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THE FUTURE OF CHARITY REGULATION IN AUSTRALIA: COMPLEXITIES OF CHANGE

Abstract

This article analyses the Australian Charities and Not-for-profits Commission (ACNC), established in 2012 by the Labor Government, and its role in charity regulation and guidance for Australia. This analysis is made in light of previous Coalition Government plans, which have since been abandoned, to disband the body. The charitable sector has long called for wholesale regulatory reform, due to the amount of duplicate reporting that exists in Australia's federal system. The ACNC has undertaken to address this issue, and many positive achievements have already been reached. Drawing on comparisons with both the New Zealand jurisdiction and Australia's pre-ACNC system, this article presents the case that the ACNC is a vital body for the sector, and presents some suggestions for future improvement in charity regulation.

I Introduction

The last 50 years have seen a significant development in the size and impact of the charitable and not-for-profit sector in Australia. The sector is large and wide-ranging, covering a vast number of activities and missions. In 2010, it was estimated that there were 600 000 not-for-profit organisations in Australia.[1] The Australian Bureau of Statistics has identified 59 000 'economically significant' not-for-profit organisations in Australia, contributing $43 billion to Australia's gross domestic product, and eight per cent of employment.[2] In January 2010, 4.6 million employees worked in not-for-profit organisations in Australia, with an equivalent wage value of $15 billion.[3] The substantial contribution of the charity and not-for-profit sector alongside the public and private sectors has led to it sometimes being referred to as 'the third sector'. However, in spite of this, the sector is poorly understood by both the public and the government. Attempts to set up a framework for the regulation of the sector have so far been piecemeal, confusing and disjointed. Against this background of uncertainty, four major government inquiries have

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1 Productivity Commission, 'Annual Report 2009–10' (Annual Report, Productivity Commission, 2010) 195.

2 Ibid.

3 Ibid.

considered the regulation of the charitable and not-for-profit sector over the last 15 years.[4]

Despite this plethora of reviews, the sector has been subject to constant change rather than a clear and uniform structure of regulation. Throughout these inquiries, there has been an overarching call for an independent supervisory body that responds to the sector's needs.[5] Some of the most prevalent issues leading to this were the lack of public understanding and trust of the sector, the onerous reporting requirements caused by overlap of regulators, and the lack of information available to support charities and not-for-profits, which are often heavily reliant on volunteers.

The Gillard Government's platform included extensive not-for-profit reform in an attempt to address these issues.[6] This began with the establishment of the now dissolved Office for the Not-for-Profit Sector in 2010, situated within the Department of the Prime Minister and Cabinet.[7] This Office facilitated the establishment of the *National Compact*, an agreement for the Australian government to work collaboratively with the not-for-profit sector towards better outcomes.[8] This broad reform platform also included the establishment of the Council of Australian Governments (COAG) Not-for-profit Reform Working Group, to facilitate co-operation between the state and federal governments.[9] Following the recurring theme of an independent regulator being required, a scoping study was undertaken, and then an Implementation Taskforce was created to work towards the body's establishment.[10] The government drafted a Bill to create such a body, and the House of

4 Namely, these have been: Industry Commission, 'Charitable Organisations in Australia' (Report No 45, Industry Commission, 16 June 1995); Charities Definition Inquiry Committee, 'Report of the Inquiry into the Definition of Charities and Related Organisations' (Report, Treasury, Australian Government, June 2001); Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008); Productivity Commission, 'Contribution of the Not-for-Profit Sector' (Research Report, Productivity Commission, January 2010). See also Myles McGregor-Lowndes, 'Are We There Yet?' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 370.

5 Productivity Commission, 'Contribution of the Not-for-Profit Sector', above n 4, 115.

6 Australian Charities and Not-for-profits Commission, 'Not-for-profit Reform and the Australian Government' (Report, Australian Charities and Not-for-profits Commission, September 2013) 7–10 <https://www.acnc.gov.au/ACNC/Pblctns/Rpts/ACNC/Publications/Rpt_LP.aspx?hkey=1340fa63-7895-4b9f-b57b-4e171ad4e7fd>.

7 Ibid.

8 Department of the Prime Minister and Cabinet, *National Compact: Working Together* (2011) 5.

9 Australian Charities and Not-for-profits Commission, 'Not-for-profit Reform', above n 6, 23.

10 Ibid 16.

Representatives Standing Committee on Economics indicated its support.[11] This culminated in the groundbreaking step of establishing the Australian Charities and Not-for-profits Commission (ACNC) as an independent regulator of charities on 3 December 2012. The stated objects of the ACNC are:

> (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
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> (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
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> (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.[12]

Finally, this reform suite also led to the passing of the *Charities Act 2013* (Cth) ('*Charities Act*'), which provided a statutory definition of charitable purposes.[13]

The above history suggests that at the time of the ACNC's introduction, the sector was in need of regulatory restructure. However, the national Coalition Government, elected in September 2013, previously disclosed plans to repeal the body with the introduction of the Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 ('*Repeal Bill*'). This scheme proposed to disband the ACNC and replace it with a National Centre for Excellence, a non-regulatory body, with regulatory functions returning to the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO).[14] The arguments put forward in the Regulation Impact Statement for this scheme were primarily that charities are subject to further duplicate reporting requirements in the current ACNC model, and that the ACNC's aims to streamline reporting have not yet eventuated.[15] Another perceived deficiency with the ACNC model among some sector commentators is that the ACNC was not specifically tasked with addressing fundraising legislation, a source of 'red tape' for charities.[16] These arguments were met with varying reactions; some in the charitable sector agreed with the proposed repeal, but a large portion of the submissions to the Senate inquiry into the proposed legislation condemned the suggestions and

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11 House of Representatives Standing Committee on Economics, Parliament of Australia, *Report on the Exposure Draft of the Australian Charities and Not-for-Profits Commission Bills 2012* (2012) 74.

12 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5.

13 Australian Charities and Not-for-profits Commission, 'Not-for-profit Reform', above n 6.

14 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 1.

15 Ibid.

16 Fundraising Institute of Australia, Submission No 120 to Senate Standing Committees on Economics, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014*, 1 May 2014, 1.

arguments.[17] Of the 155 submissions received on the *Repeal Bill*, only 13 expressly supported the abolition.[18]

Following the *Repeal Bill*, the Coalition Government's intentions regarding the ACNC were initially far from decisive or clear. Possibly in response to the critical submissions regarding the *Repeal Bill*, the then Minister for Social Services Scott Morrison announced in early 2015 that the abolition of the ACNC was not an immediate priority.[19] Subsequently, the Senate passed a motion, led by Labor Senator Penny Wong, recognising Morrison's comments and calling on the government to withdraw the *Repeal Bill*.[20] In spite of this, Minister for Social Services Christian Porter then stated in December 2015 that the government was continuing to evaluate the ACNC and its role.[21] Finally, in March 2016, Porter, and Minister for Small Business and Assistant Treasurer, Kelly O'Dwyer, announced that the ACNC is to be retained.[22] This eventual announcement was a welcome step for many in the sector, by providing some certainty regarding what to expect in the future. It is clear that the role of the ACNC has been a contentious issue, and opinion has been divided within Australia as to the best way to regulate the sector.

Other nations have introduced similar systems to the ACNC, with varying degrees of success. For instance, in New Zealand, the Charities Commission — a similar body to the ACNC — was introduced in February 2007.[23] However, it was later subsumed into a pre-existing government department. [24] This was a similar move to that which was previously proposed by the Coalition Government in Australia. In the United Kingdom, the Charity Commission for England and Wales — separate from the government's revenue raising body — makes determinations of charitable status. It was given its current form in 2006, but it has existed in some form since

17 Senate Economics Legislation Committee, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 [Provisions]* (2014) 8.

18 See Submission Nos 37, 48, 58, 59, 64, 72, 96, 102, 103, 116, 118, 132, 136: Parliament of Australia, *Submissions Received by the Committee* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ACNC/Submissions>.

19 Timna Jacks, 'Scott Morrison Puts Bill To Abolish Charity Regulator on Backburner', *The Sydney Morning Herald* (online), 7 February 2015 <http://www.smh.com.au/national/scott-morrison-puts-bill-to-abolish-charity-regulator-on-backburner-20150205-1378o9.html>.

20 Commonwealth, *Journals of the Senate*, Senate, 24 June 2015, 2799.

21 Xavier Smerdon, *Porter Will Not Commit to Keeping ACNC* (8 December 2015) Pro Bono Australia <http://www.probonoaustralia.com.au/news/2015/12/porter-will-not-commit-keeping-acnc>.

22 Christian Porter and Kelly O'Dwyer, 'Retention of the Australian Charities and Not-for-profits Commission' (Media Release, 4 March 2016).

23 *Charities Act 2005* (NZ) s 8, as at 3 September 2007.

24 *Charities Amendment Act (No 2) 2012* (NZ) s 9.

the 1800s.[25] It is clear that there is not a unified view regarding what form charity regulation should take, even across the international community.

Against the backdrop of divided opinion on this issue, this paper will analyse the different possible forms of charitable regulation in Australia. It will examine all of the proposed functions of the ACNC and analyse its current shortcomings. Some previous arguments for dismantling the ACNC, including in the Explanatory Memorandum accompanying the *Repeal Bill*, have used the dismantling of New Zealand's former Charity Commission as a justification.[26] This paper will conclude by analysing that body's existence and comparing it to the ACNC's lifespan to this point.

A *Scope of the Paper*

The mandate of the ACNC covers the entire not-for-profit sector, which includes organisations that are not within the legal definition of 'charitable'. A not-for-profit organisation is generally defined as one that applies its assets and income wholly towards its objects and purposes. To date, the ACNC's focus has been on charities.

This paper will not undertake a close analysis of the definition and scope of charitable purposes in Australia. However, it deserves brief mention in the paper's overall context. Prior to the recent Labor Government's not-for-profit reform, there was no uniform statutory definition of 'charity' in Australia's federal law; rather, it depended on the individual statute being relied on, and the concession being sought.[27] Furthermore, the principles of determination were derived largely from the common law, based on the English *Statute of Charitable Uses 1601*.[28] The introduction of the *Charities Act* has helped to establish uniformity in determinations of charitable status at the federal level. The *Charities Act* is one of several pieces of legislation that the ACNC administers. Once the ACNC makes a decision that an organisation is a charity, that determination will apply to that organisation in terms of any Commonwealth legislation that requires a charitable purpose.[29] The *Charities Act* was enacted in response to the 'Report of the Inquiry into the Definition of Charities and Related Organisations', particularly in its interpretation of the requirement of public benefit.[30] The combination of the enactment of the *Charities Act* and the establishment of the ACNC has led to a more coherent, comprehensive and uniform system of regulation.

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25 Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon, *Charity Law and Social Policy: National Perspectives and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008) 19, 200.

26 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 4.

27 Charities Definition Inquiry Committee, above n 4, 283.

28 *Charities Act* Preamble.

29 Australian Charities and Not-for-profits Commission, 'Not-for-profit Reform', above n 6, 11.

30 David Bradbury and Mark Butler, 'Statutory Definition of Charity Legislation Introduced into Parliament' (Media Release, 29 May 2013).

The *Charities Act* commenced on 1 January 2014, but Coalition Minister Kevin Andrews moved an unsuccessful amendment to delay its commencement until 1 September 2014.[31] The Explanatory Memorandum stated that this was to allow 'further consultation on the legislation in the broader context of the government's other commitments in relation to the civil sector'.[32] This led to speculation that the Coalition also planned to abolish the *Charities Act*, but this is now highly unlikely, given the announcement of the ACNC's retention.

This paper argues that a uniform definition is important to streamlining decision-making processes that affect the sector. Merely using the common law definition leaves too much room for inconsistent decisions, as will be discussed in the section on ATO regulation below (Part V). While the statutory definition of 'charity' is broad and can still be open to interpretation, a codified definition that is applied across all legislation is a step towards greater consistency. The *Charities Act* only applies to federal legislation, and to achieve further harmonisation, state legislation would need to also mirror the federal definitions.

II Uniform Regulation of the Sector

A *Background of Regulatory Difficulties*

There is a long history of charitable regulation, and some degree of regulation of the sector will always be necessary. It originally derives from two interwoven policies: (i) that it is desirable within the law to provide certain privileges to organisations whose activities benefit civil society; and (ii) that such organisations need to be exposed to a particular regime of state supervision to ensure they are not receiving these privileges undeservedly.[33] Charity regulation is a matter of balance; while there is a benefit in ensuring that only worthy organisations are receiving particular concessions, it is important not to over-regulate and thus stultify the sector.

The complex and varying nature of charity reporting and regulation has been one of the largest issues complained of by the sector to date.[34] The analysis in this paper will begin by examining this issue, and the ACNC's role in addressing it. Fundraising legislation is a particular cause of complaint, and this will be specifically addressed in a later section.

In the first instance, many charities will decide to adopt a formal legal structure of an incorporated association, in order to gain the benefits of having a legal personality. This can be problematic in itself, in that each state jurisdiction retains differing

31 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, 1561–2 (Kevin Andrews).

32 Supplementary Explanatory Memorandum, Social Services and Other Legislation Amendment Bill 2013 (Cth) 2.

33 Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) 6.

34 Ibid 7.

requirements in the process of becoming incorporated, maintaining incorporated status, and avoiding fines or even offences for failing to meet required standards of record keeping and other practices.[35] Particular difficulty is encountered by national organisations that have several state branches, each incorporated in a different state, as they cannot keep track of requirements from a central source. Some associations may instead decide to adopt the legal structure of a public company limited by guarantee. A not-for-profit company with this structure generally attracts more significant burdens that come with being subject to the *Corporations Act 2001* (Cth) ('*Corporations Act*'). If the not-for-profit company is a charity, some of the obligations under the *Corporations Act* will not apply, however.[36] While it could be argued that not-for-profits choose to take on these regulatory burdens by electing to incorporate, it is becoming less viable in Australia to operate on a large scale while being an unincorporated association.[37]

It has been the case for many years that state jurisdictions have had varied approaches in associations law, and it remains a difficulty in terms of bureaucracy for the sector, especially when operating on a national basis.[38] Australia is somewhat unique in this form of regulation in a federal system; for example, only one province in Canada has legislated in the area.[39] South Australia was the first Australian state to pass associations legislation, with the *Associations Incorporation Act 1858* (SA).[40] Although it was influential in four other state jurisdictions, there remained significant differences across states. Queensland's first associations legislation, the *Religious Educational and Charitable Institutions Act 1861* (Qld), only applied to limited types of associations, as its name suggests.[41] Progress in Queensland came largely through case law on the statute, with piecemeal amendments, until it was replaced with the *Associations Incorporation Act 1981* (Qld), this being more similar to the original South Australian legislation.[42] It is unclear if each state's unique attempts during these early stages to legislatively solve problems facing the sector derived from an unfamiliarity with the South Australian model, or from a want for independence. It was not until the 1970s that all Australian states had a model broadly similar to the South Australian one.[43] In contrast, South Australia also passed the influential *Real Property Act 1858* (SA) at the same time as its incorporations legislation, and this was adopted throughout Australia comparatively swiftly.

The history behind the legislation in this area helps to understand the differences between jurisdictions that remain today; they were originally conceived independently

35 Angela Sievers, *Associations and Clubs Law* (Federation Press, 3rd ed, 2010) 169.

36 *Corporations Act* s 111L.

37 Keith L Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (Lawbook, 1986) 207.

38 Ibid 211.

39 Ibid 207.

40 Ibid 209.

41 Ibid 211.

42 Ibid 215.

43 Ibid 218.

of one another, and although their general models bear similarities, there still seems to be a wish for independence between states. The differences can still cause operational difficulty for charities. Financial and auditing requirements, which are some of the more onerous regulatory requirements for associations, also differ significantly across jurisdictions. This can be demonstrated through a comparison of the requirements in Queensland and South Australia. Under the Queensland legislation, associations with current assets or yearly revenue of more than $100 000 are required to be professionally audited,[44] and ones with current assets or yearly revenue of between $20 000 and $99 999 need their financial records to be annually reviewed by an approved person.[45] Comparatively, in South Australia, an audit is only needed if annual gross receipts are about $200 000,[46] with no level at which a review by an approved person is required. This difference is substantial for charities, with the threshold for auditing being double in South Australia, meaning a significantly larger number of charities would potentially be subject to the audit in Queensland. Audits usually require volunteers to have at least some degree of financial expertise to ensure they are passed satisfactorily, and this has significant practical consequences. Differences also exist between the required accounting standards; the Queensland, South Australian, Tasmanian and Western Australian statutes feature no express requirements for the accounts to be prepared in accordance with accounting standards,[47] but other jurisdictions do require this.[48] These differences create a noteworthy discrepancy across states in relation to the relative time and resources a charity needs to spend on administration, rather than focusing on its mission.

With discrepancies like these, the choice of where to incorporate can become a strategic decision based upon different laws, rather than an optimal decision based on where a not-for-profit wishes to operate. Some not-for-profits with various state branches choose to incorporate each separately; this then creates inequality within an organisation as to the resources dedicated to administration, due to the differing requirements. It is noted above that some not-for-profits choose to adopt or change to the structure of a public company limited by guarantee under the *Corporations Act*, notwithstanding the apparent regulatory burden imposed by that legislation on the company and its directors. However, quite surprisingly, under that Act companies are not even required to have their financial records reviewed — a much less onerous requirement than an audit — if their annual revenue is less than $250 000,[49] and an audit is only required if their annual revenue exceeds $1 million.[50] When compared

44 *Associations Incorporation Act 1981* (Qld) s 59.

45 Ibid s 59A.

46 *Associations Incorporation Act 1985* (SA) s 35.

47 See *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Act 1987* (WA).

48 See *Associations Incorporation Act 1991* (ACT) s 76; *Associations Act 2003* (NT) s 38; *Associations Incorporation Act 2009* (NSW) s 43; *Associations Incorporation Reform Act 2012* (Vic) s 95.

49 *Corporations Act* s 301.

50 Ibid.

with the South Australian and Queensland legislation, there is a threshold level at which a professional audit would be required in both of those jurisdictions, but no review at all would be needed under the *Corporations Act*. On the other hand, the Victorian legislation mirrors the tiers of the federal legislation.[51] Although the discrepancy between the federal and state legislation can be explained by national corporations generally being larger, that does not account for or justify the inconsistency between states.

These inconsistencies highlight the difficulty created for not-for-profits in decision-making and also in migration of jurisdiction. In the Australian Community Sector Survey of 2013, conducted by the Australian Council of Social Service, 52 per cent of respondents saw the ACNC's most important role as to align regulatory burdens between the states and territories, and the federal government,[52] highlighting the importance of this issue. Understanding these jurisdictional differences requires research and legal understanding, which is difficult for smaller organisations dependent entirely on volunteers. It is difficult for them to make informed choices on their legal structure when there are so many differences with no clear rationale.

B *The ACNC's Role in Addressing Overlapping Regulation*

Following its establishment, the ACNC was proposed to have several functions to achieve its aims. One was to be a 'one stop shop' for charity regulation in Australia, juxtaposing with the previous onerous system of providing overlapping information to national departments — including ASIC and the ATO — and state regulators such as offices of fair trading.[53] Inconsistent requirements for government grant applications were also flagged as an issue to be rectified. The 2010 research report 'Contribution of the Not-for-Profit Sector' had unequivocally supported the idea of a 'one stop shop', referring to that term numerous times throughout.[54] One of the objects of the Act establishing the ACNC is to 'promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector', and it states that it achieves that object through 'establishing a national regulatory framework for not-for-profit entities that reflects the unique structures, funding arrangements and goals of such entities'.[55] It is uncontroversial that these aims were suggested throughout the discussion before the establishment of the ACNC, and welcomed by the sector. However, the significant question, which has led to ongoing debate, is whether it is helping to achieve these goals or if it has actually been a retrograde step. If it is believed that the ACNC has so far failed in its mission to achieve these goals, the next question is whether it is realistic to think it will do so in the future, or whether it is simply a body with de jure but no de facto power.

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51 *Associations Incorporation Reform Act 2012* (Vic) pt 7.

52 Australian Council of Social Service, 'Australian Community Sector Survey 2013: National Report' (ACOSS Paper No 2012, Australian Council of Social Service, 2013) 44.

53 Australian Charities and Not-for-profits Commission, 'Not-for-profit Reform', above n 6, 18.

54 Productivity Commission, 'Contribution of the Not-for-Profit Sector', above n 4, 113.

55 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5.

Arguably the major criticism of the ACNC to this point, from both government and also some charities, is that it has actually increased the reporting requirements for charities.[56] On the one hand, the introduction of the ACNC led to the disapplication of several provisions of the *Corporations Act* for charities, whereby some information now needs to be reported to the ACNC (rather than to ASIC as was previously the case), and some other previous obligations no longer apply at all.[57] However, for the large number of charities that are incorporated under state legislation, they are now required to report various changes — such as constitutional amendments or changes to their directors — to both their state regulator and the ACNC.[58] Furthermore, such associations may also be subject to the previously mentioned audits required by their state regulator, as well as the annual statements that must be provided to the ACNC.

From this perspective, it could appear that it has indeed increased, or at best maintained, the amount of red tape for the sector. However, to accept this without further analysis is to look at the issue too simplistically, without considering the reasons for this and the overall background of charity regulation. It was suggested earlier that the states evinced an intention to maintain autonomy since the beginning of associations regulation. The fact that operationally significant differences remain after all states adopted a similar model in the 1970s displays the difficulties in achieving state uniformity in the area. It would seem that in order for bureaucracy to be reduced for charities registered under state governments, state legislatures must have a significant role. Uniformity will only be achieved if states decide to either cede their powers regarding incorporated associations, or if they collaborate towards complete harmonisation of the state legislation. With one of the ACNC's roles being to strive towards establishing a national framework for not-for-profits, there is a strong argument that the existence of such a commission can facilitate dialogue between states to achieve this eventually.

The ACNC has already created arrangements with ASIC, and this was expedited due to both being federal bodies. Achieving this with the states needs time and more work, and it is unfair to blame the ACNC for failing to achieve state harmonisation at this point. In the ACNC's relatively short history, it has already achieved some progress towards this, through interactions with state governments. In late 2012, the South Australian government announced an intention to streamline its financial reporting requirements for associations required to be audited under its legislation with the reporting requirements of the ACNC.[59] Furthermore, it also intended to add information-sharing provisions to the statute, allowing the Corporate Affairs Commission of South Australia (now known as Consumer and Business Services) to share information with the ACNC to eliminate dual reporting.[60] Western Australia and Victoria

56 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 2.

57 *Corporations Act* s 111L.

58 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 2.

59 Exposure Draft: Statutes Amendment (Commonwealth Registered Entities) Bill 2013 (SA).

60 Ibid.

have also introduced similar Bills,[61] and the Australian Capital Territory government announced that it would begin the process of exempting charities from reporting requirements under the *Associations Incorporation Act 1991* (ACT), so they would only need to report to the ACNC.[62] Such processes, when fully completed, could radically streamline the charitable sector and ensure uniform national regulation. It also highlights that the states need to be willing to surrender some of their autonomy for this to be achieved. While the states have an inescapable role in this process, this author argues that the ACNC is uniquely positioned to cultivate the necessary goodwill and to facilitate the necessary discussions.

The ACNC currently uses its annual report to account to the community and the government on its progress in reducing unnecessary regulation, consistent with its statutory purposes. In its inaugural report, the progress outlined in that respect was particularly impressive, particularly given the ACNC's very short existence at that point. The report demonstrated that memoranda of understanding had been signed with ASIC, the ATO and the Office of the Registrar of Indigenous Corporations, to agree on sharing information and mutually accepting reports provided to different departments.[63] Furthermore, much has been done to address the issue of the lack of consistency between grant applications, and the amount of work that goes into them. Grant applications have long been a drain on resources in the not-for-profit sector, and the sector's reliance on grant funding means applications are difficult to escape. In a 2007 study of 10 not-for-profit organisations, the average annual number of grant applications completed was 46, with a noteworthy mean of 15.17 hours being spent on preparing each one.[64] The ACNC met with several government departments to begin the process for accepting ACNC reports for grant applications; these included the Department of Education, Employment and Workplace Relations, the Department of Health, and the now defunct Australian Agency for International Development.[65]

These discussions between the ACNC and other government departments also looked at streamlining annual reports that must be supplied to these departments by certain types of organisations, with data also to be provided to the ACNC. The use of the National Standard Chart of Accounts (NSCOA) in such reports and grant acquittals

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61 Associations Incorporation Bill 2014 (WA); Associations Incorporation Reform Amendment (Electronic Transactions) Bill 2015 (Vic).

62 David Bradbury, Mark Butler and Andrew Barr, 'ACT Signs Up to New Charities Regulator' (Media Release, 11 March 2013).

63 Australian Charities and Not-for-profits Commission, 'Annual Report 2012–13' (Annual Report, Australian Charities and Not-for-profits Commission, 20 September 2013) 60 <http://acnc.gov.au/ACNC/About_ACNC/Corporate_info/Annual_Reports/2012_13/ACNC/Publications/Reports/Annual_Report_2013/AR2013TOC.aspx>.

64 Myles McGregor-Lowndes and Christine Ryan, 'Reducing the Compliance Burden of Non-profit Organisations: Cutting Red Tape' (2009) 68 *Australian Journal of Public Administration* 21, 28.

65 Australian Charities and Not-for-profits Commission, 'Annual Report 2012–13', above n 63, 61.

has been previously recommended in inquiries into sector regulation;[66] further progress towards its implementation can be made through the ACNC. In its 2013–14 Annual Report, the ACNC reported that the federal, state and territory governments had all agreed to accept the NSCOA for all government reporting purposes,[67] after the ACNC had identified this as a priority in its 2012–13 report.

In the most recent annual report (2014–15), the ACNC identified having implemented information-sharing processes between the ACNC and Deductible Gift Recipient registers, maintained by other government departments such as the Department of Foreign Affairs and Trade, and the Department of the Environment, eliminating the need for charities to provide the same information twice.[68] This demonstrable progress in every report, and the improvement on long-standing practices, displays the beneficial role that the ACNC has so far provided for the sector.

C *Likely Effect of ACNC Abolition on Overlapping Reporting*

While it is true that the ACNC is currently responsible for some level of duplicate reporting with state regulators, the amount of progress achieved in such a short time, as shown in its annual reports, shows that the ACNC is well on the way to reducing unnecessary reporting across the sector nationwide through promoting dialogue and negotiating with the relevant government bodies.

It is difficult to see how such progress would be made in the future if the ACNC were abolished. For example, the Explanatory Memorandum to the now suspended Bill to repeal the ACNC was very vague on what form the proposed replacement body — the Centre for Excellence — would take.[69] The most tangible source of information on this was the Centre for Social Impact's report on draft models for the form of replacement. In the three possible forms suggested in the report, none mentioned reduction of bureaucracy as a potential role of such a body.[70] Furthermore, the report specifically flagged doubt as to whether there would be significant advocacy towards reduction of red tape in the future, in the absence of a commission like the ACNC.[71]

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66 Treasury, Australian Government, 'Scoping Study for a National Not-for-Profit Regulator' (Final Report, Treasury, Australian Government, April 2011) 44.

67 Australian Charities and Not-for-profits Commission, 'Annual Report 2013–14' (Annual Report, Australian Charities and Not-for-profits Commission, 2 October 2014) 6 <https://www.acnc.gov.au/CMDownload.aspx?ContentKey=b50978bd-1b24-4281-8b04-ef5410123cf8&ContentItemKey=7655cedd-15e7-4ab6-bafb-0f03bdbf875a>.

68 Australian Charities and Not-for-profits Commission, 'Annual Report 2014–15' (Annual Report, Australian Charities and Not-for-profits Commission, 5 October 2015) 69 <http://www.acnc.gov.au/AnnualReport2014-15>.

69 Explanatory Memorandum, Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (Cth).

70 Civil Society, National Centre for Excellence, 'Draft Models for Consultation' (Mid Project Report, Centre for Social Impact, 21 July 2014) 15–20 <http://www.civilsocietycentre.org.au/wp-content/uploads/2014/07/NCE-Draft-Models-Report.pdf>.

71 Ibid 30.

For a significant number of organisations, the abolition of the ACNC would result in an unchanged, or even increased, level of red tape. Charities registered under the *Corporations Act* would have their reporting obligations to ASIC reinstated, after they were removed when the ACNC was established.[72] While a financial report is required for charities at the same financial threshold in both systems, the *Corporations Act* requires such charities to also prepare and lodge a director's report with ASIC, being an increased requirement if the ACNC were dismantled. While the ACNC requires an Annual Information Statement of such charities, it requires significantly less information than a director's report under the *Corporations Act.* The Annual Information Statement is also a simple online form, whereas a director's report needs to be written in a certain format, and charities sometimes have to incur the cost of legal advice for the task. In a similar vein, when interacting with the ACNC, changes to office-holders, the constitution or the charity's address can be easily lodged through an accessible online platform. The consequences for national companies if the ACNC were abolished should be considered in conjunction with the fact that the South Australian, Western Australian, Victorian and Australian Capital Territory governments are moving towards single ACNC reporting. Though it is true that some state incorporated associations could immediately have fewer reporting requirements if the ACNC were abolished, it is unclear for how long this would remain the case. Considering these factors, it is doubtful that dismantling the ACNC would noticeably reduce bureaucracy, and thus cost, for charities, even in the short-term.

In the options paper released by the Department of Social Services about the possible replacement for the ACNC at the time, it was proposed that charities would need to maintain similar records to those previously provided to the ACNC, and these records would be publicly accessible on charities' websites.[73] This means that charities' information would not all be stored in one central location, as it currently is on the ACNC's website. It is, therefore, unlikely that the current processes of moving towards a 'report once, use often' structure for government grant applications and reports to other government departments would be completed, as there would be no single, accepted national repository of information for these departments to use. Further on this point, the requirement to provide the information to the ACNC would be replaced with the requirement to update it on charities' websites. Again, this is hardly a reduction in red tape, and also may be more logistically difficult. As already established, the ACNC's online platform for updating information is quick, easy and user-friendly; not all charities have the resources to update their websites so promptly.

Some may argue that even without the ACNC, the necessary dialogue between states could occur. As previously mentioned, the COAG Not-for-profit Reform Working Group exists to promote co-operation between state and federal governments towards reform. However, it is nevertheless suggested by this author that the ACNC remains

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72 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 3.

73 Department of Social Services (Cth), 'Australia's Charities and Not-for-Profits' (Options Paper, Department of Social Services, July 2014) 4 <https://www.dss.gov.au/sites/default/files/documents/07_2014/options_paper_-_australian_charities_and_not-for-profits.pdf>.

a superior body to promote such dialogue. This is illustrated by a comparison of the results that the ACNC has achieved with previous efforts at reform from government. In the past, there have been numerous bodies tasked with analysing the sector and working towards restructure, but few tangible results have been achieved. McGregor-Lowndes has noted that to read all Australian government reports that have been prepared on not-for-profit sector reform since 1995 would take an average person nearly three and a half months, reading eight hours a day.[74] In the same vein, in January 2013 COAG produced a 111-page Regulatory Impact Assessment of duplicate reporting requirements,[75] whereas the more substantive progress towards harmonisation has been connected with the ACNC, as demonstrated previously. More simply, the increased capacity of the ACNC makes it more likely to achieve reform. The difficulty in so far realising reform, despite the number of government reports suggesting wholesale change, illustrates that the process requires a large amount of effort and resources, which the ACNC is able to provide. Furthermore, government agendas can change with political priorities, meaning objective and consistent consideration of specific issues can be at risk; this is demonstrated by the previous indecisiveness regarding the ACNC's future. The existence of an independent commission helps to ensure that there will be sustained work towards reform and improvement of charity regulation.

III Fundraising Legislation

Fundraising legislation has been alluded to in an earlier section, but for reasons explained below, it deserves specific attention. This section will begin by outlining Australia's current legislative structure regarding fundraising, and then discuss the potential role for a commission in addressing it.

A *Inconsistent Fundraising Legislation in Australia*

The issue of duplicate regulation facing the sector is particularly prominent in the area of charitable fundraising. Funding is often dependent on, in addition to private support and government grants, more general fundraising activities.[76] This can include the solicitation of donations, sponsored activities, or social events such as quiz nights that are designed to run at a profit. While these are important for charities in their ability to operate, there is also a policy consideration to be made as to protecting the public from fundraising activities that are misleading, or will solicit funds that will be misappropriated. The legislature has responded to this by passing charitable fundraising laws in each state jurisdiction, requiring charities to gain a licence from the relevant state government before engaging in such activities.[77]

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74 McGregor-Lowndes, above n 4, 370.

75 Council of Australian Governments, *Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities* (2013) <https://www.coag.gov.au/node/492>.

76 Industry Commission, above n 4, 221–30.

77 Ibid.

Gaining such a licence is not simply a bureaucratic application, but may also subject charities to audits and reporting requirements to the government.

The primary difficulty with this area of regulation for charities is that, like so many other realms of charity supervision, there is no uniformity across state jurisdictions.[78] This inconsistency is quite far-reaching, not only extending to the types of audits and reports that needed to be provided to the government, but also to the types of organisations and events that require a fundraising licence. Despite the introduction of the *Charities Act*, which has given a more uniform definition of charitable purpose across Commonwealth legislation, the state fundraising statutes still define 'charity' differently. For example, the South Australian legislation prescribes specific requirements of what constitutes a charity,[79] whereas the Australian Capital Territory legislation only defines it broadly as including 'any benevolent, philanthropic or patriotic purpose'.[80]

There are several difficulties with this lack of consistency. A significant one is that the ACNC uses the federal *Charities Act* in making its determinations in registering charities, but this is different from the state requirements. It is conceivable, particularly under state legislation that is broad, like the current Australian Capital Territory statute, that an organisation would not be found to be a charity by the ACNC, but actually still be subject to a state charitable fundraising legislation. This potential scenario is concerning, as it is possible for smaller charities to believe, in good faith, that they are not required to obtain a state licence, and later encounter legal difficulties because this was incorrect. Similarly, under state Acts that have more specific definitions, like the current South Australian statute, it is not inconceivable that an organisation would be given charitable status by the ACNC, and then apply for a state fundraising licence unnecessarily. This lack of uniformity creates a need for charities to perform endless research as to their obligations, which may again stretch their resources.

These inconsistent legislative requirements cause particular difficulty for charities with multiple state branches. As a demonstration of the regulatory inconsistency, the Northern Territory's *Gaming Control Act 1993* (NT) only requires a licence to be obtained when the fundraising is in the form of a raffle, but not other forms. In the New South Wales statute, the regulated fundraising is 'the soliciting or receiving by any person of any money, property or other benefit', if the person has represented either the purpose the money is going towards, or the event associated with that purpose.[81] The differences between the types of appeals that are regulated are particularly problematic for larger charities, which have some activities conducted by lower level volunteers. Monitoring and ensuring compliance across the fundraising activities of different branches of an organisation, subject to different laws, is impractical and increases the risk of non-compliance. As another illustration, in Western Australia,

78 Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 489.

79 *Collections for Charitable Purposes Act 1939* (SA) s 4.

80 *Charitable Collections Act 2003* (ACT) Dictionary.

81 *Charitable Fundraising Act 1991* (NSW) s 5(1).

fundraising by way of street collections comes under completely different legislation — the *Street Collections (Regulation) Act 1940* (WA) — and requires a separate licence from that granted by the *Charitable Collections Act 1946* (WA).[82] Increasing uniformity in this area would be a significant step towards allowing charities to monitor exactly which appeals are subject to a fundraising licence.

The number of hurdles that charities in possession of fundraising licences must jump at the end of a financial year is particularly onerous. Audits and reports are required, specifically relating to funds collected from that state's definition of a 'fundraising appeal'.[83] This means that specific data must be kept in each state jurisdiction to later provide for these reports, but the requirements of such reports vary so much between states,[84] making it operationally draining for charities to conduct national appeals. A study of not-for-profit reporting demonstrated that it is significantly difficult for organisations to keep separate financial records for each project, and when there are varying reporting requirements, the strain on resources is even greater.[85] The cost of these numerous inconsistencies for charities is huge. World Vision has stated that the differing state fundraising requirements costs the organisation at least $1 million per year in extra administration fees.[86] Alternatively, there have been reports of national organisations that have simply decided not to fundraise nationally, due to the system of fundraising legislation being seemingly unworkable.[87] With the increasingly ubiquitous role of the internet in today's fundraising appeals, it is arguably more difficult for charities to track and provide such particulars of appeals. It also increases the likelihood of them needing to complete the burdensome requirement of holding licences in each state.

Beyond these reporting differences, the statutes also bear inconsistencies in terms of how the appeals themselves need to be conducted.[88] Admittedly, these differences relate to matters that are generally quite simple, such as in the Australian Capital Territory, requiring collectors to possess certain identifying tags while collecting,[89] and in Victoria, requiring receptacles to be labelled in a certain way.[90] However, it is the subtlety of these differences that makes them more difficult to manage nationally, and increases the risk of non-compliance. Any greater risk of non-compliance is dangerous to the sector on multiple levels. First, it increases the risk that charities, many of which inevitably run on a tight budget, may be subject to fines or even criminal liability. Second, it negates a sound system of regulation that ensures the original policy considerations underpinning the law are upheld. Third, it also diminishes public confidence in the charitable sector, and more specifically fundraising collections, damaging an area upon which the sector is inextricably reliant.

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82 Dal Pont, *Law of Charity*, above n 78, 512.

83 *Collections for Charitable Purposes Act 1939* (SA) s 15.

84 Dal Pont, *Law of Charity*, above n 78.

85 McGregor-Lowndes and Ryan, above n 64, 22.

86 Ibid.

87 Productivity Commission, 'Contribution of the Not-for-Profit Sector', above n 4, 139.

88 Ibid 138.

89 *Charitable Collections Act 2003* (ACT) s 16.

90 *Fundraising Act 1998* (Vic) s 10.

B *The ACNC's Role in Addressing Fundraising Legislation*

The Fundraising Institute of Australia, in its submission to the inquiry on abolishing the ACNC, argued that a major flaw in the current structure of the ACNC is that it is unable to properly address this key issue of fundraising legislation.[91] It argued this firstly, because fundraising activities are currently regulated by state and territory law, and secondly, because the previous government specifically stated the ACNC's ambit would not include fundraising. It is true that there is certainly room for fundraising legislation to have more of a prominent position on the ACNC's agenda. Nevertheless, this author argues that the ACNC actually can have a key role in fundraising legislation reform within its current ambit. This area of regulation can be compared with the area of state incorporated association legislation; while the ACNC does not in itself regulate this, it has a vital role in promoting dialogue between the states themselves, and between the states and the Commonwealth. In the ACNC's 2012–13 Annual Report, it was identified that both the Australian Capital Territory and South Australian governments had, as well as working towards streamlining reporting (as outlined in Section C of Part II of this paper), committed to work towards allowing ACNC-registered charities to fundraise in their jurisdiction, instead of requiring a separate licence.[92] The report also mentioned that it is likely that reform proposals regarding fundraising legislation would involve the ACNC. This again demonstrates the necessity of a body to interact with states in order to harmonise legislation eventually, and this author argues that fundraising legislation reform should be a priority of the ACNC.

As was previously argued regarding state associations statutes, there is a need for the states to cede some of their powers in order to harmonise fundraising legislation; again, this takes time to negotiate and implement. The authors of the 'Contribution of the Not-for-Profit Sector' report argued that fundraising reform could be achieved by states first harmonising their statutes, and then mutually recognising licences across state borders.[93] This option is based on a compelling argument; it seems that it would be most unlikely for either option to be achieved without a commission such as the ACNC in place, due to its role as an advocacy body and in promoting dialogue. Dal Pont identified the flaws in inconsistent fundraising law in his 2000 work *Charity Law in Australia and New Zealand*,[94] and again in his 2010 work *Law of Charity*,[95] yet seemingly very little progress has been achieved in this area since then. It would seem that there has long been identification of the issue, but the fact that very little change has occurred would suggest a specific body is required. COAG has recently undertaken to work towards harmonising fundraising regulation,[96] and the issue is

91 Fundraising Institute of Australia, above n 16.

92 Australian Charities and Not-for-profits Commission, 'Annual Report 2012–13', above n 63, 62–3.

93 Productivity Commission, 'Contribution of the Not-for-Profit Sector', above n 4, 125.

94 Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 388.

95 Dal Pont, *Law of Charity*, above n 78.

96 Productivity Commission, 'Annual Report 2009–10', above n 1, 197.

discussed in its Regulation Impact Statement on dual regulation.[97] Again, however, tangible steps towards the target seem to have only occurred through the dialogue that the ACNC has been resourced and tasked to promote, with both the South Australian and Australian Capital Territory governments' reform on fundraising legislation arising from dialogue with the ACNC. It would also seem that the national register administered by a national independent commission is vital to this function.

State legislation tends to have varying exemptions for fundraising licences, meaning the sector is inconsistently covered. This brings into question whether the aims of protecting against fraudulent collections are actually being achieved. For instance, religious organisations are inconsistently treated across the legislation. Religious organisations are given specific exemptions from licensing requirements under the New South Wales, Victorian, Queensland, and Tasmanian legislation,[98] but this is not mirrored in the legislation of the other states and territories. In general, state fundraising legislation is arguably outdated, with some legislation not having been reassessed in decades, and featuring provisions that are no longer relevant. The Western Australian legislation, for example, includes offences with a maximum penalty of under $10, and some elements of it derive from British legislation that applied to collecting from stage coaches in London.[99] A 2011 study showed that for every 500 fundraising licences in Australia, there are only 0.6 full-time staff employed nationally to administer the legislation.[100] This demonstrates that the practical utility of fundraising regulation is miniscule, as with so few government resources in place it is unlikely that there is adequate practical supervision of incompetent collections. It can be seen from analysing the whole context of the law of fundraising that it is currently a cluttered system that puts an unnecessary burden on certain organisations, and that it is vital that a body such as the ACNC is in place to address it.

IV National Register of Charities

A statutory function of the ACNC is maintaining a public register of information on charities, such as the details of a charity's board of directors, its governing documents, and its yearly statements.[101] This section will now analyse this function of the ACNC, and whether it has been successful.

As a sector that is so heavily dependent on public support, particularly in the form of donations, there is a high demand for transparency and accountability of charities. The ACNC's role in providing and maintaining a national, searchable register of charities is a vital function on many levels. As explained above, much of the policy

97 Council of Australian Governments, above n 75.

98 *Charitable Fundraising Act 1991* (NSW) s 7; *Fundraising Act 1998* (Vic) s 16(d); *Collections Act 1966* (Qld) s 6(2); *Collections For Charities Act 2001* (Tas) ss 4(d), (j); *Collections For Charities Regulations 2001* (Tas) reg 4.

99 McGregor-Lowndes, above n 4, 370.

100 Ibid 372.

101 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) div 40.

behind charity law comes from protecting the public from dishonest charities, as well as maintaining public confidence in the sector. This has been a driving force behind what is at times arguably draconian regulation, including associations and fund-raising legislation. The ACNC's public register of charities serves to keep charities accountable to the public. Prior to the ACNC's establishment, very few legal requirements were in place as to the information charities had to display publicly, other than requirements under the *Corporations Act* and incorporated associations legislation to provide certain information to members upon request. The ACNC's website contains a 'find a charity' feature, whereby potential donors can search for charities they are interested in, and access information such as their financial reports, annual information statements and governing documents. The simple step of making this information public is an effective way of striking a balance between accountability and over-regulation.

It is true that the proposed replacement model also required charities to publicise some information on their websites, namely the names of responsible persons, details of all funding received from government, as well as financial reports.[102] However, there are several disadvantages of this more limited approach to accountability, when compared to the ACNC system. Only financial reports would need to be published online, and not governing documents or directors' reports. The ACNC search function allows 11 different criteria to be used to find a charity, including their beneficiaries, geographical area and date registered.[103] This illustrates that the register can be used to find a charity to support, as well as to find information on one the potential donor already knows about.

In terms of regulation, the question also arises as to how well the publication of details could be policed in the proposed replacement model. With a centralised register in place, the government will immediately be aware if charities have failed to file their requisite reports. On 12 November 2015, the ACNC announced in a media release that it revoked the charitable status of 169 charities that had made no contact with the ACNC or had failed to complete their reporting requirements since originally registering as charities.[104] This is a routine consequence of the ACNC's monitoring role, which ensures that confidence is maintained in charitable status. It is doubtful whether this non-compliance would be so easily detected by the proposed alternative reporting system, where the reports are not accessible in one location, thereby decreasing confidence in the sector.

V ATO Regulation

Before the ACNC was established, there had long been criticism of the ATO's de facto role as the body that decided charitable status; indeed, this was one of the

102 Department of Social Services, above n 73, 4.

103 Ibid 3.

104 Australian Charities and Not-for-profits Commission, 'ACNC Revokes Status of 169 Charities' (Media Release, 12 November 2015).

catalysts towards recommendations for an independent commission.[105] This section will compare the current system, whereby the ACNC makes determinations, with the previous system.

The most common argument in this area is that it is inappropriate for the public body chiefly responsible for revenue raising to make decisions regarding tax concessions, as there is then a bias and vested interest in not awarding charitable status.[106] As well as this policy argument, it was also commonly argued that the ATO was inefficient in this respect and at times lacked resources to perform the role. For instance, some previous submissions to government inquiries on the sector have described the inconsistency in ATO rulings between different regional offices.[107] This led to situations where applications to a particular regional office were nearly invariably approved, whereas the opposite was the case for another regional office. It has also been argued more generally that the ATO previously made inconsistent decisions on charities that had identical objects, purposes and structures.[108] During the previous system, the ATO was involved in repeated litigation, challenging the charitable status of certain organisations. In several of these cases it has lost, such as in the high-profile cases of *Federal Commissioner of Taxation v Word Investments Ltd*[109] and *Aid/Watch Inc v Federal Commissioner of Taxation*.[110] Arguments have been raised that through co-operation between the ACNC and state regulators, government money will be saved when compared with the ATO system, as there will eventually be less overlap, and this will in turn ease the burden on the sector itself.[111]

Weight must also be given to the opinion of the ATO on this issue, expressed before the establishment of the ACNC. In its submission to the 'Report of the Inquiry into the Definition of Charities and Related Organisations', the ATO itself conceded that the system was disjointed.[112] It further recommended that the decision-making process would be more effective if an independent body, similar to the Charity Commission for England and Wales, made determinations that would be the measure for charitable concessions. It did not make a submission to the Senate inquiry into the *Repeal Bill*.[113] If determinations of charitable status ever returned to the ATO, its own submissions on the difficulty and ineffectiveness of the previous system raise strong and valid concerns as to its capacity to properly perform this role in the future.

105 Australian Charities and Not-for-profits Commission, 'Annual Report 2012–13', above n 63, 283.

106 Productivity Commission, 'Contribution of the Not-for-Profit Sector', above n 4, 144.

107 Industry Commission, above n 4, 306.

108 Ibid.

109 (2008) 236 CLR 204.

110 (2010) 241 CLR 539.

111 Andrew Barr MLA, Submission No 109 to Senate Standing Committees on Economics, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014*, 2 May 2014, 3.

112 Charities Definition Inquiry Committee, above n 4, 282.

113 Senate Economics Legislation Committee, above n 17.

Before the retention of the ACNC was announced, two government proposals were made as to how the regulatory function of the ATO could operate if the ACNC were abolished; there were differences in both methods from the pre-commission system, in terms of decision review. In one proposal, a specific area within the ATO would be formed for hearing reviews on decisions of charitable status.[114] It was suggested in this proposal that the officers responsible for the original determinations would not be part of the review process, and that this would eliminate bias. However, there are flaws in this approach. While it would be a separate department of the office, the entire process would still occur within the ATO, so it is difficult to see how the original problem of at least perceived bias would be rectified. It was then proposed that merits review would be allowed in the Administrative Appeals Tribunal if the decision were further disputed, again assisting in preventing bias. While this is true, and likely would eventually provide for an unbiased decision, this would arguably be a backwards step in a reform schedule based on eliminating bureaucracy.

With the amount of red tape charities are already subjected to in the sector, providing a system where a decision would potentially need to be reviewed twice before an ostensibly unbiased decision was made is inferior to reform where the original decision-making process was objective from the outset. The latter is arguably achieved by the ACNC; many smaller charities would simply lack the resources and time to go through so many reviews, and could possibly decide not to go through with the entire process. McKenna, when discussing a specific Charity Tribunal in the United Kingdom, argues that it is difficult to make a charity tribunal decidedly simplistic, inexpensive and accessible, as charities will often still choose to be legally represented, and they cannot legally be prevented from doing this.[115] While that discussion concerned a judicial body, it nonetheless emphasises the point that it is difficult to simplify review of charitable status. In particular, it raises flaws in the previous proposal as a way of streamlining the process. It is unclear how improving the appeals process would rectify the previously documented cases of different ATO offices making inconsistent decisions; the establishment of the ACNC seems to have been the only step taken to improve the original process of charitable determinations.

The second option proposed as to how the ATO could operate was that an independent panel would be created, made up of external experts, to advise applicants who disagreed with the initial determination.[116] It was proposed that the experts would have the power to make recommendations to the Commissioner of Taxation, and again that applicants would have merits review rights in the Administrative Appeals Tribunal. The same difficulties with the first proposal would apply, in that again, only the steps after the decision-making process would be addressed; it seems that it would also lead to an increasingly bureaucratic procedure for organisations in gaining charitable status.

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114 Department of Social Services (Cth), above n 73, 6.

115 Alison McKenna, 'Appealing the Regulator: Experience from the Charity Tribunal for England and Wales' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 342.

116 Ibid.

VI Educational Role of the ACNC

The ACNC was given a statutory task to educate and support the sector on what is best practice in not-for-profit management, as well as on the legal requirements that are placed on both the directors of a charitable organisation and the organisation as a whole.[117] This section will consider this function, and whether the ACNC has been successful in it.

Although reduction of bureaucracy should always be a key focus in charity reform, providing information as to what exactly a charity's responsibilities are, and how to follow them, may in itself reduce red tape. The Governance Institute of Australia suggested in its submission to the Senate inquiry into the *Repeal Bill* that the role of the ACNC is to provide a wide range of support and educational resources to the sector, and that its philosophy should be to use direct intervention as a last resort.[118] The number of powers conferred to the ACNC Commissioner under its Act reflects this approach,[119] whereby intervention can be discretionally used in more extreme cases. This is a prudent suggestion, in line with the balance between providing adequate oversight and ensuring the sector is not overly regulated in minor areas. By focusing more on providing education, fewer borderline compliance cases will arise. In the report of draft models for the previously proposed Centre for Excellence, it was suggested that a replacement should provide a portal to educational content, and provide this in collaboration with partners.[120]

This author argues that this is an absolutely vital element of any charitable regulation in Australia, and there should always remain a government body that is the primary provider of this educational role to the sector. This was not previously provided by the ATO in the pre-ACNC era. It is true that within the sector, there are peak bodies that are able to provide advice. Queensland University of Technology runs the Australian Centre for Philanthropy and Non-profit Studies, which provides publications and resources to the sector. However, a dedicated government body will likely be better resourced in this role.

The ACNC strikes an appropriate balance in its degree of connectedness with the sector; while it consults with stakeholders in the sector in its policies and answers the needs of the sector, it is independent enough to prevent certain charities and not-for-profits having greater influence than others, arguably more so than a peak body could. O'Halloran identifies that peak bodies have difficulties in negotiating with government: often being reliant on government funding, peak bodies can face a dilemma between representing their members, and having to compromise with

117 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(2)(b)(iii).

118 Governance Institute of Australia, Submission No 61 to Senate Standing Committees on Economics, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014*, 1 May 2014, 4.

119 *Australian Charities and Not-for-profits Commission Act 2012* (Cth) pt 4-2.

120 Civil Society, above n 70, 10.

government to avoid the loss of funding, especially in terms of media comment.[121] While the ACNC also needs to have the support of the government to survive, the fact that it was created with the intention of achieving reform demonstrates its greater ability to powerfully advocate for the sector.

One role of charity regulation that is not often acknowledged as significant is promoting research in the sector. Before the ACNC, it was sometimes argued that there was inherent difficulty in making comparisons across the sector, due to the lack of a central location for reporting.[122] The previous proposal for the Centre for Excellence did seem to recommend that it would continue the educational function that the ACNC currently provides. However, it failed to recognise that the data that the national register currently offers gives charity practitioners the ability to learn about principles of good governance and compliance.[123] This information is also beneficial for researchers and academics looking to provide further support to the sector; the ACNC provides datasets on the charities registered with it, and the annual information statements submitted, to the government's data.gov.au website.[124] This allows for easier and sounder data analysis and comparison, for use in studies and reports. Both this increased research, and also the ability for charities to look at other examples of best practice, are likely to minimise the instances of non-compliance. This in turn reduces strain on government resources and leads to fewer instances of action needing to be taken against non-complying charities, which in turn improves public faith.

VII Submissions Supporting the ACNC's Abolition

In evaluating the ACNC, it is relevant to analyse the nature of arguments against it within the sector itself. In the submissions on the proposed Bill to abolish the ACNC, of the 13 submissions specifically supporting the abolition, only eight were from organisations that were charities themselves. Of that eight, seven were specific types of charities with unique reporting requirements: four were bodies representing schools, two submitted specifically on behalf of medical research institutes, and one was on behalf of a religious organisation.[125] It must be considered that the separate reporting requirements faced by these bodies are largely an issue beyond the ACNC's role and ambit. In the Independent Schools Council of Australia's submission, it stated:

121 Kerry O'Halloran, *The Profits of Charity* (Oxford University Press, 2012) 350.

122 Fundraising Institute of Australia, Submission No 76 to Productivity Commission, *Contribution of the Not-for-Profit Sector*, 28 May 2009, 4.

123 Australian and New Zealand Third Sector Research Inc, Submission No 50 to Senate Standing Committees on Economics, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014*, 29 April 2014, 1.

124 Australian Government, *ACNC Registered Charities* (20 February 2014) <https://data.gov.au/dataset/b050b242-4487-4306-abf5-07ca073e5594>.

125 Senate Economics Legislation Committee, above n 17.

> it is far from clear that an agreement can be reached with all states, territories and government agencies to remove any of the operational requirements for non-government schools that were already in existence prior to the establishment of the ACNC.[126]

The argument that the ACNC has failed to address the issues faced specifically by one type of charity, as illustrated in this quotation, is common amid these submissions. While it is understandable that such organisations, under industry-specific regulations, perceive the ACNC to have only increased the regulatory burden, this does not undermine the effectiveness of the body as a whole. Rather, reform for these specific types of organisations is more of a matter for specific working groups, but the ACNC is still overwhelmingly supported by the sector as a whole. The relatively recent book *Modernising Charity Law* identifies that a difficulty in achieving a unified voice in the Australian charitable sector is the number of special interest groups, including specific industry umbrella groups.[127] While meeting the needs of numerous special interest groups at one time is a difficulty, doing so arguably goes beyond the ACNC's role. The fact that there were only a small number of submissions supporting the ACNC's abolition illustrates its positive effect on the sector as a whole.

IX Analysis of New Zealand's Charity Commission

At this time of reform in the Australian charitable sector, it is prudent to make an analysis of nearby New Zealand's system of charity regulation, which has undergone similar changes in the last decade. In fact, Australia's recent charitable reform, including the previous steps to abolish the ACNC, has been quite contemporaneous with New Zealand's changes in the charitable sector, and New Zealand's changes have been used in arguments regarding whether the ACNC should be abolished.

New Zealand's situation was similar to Australia's, in that a large number of studies were conducted and reports written on the charitable sector before any real substantive change occurred. In 1979, an 11-year study into New Zealand charity law was completed, making particular comparison and analysis with the United Kingdom's structures; this study concluded that an independent charities regulator was not required in New Zealand.[128] Even after this report, studies into the New Zealand sector continued to be conducted, similarly to Australia's continued reports into the area. In 1989, a working party into charities wrote a report that this time did suggest the creation of an objective charities commission.[129] However, it was still some time until

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126 Independent Schools Council of Australia, Submission No 96 to Senate Standing Committees on Economics, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014*, 2 May 2014, 5.

127 Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing, 2010) 42.

128 Property Law and Equity Reform Committee, *Report on the Charitable Trusts Act 1957* (Report, New Zealand Department of Justice, 1979).

129 Donald Poirier, *Charity Law in New Zealand* (Department of Internal Affairs, 2013) 95.

this suggestion was acted upon by the legislature. One of the more influential reports was a 2001 government discussion paper entitled 'Tax and Charities', which looked at how the taxation of charities can be better managed in New Zealand.[130] Thousands of submissions were given from the sector in preparation of that report, and it led to a working party being formed to make recommendations to the government. In 2002, the working group produced a report on the registration, reporting and monitoring of charities, which suggested that an independent charities commission would be the most efficient way to manage the sector.[131] This was received with generally positive feedback by the sector in New Zealand, and it eventually led to the introduction of a Bill to establish a Charities Commission; the structure of the proposed commission was quite similar to that in the United Kingdom.[132]

The statute that finally set up the Charities Commission (NZCC) was the *Charities Act 2005* (NZ).[133] Many of the listed functions of the NZCC were similar to those of the ACNC. Some of the most similar functions were registering charities, promoting public confidence in the sector, educating and assisting charities with respect to good governance and management, processing annual returns, and ensuring charities uphold their obligations once registered.[134] Interestingly, these purposes did not mention any form of reduction of bureaucracy, whereas this was a significant focus and statutory function of the ACNC.

However, in a move similar to the Coalition's previous plans in Australia, the NZCC was abolished through the *Charities Amendment Act (No 2) 2012* (NZ).[135] It replaced the NZCC with a board, which makes determinations on charitable status.[136] This board is, however, subsumed within another government department, the Department of Internal Affairs,[137] taking away the independence of a commission. This New Zealand precedent was at times used to justify previous steps to dismantle the ACNC, including within the statement accompanying the now suspended *Repeal Bill*.[138] This was unwarranted; such comparisons failed to properly recognise the differing motivations behind establishing and dismantling each commission, as well as the functions of the commissions themselves.

130 Ibid.

131 Working Party on Registration, Reporting and Monitoring of Charities, 'Report by the Working Party on Registration, Reporting and Monitoring of Charities' (Report, New Zealand Treasury, 28 February 2002) 7 <http://web.archive.org/web/20040727063004/http://www.treasury.govt.nz/charities/report-wprrmc.pdf>.

132 Poirier, above n 129.

133 *Charities Act 2005* (NZ) s 8, as at 3 September 2007.

134 Ibid s 10.

135 *Charities Amendment Act (No 2) 2012* (NZ) s 9.

136 Ibid.

137 Ibid s 5.

138 Regulation Impact Statement, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 4.

When the abolition of the NZCC was announced, the primary reason for doing so was monetary; the government estimated that by incorporating the functions of the NZCC into an already existing government department, over $2 million would be saved.[139] It must at the outset be remembered that finances were not a strong focus of arguments to abolish the ACNC; discussions almost completely focused on its role in red tape reduction. Looking at the working party report that led to the establishment of the NZCC, reduction of bureaucracy was not one of the primary arguments — rather, it focused on more consistent determinations as to charitable status, having a unified register of charities, as well as improving public confidence in the sector.[140] In the report's list of advantages of the proposed new regime, reduction of unnecessary regulation was not mentioned once.[141] As previously argued, Australia is somewhat unique in the amount of duplicate regulation of charities, largely due to its system of federalism.[142] With New Zealand being a unitary state, it already does not face Australia's issue of duplication of associations and fundraising legislation across jurisdictions. These distinctions bare the different reasoning for establishing the commissions, yet they would also suggest that the required purpose of a commission may differ in Australia from in New Zealand. It can be argued that due to these different purposes, their success should be evaluated against different factors, and the ACNC has already made positive steps in promoting co-operation towards reducing bureaucracy for the sector.

Whether or not it is believed that the NZCC's abolition was a prudent move, its discrepancy with the previously proposed model to replace the ACNC negates any genuine comparisons. The difficulties caused by the government's chief revenue raising department determining charitable status have already been outlined in this paper. In the New Zealand reform, these functions were taken away from a stand-alone commission, but handed to a pre-existing department that had no role in revenue raising or tax collection, unlike what was previously suggested by the Coalition in Australia. Furthermore, arguably, the NZCC was not wholly abolished. The reform to the NZCC largely involved removing its independence and moving it to another department with another leadership structure, but its functions have remained largely the same.[143] This includes still maintaining a public, searchable register of charities. The previous Australian proposal, on the other hand, was to split the functions of the ACNC between at least three other government bodies, completely ceasing some of its current functions in the process, including that of operating a public register.

Some arguments regarding the ACNC have focused too heavily on the role of charitable commissions generally. It must be considered that they have different

139 Helen Rittelmeyer, 'Independent Charities, Independent Regulators: The Future of Not-for-Profit Regulation' (Issue Analysis No 143, Centre for Independent Studies, 6 February 2014) 1, 8.

140 Working Party on Registration, Reporting and Monitoring of Charities, above n 131.

141 Ibid.

142 Fletcher, above n 37, 207.

143 Queensland Law Society, Submission No 7 to Senate Standing Committees on Economics, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014*, 9 April 2014, 3.

functions, depending on the particular nation's needs. For the Coalition Government to cite the dismantling of the NZCC as a reason for abolishing the ACNC is a false attribution when no specific account is taken of the different surrounding circumstances. The Centre for Independent Studies published an analytical paper on the ACNC debate, which was heavily critical of the ACNC and called for its abolition. The particular article placed emphasis on the decline in public confidence in charity commissions abroad, drawing strongly upon the New Zealand reform.[144] This is again an irrelevant comparison, as it purely considered whether other charity commissions were effective in their regulatory roles, while failing to consider the wider background of Australia's not-for-profit sector. Considering Australia's unique need to achieve regulatory harmonisation, it is irrelevant to argue whether overseas commissions have garnered sufficient public faith.

This author does not argue that the NZCC was an incompetent body, or even that it did not have important functions. Many of its tasks, including educating the sector, and providing a national register, were important in the same way they are to Australia. Parliamentary debates on the NZCC abolition showed opinions were divided, with several Labour politicians arguing that the step would undermine the independence and integrity of the sector.[145] Furthermore, some commentators have labelled it a retrograde step, as the sector will now have less confidence in the independence of regulation. They also suggested that in the future the government may reconsider its decision.[146] However, the differences between the two bodies illustrate that the functions of the NZCC were able to be transferred to another government department and still function effectively, whereas in Australia this would be unlikely. This difference is also influenced by New Zealand being a unitary state, as noted earlier, eliminating the issue of state inconsistency. The ACNC's function of reducing duplicate reporting would unlikely be as effectively achieved if it were dismantled, and this is a role that was more vital in Australia than in New Zealand.

A significant discrepancy between the New Zealand and Australian reform history is the amount of time given to the commission to achieve its goals. The Centre for Independent Studies article specifically mentioned that the ACNC was given a five-year review period (2012–17),[147] yet failed to recognise that this negates arguments for its *immediate* termination. Considering that the NZCC existed for seven years further supports the view that it is an irrelevant comparison with the ACNC. The ACNC has only operated since December 2012, and the progress it has made so far would suggest that it will make a significant impact by December 2017.

144 Rittelmeyer, above n 139, 8–9.

145 New Zealand, *Parliamentary Debates*, House of Representatives, 22 May 2012, 2242 (Trevor Mallard).

146 O'Halloran, above n 121, 407–8.

147 Rittelmeyer, above n 139, 5.

X Conclusion

In the process of analysing many of the arguments and issues regarding the role of the ACNC, the overall case has been presented that it is a vital body for the sector, the functions of which would be difficult to parallel in a replacement. The overwhelming number of studies and opinions presented about the sector in the last two decades clearly demonstrates that some type of reform was necessary, and the creation of an independent charity commission was a common theme in this discourse. The ACNC has proposed and planned to address the sector's needs in numerous ways, and although there remains work to do to complete its goals, it has already displayed some impressive progress. Moreover, this paper has argued that despite the ACNC's perceived shortcomings to this point, the previously proposed alternatives by the Coalition Government would have created difficulties of their own. In the absence of the ACNC, although the status quo may have been restored, it is difficult to see how any long-term progress would be made without there being a body to promote dialogue and harmonisation on the issues affecting the sector. Simply establishing working groups is insufficient, as these have existed in numerous forms for the last two decades. In this sense, the abolition of the ACNC would have prioritised immediate, seemingly political, goals while compromising the long-term. General arguments against independent commissions, particularly by means of comparison with other nations' shortcomings, are not strictly relevant to discussions of the ACNC as they do not take account of the different circumstances in each jurisdiction.

Although this paper has focused upon the previously suggested abolition of the ACNC in its analysis of charitable regulation, it is hoped that its relevance does not only extend to that particular policy discussion. The case has been presented that the regulation of the charitable sector in Australia is generally in need of reform. The policy behind charitable regulation will always be one of balance, weighing the interests in protecting the public from wrongdoing and incompetent organisations, against that of not overburdening the sector with regulation, and not deterring philanthropy and participation in the sector. The balance in Australia is currently tilted in favour of the former, largely due to the amount of duplicate regulation. Much of this is due to federalism, and this author argues that state governments will need to cede some of their powers in order truly to reduce red tape. This does not need to be achieved through giving powers to the Commonwealth, but at least by harmonising requirements across state borders.

The evidence of how few government resources are used on the regulation of areas such as fundraising shows the harmful nature of such an overly bureaucratic and outdated system, with the costs borne by the sector and its contributors. For too long, concerns regarding the charitable sector have been merely stated and debated, without effective action. It is now time that these concerns are acted upon, and for the charitable sector to benefit from a coherent and modern system.