THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION: REFORM OR UN-REFORM?

Ian Murray*

Introduction

Australia's adoption of a national regulator for the charity sector, the Australian Charities and Not-for-profits Commission (ACNC), took place after what can best be described as a leisurely and thorough process of reviews and inquiries, dating at least from the *Charities Definition Inquiry* of 2001. When leisure was replaced by haste under the former federal government,[1] the alacrity with which the ACNC was created inevitably created some tensions over implementation and settings at the micro-level. However, the macro-level matters had largely been determined thanks to broadly consistent recommendations (including the adoption of a national regulator/regulatory scheme) from the various inquiries. Regardless, the change of federal government in Australia in 2013 has seen a concerted effort from the new Coalition Government to eliminate the regulator, abolish its supporting legislation and to fill the gap in a largely unspecified way, other than through the creation of a Centre for Excellence.

This paper builds on Fiona Martin's earlier paper in this volume,[2] by teasing out the Coalition's plans to replace the ACNC and examining in greater detail the practical problems that such an attempt might involve and might generate. With this understanding, the paper expands on Martin's critique of the Coalition's stated

* Assistant Professor in the Faculty of Law, University of Western Australia and Consultant, Ashurst. Email: ian.murray@uwa.edu.au

1 For a summary of the implemented and proposed reforms as at the date of the federal election (as well as previous reviews and inquiries), see e.g. ACNC, 'Not-for-profit Reform and the Australian Government' (Report, Australian Charities and Not-for-profits Commission, 1 September 2013).

2 F Martin, 'Developments in Australian Charity Law: One Step Forward and Two Steps Backward' (2014-15) 17 CL&PR 23.

bases for ACNC abolition in order to provide a holistic analysis of the net merit of the change. In doing so, it is important to recall that the question of the appropriate balance between ensuring public trust and confidence in not-for-profits and ensuring that government intervention is not overly intrusive, is not a new debate. The Statute of Elizabeth,[3] the lodestone for the definition of 'charity', was a piece of legislation providing for the appointment of Commissioners to investigate abuses of charities and to make orders for their redress.

Context: Recent Reforms and the Coalition's Philosophy for the Not-for-profit Sector

The creation of a national regulator formed part of a much broader Australian not-for-profit reform agenda which incorporated a range of regulatory, administrative architecture and more substantive legal form and tax reforms. Martin has outlined the drivers for this reform process and a number of the key reforms in her paper and they will not be repeated here. However, by way of addition, it is pertinent that the overall reform agenda contained a range of inter-governmental initiatives. These included matters such as reform of fundraising regulation across Australia, reviewing legal and reporting requirements under grant agreements and considering the adoption, by the states and territories, of the Commonwealth definition of 'charity'. As discussed further below, the ACNC's role as a co-ordinating body is vital to such initiatives.

In addition, an understanding of the Coalition's philosophy for the sector is instructive. Before the 2013 election, then Shadow Minister for Families, Housing and Human Services and now Minister for Social Services, Kevin Andrews, identified the following philosophies as underpinning the Coalition's policies in general and toward the not-for-profit sector in particular:[4]

- Government should 'live within its means';
- Government should 'back our nation's strengths';
- The 'nanny state' should be 'reverse[d]', meaning that government should have a smaller role; and,
- The aim of 'restor[ing] a culture of personal responsibility', which appears linked to reducing the role of government and increasing self-regulation.

3 Statute of Charitable Uses (1601) 43 Eliz I c 4.

4 Kevin Andrews, 'Empowering Civil Society: Major Policy Address: The Coalition's Approach to the Charitable Sector' (Speech delivered at the Menzies Research Centre, Melbourne, 15 June 2012).

These philosophies suggest limited appetite for additional regulation of the sector, which is supported by the Coalition's commitment to reduced government regulation via its broader deregulation agenda.[5] The philosophies also underpin Andrews' goal that government ought to be 'enabling' the not-for-profit sector, rather than 'mastering' not-for-profits.[6]

Purportedly in keeping with the Coalition's emphasis on small government, enabling greater freedom (and personal responsibility) for the not-for-profit sector, and on its broader deregulation agenda, on 19 March 2014, the Coalition introduced the Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (Cth) (ACNC Repeal Bill). The Bill provides for the abolition of the entire Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act), hence the ACNC is to go, along with its regulatory regime, rather than merely curtailing the powers of the ACNC or the obligations imposed on registered charities, such as reporting and governance requirements.

The ACNC and its Functions

Martin has already described the ACNC and the goals of its regulatory framework of supporting 'public trust and confidence' in not-for-profits; 'support[ing] and sustain[ing]' the sector; and championing a decrease in 'unnecessary regulatory obligations'.[7] In summary, to implement the framework, the ACNC:

- determines charity status and registers eligible entities;[8]
- undertakes an educational role for registered charities;[9]
- possesses a monitoring and enforcement function to ensure compliance by registered charities where education is insufficient;[10]

---

5 As to the broader deregulation agenda, see e.g. Arthur Sinodinos, Assistant Treasurer, 'Plenary Address to the Association of Financial Advisers' (Speech delivered at the Association of Financial Advisers, National Conference, Gold Coast, 13 October 2013).

6 Kevin Andrews (n 4) 5.

7 ACNC Act, s 15-5(1); Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (Cth) ('ACNC Revised Explanatory Memorandum') 3-4.

8 ACNC Act, s 15-5(2).

9 ibid ss 15-5(2)(b)(iii), 110-10(1).

10 ibid s 15-5(2)(b)(ii), ch 3, ch 4.

- maintains a public register, or portal, containing information on registered charities;[11] and,
- is obliged to cooperate with other regulators and government agencies to reduce regulatory duplication.[12]

As discussed by Martin, under the regime, registered charities must comply with record-keeping, reporting and notification requirements and also with broad governance standards.[13]

'Un-reform' of the ACNC and its Implications

The ACNC Repeal Bill provides for the abolition of the entire ACNC Act, meaning the ACNC along with its regulatory framework. What is puzzling, and as Martin describes, productive of uncertainty, is that the Bill does not detail what the replacement arrangements will be. The ACNC Repeal Bill does contain records and agency reporting transfer provisions, but to an unidentified recipient agency to be determined by the relevant Minister.[14] The accompanying explanatory materials also refer to a proposed 'Centre for Excellence', which is very generally described and appears focussed on self-help, rather than self-regulation.[15] Indeed, the wholesale abolition may be a matter of form rather than substance as the elegantly brief ACNC Repeal Bill would, if enacted, not commence until a further Act is passed which provides for the 'arrangements [to] replac[e] the Commission'.[16]

This raises the question of what regime is intended to replace the ACNC and brings into focus the notion of an 'un-reform' employed in the title of this article. In raising this question, this part of the paper complements the analysis in Martin's paper by teasing out, where possible, the Coalition's plans for any replacement arrangements and examining in greater detail the practical problems that the attempted abolition might generate. Returning to the concept of 'un-reform', the Coalition has indicated that in terms of determination of charity status, reporting and governance oversight (i.e. monitoring and enforcement), its favoured approach

11 ibid pt 2-2.

12 ibid s 15-10(f).

13 ibid ch 3, s 45-10(1); Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) div 45.

14 ACNC Repeal Bill, sch 1 pt 2.

15 Explanatory Memorandum to the ACNC Repeal Bill, Regulation Impact Statement, 3. See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2387 (Kevin Andrews, Minister for Social Services).

16 Explanatory Memorandum to the ACNC Repeal Bill, 1.

is to largely revert to the regulatory requirements in place immediately prior to the ACNC, albeit with some unspecified or ambiguous adjustments.[17] As discussed below, the creation of a new sector proponent in the Centre for Excellence and the potential archiving of the public register/information portal, coupled with a requirement for charities to self-report on their own websites, appear to be the only key measures that the Coalition intends to implement or retain.

Determination of charity status

The creation of the ACNC represented a fundamental shift at the federal level in terms of determining charity status, including resolution of whether an entity comes within certain charity sub-types,[18] such as a public benevolent institution. As discussed by Martin, previously the Australian Taxation Office (ATO) had the predominant role at the federal level as gatekeeper to charity status for the purpose of accessing tax concessions. However, other federal regulators and government agencies also made separate determinations for a variety of purposes, such as reduced annual review fees for incorporated charities regulated by the chief corporate regulator, the Australian Securities and Investments Commission (ASIC).[19] The ACNC has largely resulted in a unified and co-ordinated determination mechanism at the federal level and also created the *potential* for the Australian states and territories to align their own definitions and, more significantly, administrative determination, of charity status or charity sub-type.[20] Martin elaborates on the constitutional reasons and the mind-boggling array of legislation and government agencies that may apply, across jurisdictions, to a single charity. It suffices for the purposes of this article to note that in 2011 the Scoping Study for a National Not-for-profit Regulator identified over 178 pieces of

17 Explanatory Memorandum to the ACNC Repeal Bill, Regulation Impact Statement, 3; Department of Social Services (Cth), 'Australia's Charities and Not-for-profits: Options for Replacement Arrangements Following the Abolition of the Australian Charities and Not-for-profits Commission' (Options Paper, July 2014) 4-8. See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2386 (Kevin Andrews, Minister for Social Services); Kevin Andrews, Minister for Social Services, 'ACNC Must Go to Free Up Red Tape' (Media Release, 19 March 2014).

18 As to charity sub-types, see ACNC Act, s 25-5(5).

19 See e.g. The Treasury (Cth), 'Scoping Study for a National Not-for-profit Regulator' (Final Report, April 2011) 27-8; The Treasury (Cth), 'Scoping Study for a National Not-for-profit Regulator' (Consultation Paper, January 2011) 7. In relation to the range of regulatory regimes applying to charities in Australia, see e.g. G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) ch 17.

20 As to separate administration at the state and territory level, see e.g. The Treasury (Cth), 'Scoping Study Final Report' (n 19) 27-8.

legislation across all levels of government in Australia, which required 19 separate government bodies to determine charity status.[21]

Accordingly, the abolition of the ACNC and a return to pre-existing regulatory arrangements would reintroduce the Commissioner of Taxation at the federal level as the de facto, *but not sole*, decision-maker for charitable status and the de facto regulator of the not-for-profit sector, a move that is unlikely to be welcomed by the sector. Indeed, the need for an independent regulator was a principle strongly supported by most participants in the consultation process leading up to the formation of the ACNC,[22] in part due to a 'perceived conflict of interest' on the part of the ATO.[23] This conflict of interest was recently reiterated in an open letter to the Prime Minister by a range of not-for-profit sector representatives.[24] Further, responses to a survey of the not-for-profit sector conducted shortly before the 2013 federal election clearly indicate a distinct aversion to ATO regulation (only six per cent supported ATO regulation) and a much stronger preference for either ACNC regulation (44 per cent) or some form of co-regulation (37 per cent), involving a degree of self-regulation (the latter two, combined, giving the 81 per cent support for the ACNC referred to by Martin).[25] As Martin also notes, submissions to a senate inquiry into the ACNC Repeal Bill 'overwhelming[ly]' support regulation involving the ACNC.

---

21 The Treasury (Cth), 'Scoping Study Consultation Paper' (n 19) 7, 26.

22 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012; the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* (2012) 32 [2.90]-[2.91].

23 The Treasury (Cth), 'Scoping Study Final Report' (n 19) 66. See also Productivity Commission, 'Contribution of the Not-for-Profit Sector' (Research Report, January 2010) 144 (citing submission received from Australian Women's Health Network); Not-for-Profit Project Tax Group, *Regulating the Not-for-profit Sector Working Paper* (July 2011) University of Melbourne <http://www.law.unimelb.edu.au/files/dmfile/MicrosoftWord-RegulatingtheNot-for-ProfitSectorWorkingPaperfinalversion2.pdf> 15.

24 Ann O'Connell et al, *Open Letter to the Prime Minister: Civil Society Support for Independent Regulator* (Letter, 19 March 2014): <http://www.communitycouncil.com.au/sites/default/files/Open%20letter%20to%20govt%200214.pdf>.

25 Pro Bono Australia, 'Not for Profit Sector Election Survey' (Research Survey Report, 15 August 2013) 6. A more recent survey by Pro Bono Australia indicates that support for the ATO has remained steady at 6%, but that support for the ACNC has increased: Pro Bono Australia, '2014 State of the Not-for-profit Sector Survey' (Research Survey, September 2014) 25.

Minister Andrews has responded to these concerns in the past with relatively general comments about considering mechanisms to split the regulatory function (for endorsement of not-for-profits) from the remainder of the ATO's functions.[26] A recent Department of Social Services *Options Paper*[27] puts some meat on these bones by suggesting that a 'dedicated unit' be established within the ATO to determine charitable status and satisfaction of tax endorsement requirements.[28] This does not seem vastly different to the previous arrangements under which the ATO maintained a specialist Not-for-profit Centre. However, there is a potential change in the proposal that objections to decisions would be considered either by an independent panel (including non-ATO experts), or by an ATO panel comprised of officers from a different section of the ATO. It is unclear how the second alternative materially differs from existing ATO processes for independent review of objection applications, but the first is a genuine change and would appear to go some way toward addressing conflict of interest perceptions. Of course, as the review relates solely to determination of charitable status, it would not address such perceptions in regard to monitoring and enforcement action.

In addition, abolition would impede, but not eliminate, attempts to harmonise a definition of charity (and of the various sub-types of charity) across Australian jurisdictions.[29] However, abolition does seem likely to annihilate the possibility of unified and harmonised *administration* of such definitions. That is because it would entrench the previous position of multiple regulators and decision-makers at the federal level, as well as leaving in place the various state and territory regulators and decision-makers, without a clear body to act as the champion of co-ordinated administration.

Monitoring and enforcement

The monitoring and enforcement function of the ACNC was intended to enable proportionate regulation of registered charities, as distinguished from the ATO's

---

26 Kevin Andrews, '*National Press Club Not-for-profit Sector Forum'* (Speech delivered at the National Press Club Not-for-profit Sector Forum, Canberra, 23 August 2013).

27 As noted by O'Connell, the title is largely a misnomer as the Options Paper presents only one true (minor) option, with the remainder of the paper seeking feedback on single proposals as to reporting, determination of charitable status, proportionate compliance and transitional arrangements: Ann O'Connell, 'The Ministry for Funny Hats', *Pro Bono News* (online), 10 July 2014 <http://www.probonoaustralia.com.au/news/2014/07/ministry-funny-hats>.

28 Department of Social Services (Cth) (n 17) 6.

29 As discussed by Martin (n 2) while Australia has recently introduced a statutory definition of charity at the federal level (Charities Act 2013 (Cth)), it does not automatically apply at the state or territory level and the Coalition Government has previously opposed the commencement of the legislation and appears to retain continuing concerns.

limited ability to respond to regulatory infractions (effectively, an all or nothing response).[30] In keeping with principles of responsive regulation, the ACNC Act provides the ACNC with a spectrum of responses where a registered charity fails to meet its obligations, or where it is more likely than not that it will fail to do so in the future. The range of enforcement powers listed by Martin demonstrates the breadth of the spectrum. As made clear by its *ACNC Statement: Regulatory Approach,*[31] the ACNC employs the regulatory principles of 'Fairness, Accountability, Independence, Integrity and Respect' in determining its approach, with 'Fairness' involving proportionate action on the part of the ACNC.[32] The concept of 'Fairness' therefore envisages the use of different compliance tools in different circumstances, depending on the seriousness of the issue.[33] Despite assertions to the contrary in the Department of Social Services *Options Paper*,[34] reverting to the ATO's traditional monitoring and enforcement would mean the loss of this proportionate regulation. That is because the ATO can generally only respond by not acting, or by acting to revoke tax endorsement – an extreme measure that would not be appropriate for many lesser breaches. This was one of the key reasons for the introduction of the ACNC and from the perspective of regulatory theory, its abolition would significantly impair the implementation of responsive regulation.

In addition, the pre-ACNC regime contained significant regulatory gaps, even if ATO regulation is considered in conjunction with regulation based on:

- legal form, such as that by ASIC (for example, for companies limited by guarantee), or by state and territory departments regulating incorporated associations, or state and territory Attorneys-General (in relation to charitable trusts); or,
- to a lesser extent, specific activities, such as state and territory regulation of fundraising.

As identified in relation to financial reporting, many charitable trusts and some incorporated associations may have had no reporting obligations, if not engaged in

30 See e.g. ACNC Revised Explanatory Memorandum (n 7) 120; Ian Murray, 'Fierce Extremes: Will Tax Endorsement Stymie More Nuanced Enforcement by the Australian Charities and Not-for-profits Commission?' (2013) 15(2) Journal of Australian Taxation 233, 246.

31 ACNC, *ACNC Statement: Regulatory Approach* (May 2013).

32 ibid 5-6, 10.

33 ibid 5.

34 Department of Social Services (Cth) (n 17) 8. Although the *Options Paper* uses some ambiguous language, it appears to suggest that the ACNC's pt 4.2 enforcement powers will not be transferred to the ATO.

activities such as fundraising, which rendered targeted enforcement action difficult. Further, in terms of governance failures, it appears that enforcement actions or schemes to vary the internal management of charitable trusts have not typically been actively pursued.[35] This has been ascribed to the high compliance and administration costs, as well as to the difficulty in monitoring and establishing trustee breaches.[36] Certain professional trustee companies are themselves subject to additional regulation by ASIC,[37] though this is to be distinguished from the trusts that they administer and, in any event, they control approximately only half of total charitable trust assets.[38]

Further, in the past, many religious organisations (depending on their legal form) and unincorporated associations may not have been subject to any regulatory regime. While the introduction of the ACNC did not represent as big a shift for basic religious charities due to the range of concessions, significant numbers of unincorporated associations are registered with the ACNC and subject to the new regime.[39]

The fact that the Coalition has identified the introduction of regulation for unregulated and under-regulated charities as a reason for abolishing the ACNC (see below) strongly suggests that removing the ACNC will re-introduce monitoring and enforcement gaps in the form of non or under-regulation. The existence of these gaps means that the Coalition Government is effectively relying on self-regulation, as expressly acknowledged in Minister Andrews' second reading speech.[40] This poses serious challenges to good governance.[41] In particular, it provides opportunities for charities that do not want to comply and

35 See e.g. The Treasury (Cth), 'Scoping Study Final Report' (n 19) 58; The Treasury (Cth), 'Scoping Study Consultation Paper' (n 19) 10.

36 The Treasury (Cth), 'Scoping Study Consultation Paper' (n 19) 10.

37 A relatively select group of professional trustee companies ('licenced trustee companies') which are prescribed by regulations to the Corporations Act 2001 (Cth) and which are required to hold an Australian financial services licence for the provision of traditional services: Corporations Act 2001 (Cth), ch 5D.

38 Corporations and Markets Advisory Committee, 'Administration of Charitable Trusts' (Report, May 2013) 17.

39 The Explanatory Memorandum to the ACNC Repeal Bill claims a figure of 21,000 unincorporated associations registered as charities with the ACNC: Regulation Impact Statement, 2.

40 *Parliamentary Debates* (n 17).

41 See e.g. Marina Nehme, 'Regulation of the Not-for-profit Sector: Is Another Change Really Needed?' (2014) 39(1) Alternative Law Journal 24, 25-6.

potentially imposes a comparative disadvantage on better-intentioned charities.[42] Further, as noted by Valerie Braithwaite, the relevance of an enforcement framework to the regulation of not-for-profits, including charities, is heightened by the increased importance of 'trust' for the sector.[43]

Reporting and dissemination of information

Compared with the previous arrangements, the ACNC notification and annual reporting requirements significantly increased the depth and consistency of information gathered and marked a drastic change in the dissemination of that information. For instance, all registered charities are required to submit an Annual Information Statement (AIS),[44] which initially contains a range of operational questions and which will require financial, as well as non-financial, information in future years. For the year ending 30 June 2013, the AIS contains 17 mandatory and three optional operational questions, with the AIS for future years slated to include up to 15 additional financial questions, depending on charity size. Medium and large registered entities (except basic religious charities) are also required to provide reviewed or audited financial reports.[45]

Previously, many charitable trusts and Western Australian incorporated associations may not have been subject to any mandatory financial reporting (unless conducting fundraising or due to other specific legislation, such as the tax reporting requirements for ancillary funds).[46] Typically, charities in the form of unincorporated associations and many religious charities formed by individual Act of Parliament or by letters patent were not subject to any regulatory regime, other than tax requirements, and hence not required to report.[47]

As noted above, the level of information collected is highly relevant to the effectiveness of monitoring and enforcement action. More fundamentally, dispersing the information amongst a range of regulators (as was the case prior to

42 See e.g. ibid 25-6; Valerie Braithwate, 'A Regulatory Approach for the Australian Charities and Not-for-profit Commission: A Discussion Paper' (Occasional Paper No 19, Regulatory Institutions Network, February 2013) 6; Not-for-Profit Project Tax Group (n 23) 5.

43 Valerie Braithwate (n 42) 31. See also, Not-for-Profit Project Tax Group (n 23) 5.

44 ACNC Act, s 60-5(1).

45 ibid ss 60-10, 60-20, 60-60.

46 For a useful summary across jurisdictions and charity types, see e.g. ACNC Implementation Taskforce, 'Financial Reporting Stimulus Paper' (Stimulus Paper, 20 October 2011) 3 and Attachment A. For Western Australian incorporated associations, see Associations Incorporation Act 1987 (WA).

47 See e.g. The Treasury (Cth), 'Scoping Study Consultation Paper' (n 19) 9.

the ACNC), would mean the loss of a central repository for data on the sector, the patchy nature of which was acknowledged in 2010 by the Australian Productivity Commission.[48] Reduced and dispersed information would therefore impact on the performance of the regulators.

Turning to dissemination of information to the public, the ACNC established a public register containing much of the information collected, which provided the key information on a charity in the one place for the first time and without imposing any access fee to that information.[49] At one stage it seemed that the Coalition was still considering whether to retain a public charities register in some form.[50] However, the Department of Social Services *Options Paper* indicates that the register is to be archived and, instead, all (presumably registered) charities will be obliged to have 'a publicly accessible website that features' the identities of responsible person controllers, details of government funding and, subject to numerous exceptions, financial statements.[51] The direct compliance costs in money and time for charities and the inefficiencies this would present for charities, regulators and donors seem so obvious that it is difficult to understand why such an approach might be raised in preference to the inclusion of the same information on the existing public register.

In any event, even if the register does continue to exist and responsibility is transferred to another regulatory agency, such as the ATO, abolition of the ACNC would be likely to significantly curtail the level of information maintained on the register. Over time, register entries would be more likely to resemble Australian Business Register records, with details of a registered charity's name, charity type, legal form and tax endorsements,[52] but likely not including information about the charity controllers, places of operation, beneficiaries, financial and other matters. Some, but by no means all, of this additional information would be collected by other regulators, such as ASIC, in relation to companies limited by guarantee, and by state and territory agencies in relation to incorporated associations. In this context, it is worth noting that independent charity evaluation websites, such as 'Charity Navigator' and 'GuideStar', which have been suggested by Minister Andrews as an alternative to a national regulator as a means of achieving

48 Productivity Commission (n 23).

49 As to access to charity information under the previous regimes, see e.g. The Treasury (Cth), 'Scoping Study Consultation Paper' (n 19) 15.

50 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 4 December 2013, 1561-2 (Kevin Andrews, Minister for Social Services).

51 Department of Social Services (Cth) (n 17) 4.

52 Based on existing tax endorsement application forms.

transparency,[53] must base their evaluations on data collected by someone and, in the US context, this is detailed data submitted by charities to the Internal Revenue Service.[54]

Accordingly, reverting to previous arrangements for reporting and disclosure would eliminate a broad and timely source of information for regulators, researchers, donors and potential recipients of benefits. It may also reduce compliance costs for a range of registered charities that are not required to report to other regulators, although this saving will be ameliorated for some by the proposed obligation to create and maintain a public website.

Sector proponent/deregulation champion

The creation of the ACNC as endowed with the objective of championing a reduction in the sector's regulatory burden, where appropriate, means that there is now a co-ordinating body focussed on not-for-profit sector deregulation as a core, rather than a peripheral issue. This is a key role, as significant regulatory complexity and duplication is due to lack of harmonisation between state or territory requirements and federal requirements, and due to lack of consistency for charities operating in multiple states and territories.[55] While closing the ACNC may eliminate some regulatory obligations, it also has the potential to remove the drive for a broader improvement in the regulatory environment for charities, both amongst federal agencies and regulators and between the different jurisdictions. Nevertheless, although there have been some suggestions in Australian Senate Committee hearings that there is no longer a focus on Commonwealth and state/territory cooperation in not-for-profit regulation,[56] the Coalition has previously indicated its intention to persist in attaining harmonisation of certain areas of regulation, such as fundraising,[57] and in working with the states and

53 Freyla Ferguson, '"Charity Navigator" Model Tipped to Replace ACNC', *Pro Bono Australia News* (online), 29 January 2014: <http://www.probonoaustralia.com.au/news/2014/01/'charity-navigator'-model-tipped-replace-acnc>.

54 See e.g. Krystian Seibert, 'Testing the Case Against Independent Charities Regulation' *Pro Bono Australia News* (online), 20 February 2014: <http://www.probonoaustralia.com.au/print/news/2014/02/testing-case-against-independent-charities-regulation>.

55 See e.g. Productivity Commission (n 23) 114, 124-6.

56 Parliament of Australia *Evidence to Senate Community Affairs Committee* Canberra, 27 February 2014.

57 Kevin Andrews, 'Civil Society and the Role of Government' (Speech delivered at the Centre for Independent Studies, Sydney, 23 April 2013): <http://kevinandrews.com.au/media/public-speech/civil-society-and-the-role-of-government>.

territories to implement more streamlined reporting.[58] The removal, in the most recent federal budget, of funding for a key inter-governmental committee that monitored inter-governmental reform such as fundraising reform, the Council of Australian Governments Reform Council,[59] suggests that the process will be slow.

If one asks who will co-ordinate and facilitate such reform discussions, Andrews initially indicated that the proposed Centre for Excellence would maintain a role liaising with the Commonwealth, states and territories to achieve harmonised financial and non-financial reporting standards.[60] The Centre for Excellence, now Civil Society National Centre for Excellence, has only been sketched in general terms, but it appears that it will be 'small' in size and will focus on 'advocacy', 'innovation' and 'collaborative education, training and development', as well as a reduction in 'red tape' for the sector.[61] It appears that the overarching goal of the Centre is to 'build the capacity of civil society organisations'.[62] However, as the *Mid Project Report* on potential models for the Centre demonstrates, the consultation process is expressly intended to determine the scope of the Centre (by identifying a meaning for 'civil society'), its roles and activities, its purpose and desired outcomes, its legal form and its funding sources.[63] The four interim models proposed range from a focus on strengthening relationships between people in communities, to a focus on charities and other not-for-profit organisations. In short, no-one yet knows what the Centre is and what it will do.

In this context, it appears likely that the Centre will have some roles that are additional to the education function of the ACNC. Further, if the ACNC does cease to exist, it may be that its deregulation champion function could be continued

---

58 Kevin Andrews, 'The Role of Civil Society' (Speech delivered at the Association Forum, Sydney, 18 July 2013): <http://kevinandrews.com.au/media/public-speech/the-role-of-civil-society-association-forum-sydney>.

59 Commonwealth of Australia, *Budget Measures 2014-15: Budget Paper No 2* (2014) 187.

60 See e.g. Kevin Andrews (n 57); Kevin Andrews (n 4) 7.

61 Department of Social Services (Cth), *Civil Society National Centre for Excellence Research and Consultation* (12 June 2014): <http://www.dss.gov.au/about-the-department/news/2014/civil-society-national-centre-for-excellence-research-and-consultation>; Kevin Andrews, 'Address to Australian Institute of Company Directors' (Speech delivered at the Australian Institute of Company Directors: NFP Directors Lunch, Melbourne, 29 January 2014); Kevin Andrews (n 58).

62 Department of Social Services (Cth) (n 61).

63 Centre for Social Impact, 'Civil Society National Centre for Excellence Consultation and Engagement: Draft Models for Consultation' (Mid Project Report, 21 July 2014). The Centre for Social Impact was engaged by the Department of Social Services to undertake consultation and development work on a model for the Centre for Excellence.

to some extent by the Centre. However, replacing a widely respected[64] operating regulator with a new body that, at least initially, seems likely to lack a clear mandate, raises some risks for not-for-profit sector engagement in the process. Nevertheless, the paucity of detail on the Centre, makes it difficult to say much more at this stage.

Critiquing the Proposed Bases for ACNC Abolition

Despite the Coalition's intentions and the recent Australian Senate committee report recommending abolition,[65] it is by no means certain that the ACNC Repeal Bill will be enacted. For a start, as noted by Martin, despite the report's recommendation, the submissions to the committee were generally supportive of the ACNC and of the view that the ACNC has the potential to reduce regulatory duplication and compliance costs. More fundamentally, however, there are some serious questions about the chief 'problems' with the ACNC regime identified in the Explanatory Memorandum to the ACNC Repeal Bill. It appears that the supposed problems are:[66]

- The introduction of regulatory oversight for previously unregulated (for example, unincorporated associations) or under-regulated charities (such as charitable trusts);
- The creation of regulatory duplication for more actively regulated entities (such as incorporated associations); and,
- The ACNC has failed to meet its objective of reducing the regulatory burden (especially in relation to the achievement of a 'single reporting point for charities') because, on balance, it has added to the level of regulation.

These 'problems' are examined below to critique the legitimacy of the proposed 'un-reform'.

---

64 The most recent survey conducted indicates that 60% of respondents preferred the ACNC as a regulator to the ATO or to self or co-regulation: Pro Bono Australia, 2014 (n 25) 25. The 60% figure is a significant increase from the 2013 election survey (n 25). In addition, 82% of respondents considered that the ACNC was 'important/very important in developing a thriving Not for Profit sector': at 25. See also, Ann O'Connell et al (n 24).

65 Senate Economics Legislation Committee, Parliament of Australia, *Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 [Provisions]* (June 2014) 29 [2.88]-[2.89].

66 Explanatory Memorandum to the ACNC Repeal Bill, Regulation Impact Statement, 2-3.

New regulatory oversight for previously un-regulated or under-regulated entities

As identified above, the ACNC regime has resulted in regulatory oversight and reporting obligations for a variety of charities which were not previously subject to effective regulatory control and which were not required to prepare and/or lodge annual information statements – especially charitable trusts and unincorporated associations. However, by labelling this a problem, the implication, indeed the express contention,[67] is that such regulation and reporting is 'unnecessary'.

The previous approach consisted of ad hoc regulation depending largely on matters such as legal form, jurisdiction of creation, or, for contractually enforced standards, funding source; and only to a lesser extent or indirectly on matters such as the charity's purpose and activities, the size of the entity and its previous compliance history. This does not generally reflect the 'risk-based approach' to which the Explanatory Memorandum aspires. There is a justification for a risk-based exclusion of some unincorporated associations, as the evidence indicates that they tend to be relatively small in economic terms.[68] However, such an exclusion could be more directly linked to economic size, than using legal form, and is already reflected to some extent by the ACNC's tiered reporting requirements. Further, Australian charitable trusts were estimated to hold assets of around $7 billion in 2013,[69] so it does not appear possible to collectively exclude them on a risk basis from effective regulation.

More fundamentally, from the broader perspective of regulatory theory, as discussed above, reliance on self-regulation for these entities raises significant governance risks stemming from the minority of charities that will inevitably manipulate the situation and from the flow-on effects to other charities. Further, the 'problem' appears to have been framed from a dichotomous perspective of 'regulated' or 'unregulated', rather than acknowledging that various degrees of co-regulation are also possible, and that they may be of relevance to charities.[70] Finally, a preference for a 'risk-based' approach fails to identify the regulatory goals that the approach is intended to achieve, nor to explain why different goals have, presumably, been selected for different legal forms of charities.

In addition, failing to collect data, including financial data, on significant sections of the not-for-profit sector will make enforcement, as well as informed analysis and evidence-based policy, very difficult to achieve. Also, the data that is

67 ibid 2; *Parliamentary Debates* (n 17).

68 Productivity Commission (n 23) 57.

69 Corporations and Markets Advisory Committee (n 38) 17.

70 See e.g. Not-for-Profit Project Tax Group (n 23) 4-5.

collected may be housed in a vast array of disparate state/territory and federal agencies, along with individual charity websites.

Regulatory duplication?

The claim in relation to more actively regulated charities is that the ACNC regime has resulted in duplicated regulatory requirements, such as reporting and governance obligations. This concern has been raised in the context of incorporated associations, although it could also be applied to the Corporations Aboriginal and Torres Strait Islander Act 2006 (Cth) corporations (Indigenous corporations) at the federal level. However, it should be noted that for companies limited by guarantee, a number of the reporting and governance requirements that are imposed under the Corporations Act 2001 (Cth) (and administered by ASIC) do not apply where those companies are registered with the ACNC.[71]

Many incorporated associations and Indigenous corporations do potentially have two sets of statutory reporting requirements and governance obligations, although, as identified above, reporting rules vary between jurisdictions. However, the ACNC has acted to reduce the practical impact by accepting financial reports submitted to state or territory regulators in place of the ACNC required financial reports for 2014 and has also entered into a memorandum of understanding with the Office of the Registrar of Indigenous Corporations, under which the ACNC will initially accept annual reports lodged by Indigenous corporations with the Office.[72] These initiatives significantly diminish, but do not eliminate duplication. More promisingly, however, South Australia and the Australian Capital Territory have proposed the alignment of a number of aspects of their associations' incorporation and charitable fundraising regulatory regimes with that of the ACNC.[73] While Martin notes that only these two jurisdictions have done so, that is no small accomplishment in the short time that the ACNC has been in existence, particularly given the uncertainty over its future for a significant period of that existence.

In summary, this 'problem' has legitimacy, although it appears overstated. To the extent that the 'problem' is attributed to the ACNC in relation to continued

---

71 Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth), sch 3, pt 3.

72 ACNC, *Red Tape Reduction* (2014): <http://www.acnc.gov.au/ACNC/About_ACNC/Redtape_redu/ACNC/Report/Red_tape.aspx>; ACNC, *ACNC Annual Report 2012-13* (2013) 60.

73 Department of Treasury and Finance (SA) 'Not-for-profit Sector Reform' (Fact Sheet, August 2013); David Bradbury, Assistant Treasurer, Mark Butler, Minister for Social Inclusion and Andrew Barr, ACT Deputy Chief Minister, 'ACT Signs Up to New Charities Regulator' (Joint Media Release, No 030, 11 March 2013).

regulation by multiple jurisdictions, as Martin discusses, the constitutional limits on the Commonwealth and, in turn, the restrictions on the ACNC are the real causes, rather than the manner in which the ACNC has operated. Further, while the impact on the affected entities should not be ignored, the problem should also be seen in light of the discussion below about the ACNC's ability to accomplish a net reduction in regulation.

Failure to achieve a net reduction in regulation

The introduction of the ACNC regime has resulted in instances of multiple regulators for the same entity, including multiple (potentially overlapping) reporting requirements, as well as partially superimposed governance obligations.[74] Nevertheless, the criticism seems both premature and too late.

It is too late in the sense that much of the initial consultation has taken place and compliance pain for registered charities has already been incurred – although it is certainly not all wasted effort whatever the outcome for the ACNC. Charities have been involved in extensive consultations which resulted in the formation of the ACNC. They have, at least in theory, already reviewed the ACNC regime and decided whether to opt into registration (since registration is voluntary).[75] Many have already confirmed their details for the purposes of the ACNC register. Registered charities have already lodged their first AIS, with much of the information able to be repeated in future years.[76] Admittedly, the initial AIS did not require financial information and this will be a significant change for registered charities which were not previously subject to mandatory financial reporting, as discussed above. However, even in this space, some registered charities that typically fell outside previous reporting regimes, such as many basic religious charities and unincorporated associations, will either remain exempt from having to provide financial information or reports, or will only have to provide summary financial information due to their small size. Registered charities are also already subject to the new governance standards discussed above and, in the author's experience, many have taken at least some steps to confirm their degree of compliance and to update systems to improve compliance.

---

74 For instance, the ACNC governance standards generally apply in addition to the governance obligations imposed by legal form (with exceptions from legal form governance obligations for companies limited by guarantee), or as a result of tax endorsements.

75 Charities that choose not to register miss out on federal government benefits, such as tax concessions.

76 Over 25,000 of 30,000 registered charities with a 31 March deadline have lodged AISs, with 20% voluntarily including financial statements: ACNC, 'Regulator Thanks Charities' (Media Release, 1 April 2014): <http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_072.aspx>.

In addition, given the ACNC has only been operating for a year and a half, the reproof also seems premature. The ACNC has already created or had key involvement in a number of processes to assist in longer-term regulatory reduction. For instance, by seeking feedback and commissioning research to identify precisely what 'red tape' affects the not-for-profit sector, including by way of the recent *Red Tape in the Charity Sector* online survey and the December 2013 forum, *Measuring and Reducing Red Tape in the Not-for-profit Sector*.[77] The ACNC has also established a range of department or sector-specific working groups and projects to investigate targeted regulatory reduction, as well as co-chairing the whole of federal government Removing Not-for-profit Regulatory Duplication Working Group and participating in the inter-jurisdictional Council of Australian Governments Not-for-profit Reform Working Group.[78]

Further, the ACNC has also instigated or enabled more substantive measures, such as the reduction in duplicative reporting for incorporated associations and Indigenous corporations, outlined above. While these examples merely alleviate additional compliance obligations caused by the introduction of the ACNC, some measures do have real potential to lead to a net decrease in duplicated reporting, from the position existing before the commencement of the ACNC. For instance, the adoption of revised Commonwealth grant guidelines that:[79]

- preclude federal government departments from using grant conditions to obtain information already collected by other federal agencies or regulators, like the ACNC; and,
- restrict the circumstances in which financial acquittal conditions can be imposed for entities already lodging audited financial reports with the ACNC.

The procedural measures also hold significant promise in this respect. Moreover, even though one of the key difficulties is that much of the regulatory overlap is between federal and state/territory or local government bodies, as noted above, the existence of the ACNC has already led South Australia and the Australian Capital Territory to propose alignment of their associations' incorporation and charitable fundraising regulatory regimes with the ACNC regime. In addition, the majority of the not-for-profit sector is very supportive of the continued existence of the ACNC and of its potential to drive a net decrease in regulation.[80]

---

77 ACNC, 2014 (n 72).

78 ACNC, 2013 (n 72) 56-62.

79 Department of Finance and Deregulation (Cth), *Commonwealth Grant Guidelines* (2nd ed, 2013) 25 [4.7].

80 Ann O'Connell et al (n 24); Pro Bono Australia, 2013 (n 25) 5.

Accordingly, as much of the additional ACNC regulation has already been implemented and the short-term costs incurred, it makes no sense to abolish the ACNC before it has had a reasonable opportunity to explore the possibility of securing longer term rewards, in the form of more harmonised regulation. This point is supported by the fact that any regulatory reversion from the ACNC to the ATO (and other regulators) will require some transitional arrangements, with associated compliance and administration costs. This further round of costs is likely to be augmented if abolishing the ACNC will not mean returning to the regulatory position in precisely the same form as it existed immediately before the commencement of the ACNC. This is likely to be the case, since the Coalition is contemplating making at least some changes.

Change to the form of the amendments?

The discussion above of the implications of reform and of the grounds for abolition of the ACNC suggests that it will not be easy for the Coalition to simply abolish the regulator. Indeed, further consultations have recently taken place on the form of arrangements to replace the ACNC, albeit that the relevant Department of Social Services *Options Paper* resolutely presses for the ACNC's abolition.[81] That the government is seeking further feedback indicates that some aspects of the ACNC regime may survive. Moreover, the unpalatable single option presented for reporting (the maintenance of an individual website by all charities) and the expressed desire for a 'proportionate compliance framework' bolster the likelihood of at least a limited survival.

Conclusion

The proposed 'un-reform' of abolishing the ACNC and reverting to a state of affairs approximating the previous arrangements would likely reinstate the ATO as the default (but not sole) federal decision-maker for charitable status and regulator for charities and would recreate perceptions of a conflict of interest. Such a change appears very likely to annihilate the possibility of unified and harmonised administration of the definition of 'charity'. Due to the ATO's limited range of enforcement sanctions, it would also severely restrict proportionate and hence responsive, regulation. Further, even if ATO regulation is viewed in conjunction with regulation based on legal form or fundraising, significant regulatory gaps will remain, especially for charitable trusts. This provides serious challenges to good governance.

In addition, the fate of the ACNC public register is uncertain, although it appears

81 Department of Social Services (Cth) (n 17).

increasingly precarious. Even if the register remains in existence and responsibility is transferred to another agency, such as the ATO, abolition of the ACNC would be likely to significantly curtail the level of information maintained on the register and therefore a reduction in the usefulness of the register over time. This would also make it difficult for non-government entities along the lines of 'Charity Navigator' or 'GuideStar', to provide data equivalent to the register. Ultimately this would be likely to mean the loss of a single source of free and deep information for researchers, donors and potential recipients of benefits. Less information collection would, however, create some compliance savings for charities, especially for those that were not previously required to regularly report to a regulator.

There are significant detriments to abolishing the ACNC. This makes it surprising that the reasons provided for the 'un-reform' are not more compelling. Fiona Martin has called for closer scrutiny of these grounds in her paper in this volume. This article has conducted an examination of the reasons and found that, of the three key problems identified, only the complaint of regulatory duplication for charities actively regulated by other regulators (such as many incorporated associations and Indigenous corporations) appears justified. However, even this concern is overstated and must be considered in light of the ACNC's potential to drive the longer-term goal of a net reduction in regulation for charities. These longer-term benefits provide a very strong justification for retaining the ACNC, or a scaled-back version of the regulator. Charities have already dedicated resources to understanding and complying with the new requirements. Why abolish the ACNC at this stage before seeing whether it will have success? If the Coalition has genuine concerns, then why not introduce a statutory requirement for a review of the ACNC's operations after a sufficient time? In any event, if the ACNC is to be abolished then it is hoped that the proposed Centre for Excellence might adopt the ACNC's co-ordinating and instigating role of championing a reduction in unnecessary regulatory obligations.

Finally, there are significant political and administrative impediments to the termination of the ACNC. The Coalition Government will not control both houses of parliament during this term of government. Further, one of the first orders of business for the Coalition in 2013 was to disband the Office for the Not-for-profit Sector, which was a co-ordinating body for not-for-profit matters at the centre of government. This would appear to have reduced the Federal Government's capacity to unwind implemented reforms such as the ACNC. The two-stage approach to the legislation to abolish the ACNC is testament to this reality, in that the ACNC Repeal Bill does not commence until a subsequent piece of legislation is enacted containing the details of the transitional and replacement arrangements. For the immediate future then, it appears that Australia will continue to retain its charities regulator, but subject to the uncertainty for staff and all members of the

regulatory community and the broader not-for-profit sector caused by the on-going threat of imminent demise.