
Medium	Revenue of \$250,000 to \$999,999
Large	Revenue of \$1 million or more

! Detailed guidance on how to calculate revenue can be found on the ACNC's website www.acnc.gov.au

CHARITIES

8 What are the charitable purposes of your charity?

Select all that apply.

- The relief of poverty, sickness or the needs of the aged
- The advancement of education
- The advancement of religion
- The provision of child care services
- Other purposes beneficial to the community

If you selected 'Other purposes beneficial to the community', describe your charity's purpose:

9 If your charity's charitable purpose is the advancement of religion, do you meet the criteria of a 'basic religious charity', as set out in the Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act)?

[▶ See guidance note 9 for more information.](#)

- Yes
- No
- Not applicable

10 Is your charity part of a reporting group that has been approved by the ACNC?

- Yes
- No

Section B: Activities

11 Has your charity conducted any activities in the last financial year?

- Yes
- No ▶ Complete Question 14 and Section E only

12 What were your charity's activities in the last financial year?

Please select one main activity from the list below and enter it into the provided box, then select as many general activities as needed from the checklist.

Main activity

--

- Animal protection
- International activities
- Aged care activities
- Law and legal services

- Civic and advocacy activities
- Mental health and crisis intervention
- Culture and arts
- Political activities
- Economic, social and community development
- Primary and secondary education
- Emergency and relief
- Religious activities
- Employment and training
- Research
- Environmental activities
- Social services
- Grant-making activities
- Sports
- Higher education
- Other education
- Hospital services and rehabilitation activities
- Other health service delivery
- Housing activities
- Other recreation and social club activity
- Income support and maintenance
- Other (please describe in the box below)

--

13 Describe how your charity pursued its charitable purposes in the last financial year:

Please limit your response to 300 words. You can attach your 300 word response if completing a hard copy of this statement.

14 Is your charity going to change the way it pursues its charitable purposes in the next financial year?

- Yes ▶ Please describe what changes are planned in the box provided below.
- No ▶ Go to Question 15.

Please limit your response to 300 words. You can attach your 300 word response if completing a hard copy of this statement.

CHARITIES

15 Who was helped by your charity's activities in the last financial year?

Select all that apply.

- Aboriginal & Torres Strait Islander people
- Children
- Communities overseas
- Disaster victims
- Elderly people
- Ethnic groups
- Gay, lesbian, bisexual, transgender, intersex persons
- General community in Australia
- Men
- Migrants, refugees or asylum seekers
- People at risk of homelessness/the homeless
- People with disabilities
- People with chronic or terminal illness
- Pre/post release offenders and their families
- Unemployed persons
- Veterans or their families
- Victims of crime
- Women
- Young people
- Other charities
- Others not listed
Please describe in the box provided below

Section C: Resources and operating locations

16 What is the number of paid employees and unpaid volunteers who worked for your charity during the last financial year?

If exact figures are not available, please provide your best estimate.

Full time employees

Part time employees

Volunteers

17 Please indicate where your charity operated during the last financial year:

Select all that apply.

- ACT
- NSW
- NT
- QLD
- SA
- TAS
- VIC
- WA
- Overseas/outside of Australia
(Please list the relevant countries)

Section D: Reporting and regulatory obligations - this section is optional

! Any information you voluntarily provide will be used by the ACNC to identify ways to reduce unnecessary regulatory obligations and cut red tape in the future.

18 Did you have a corporate or financial reporting obligation to a Commonwealth department or agency over the last financial year?

For instance, did you report on funding you received from a Commonwealth agency? Do not include reporting obligations to the ATO.

If you need more space to complete this question, please attach a separate page.

Yes Please list the Commonwealth department or agency and the relevant program (if applicable) below.

No Go to Question 19.

19 Apart from any corporate reporting obligation you may have to a state or territory regulator (under associated incorporations or cooperatives legislation), did you report to any state or territory department or agency over the last financial year?

For example, reporting in respect of fundraising or grant acquittals.

Yes Please indicate which state or territory you had non-corporate reporting obligations to.

No Go to Question 20.

- ACT
- SA
- NSW
- TAS
- NT
- VIC
- QLD
- WA

20 If you had corporate or financial reporting obligations to a Commonwealth, state or territory department or agency in the last financial year, how many hours do you estimate your charity spent completing these reporting obligations over that 12-month period?

Include time spent reporting to Commonwealth, state and territory regulators, as well as time spent writing government grant acquittals, government fundraising reporting, etc. Do not include time taken to meet reporting obligations to the ATO.

Approximate hours spent reporting – by paid staff (a)

Approximate hours spent reporting – by unpaid volunteers (b)

Total hours spent reporting (add the totals for (a) and (b))

CHARITIES

Section E: Declaration

21 Please complete the declaration below

! It is a serious offence to give false or misleading information. Penalties may be imposed.

Please tick the declaration relevant to you.

'Responsible person' has the same meaning as 'responsible entity' which is defined in s.205-30 of the Act.

A responsible person is a person (or in some limited cases an organisation) responsible for directing a charity, and who is a member of the charity's governing body (including directors or committee members) or who is a trustee (including insolvency trustees or administrators).

Authorised person's declaration

We accept that you are authorised to sign on behalf of the charity if you:

- are a responsible person of the charity, or
- hold a position in the charity which gives you authority to do so.

I declare that:

- I am authorised to sign on behalf of the charity whose ABN appears on this form about the contents of this form, and
- the information given on this form and any attached document is true and correct.

OR

Agent's declaration

An agent is a person (or entity) who has been authorised by the charity to complete and submit this form (for example, a professional adviser such as a lawyer or an accountant).

I declare that:

- I have a signed, written authorisation from a responsible person of the charity (whose ABN appears on this form) to complete and submit this document as an agent, and
- this form has been prepared in accordance with information supplied by a responsible person of the charity who has advised me that the information on this form and any attached document is true and correct.

OR

Lodging entity declaration

This form is being provided by a lodging entity as an agent of the charity whose ABN appears above. A lodging entity within the meaning of section 190-40 of the Act is another charity which can amend the governing rules of the charity or charities on whose behalf it is lodging.

I declare that:

- I have authority to sign on behalf of the lodging entity whose name and ABN appear below on this form, and
- the information given on this form and any attached document is true and correct.

Name of lodging entity

ABN of lodging entity

<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
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22 Who is the person signing this declaration?

Title

Mr Mrs Miss Ms Other

Family name

Given name

Other given name(s)

23 Phone number

Business hours phone number (including area code)

Mobile phone number

24 Email address

25 Position held

Please tell us your relationship to the charity and where appropriate include the position you hold in the charity. If you are completing the form as an agent of the charity, please provide details of your relationship to the charity (such as 'legal representative' or 'accountant' and include the name of your firm).

Signature

Date

Day Month Year

<input type="text"/>	/	<input type="text"/>	/	<input type="text"/>
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Privacy

The ACNC is required to handle information we collect in accordance with the *Australian Charities and Not-for-profits Commission Act 2012* (the ACNC Act) and the Privacy Act 1988. For more information about our information-handling policies please see acnc.gov.au or contact us.

The ACNC is authorised by the ACNC Act to collect the information requested in this form. We may use information we collect to help us administer the ACNC Act, update our records about your organisation, maintain the ACNC Register or provide information to other government agencies when authorised to do so.