

What the Future hold for Not-for-profit Regulatory Change (Part 3)



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The final of our series of three articles on “[What the Future Holds for Not-for-profit Regulatory Change](#)” explores the topic of effective regulation and the powers of the [Australian Charities and Not-for-profits Commission \(ACNC\)](#). The [Federal Government response](#) to the ACNC Review highlighted the following three areas which have been covered in this series of articles:

- **Effective regulation** - enabling swifter decision making through expanded delegation powers, enhancing ACNC powers to detect breaches of governance standards and deal with misconduct and prioritising education and research.
- **Reducing red tape** - amending reporting thresholds for registered charities, streamlining regulatory requirements, simplifying reporting for small entities, and sharing data on charities between Commonwealth agencies.
- **Strengthening trust** - mandated disclosure of related party transactions and, for large charities, aggregated remuneration paid to responsible persons, sharing information on ACNC investigations when it is in the public interest and disqualifying responsible persons who have certain criminal convictions.

Effective Regulation Review Recommendations

The recommendations from the review of the ACNC included a number that related to effective regulation and broadening of the powers of the regulator. The most notable of these are detailed below. It is important to note not all recommendations were supported by the Federal government.



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- Extend the remit to include larger not-for-profits with annual revenue of \$5m or more. Where these not-for-profits are not registered charities the review recommended they be invited to register under the ACNC Act and that this should be required for those organisations to access Commonwealth tax concessions.
- Relaxation of secrecy provisions that have prevented the ACNC from informing the public of investigations into charities and not-for-profits.
- Expansion of the ACNC Act to conform with the legislative model adopted in the United Kingdom where the functions and duties of the regulator correspond with the objects.
- The powers of the ACNC Commissioner to replace a responsible person should be removed.
- The ACNC Act should be amended to give the Commissioner broader powers to delegate functions or powers to staff to facilitate more effective decision making.
- The ACNC Advisory Board should be empowered to provide advice to the Minister or the Commissioner on its own initiative and engage directly with the sector.
- ACNC Governance standard 3 should be repealed and standard 5 should be amended to remove the word 'perceived'. This relates to the stipulation that a charity must not commit a serious offence under Australian laws and conflicts of interest.
- [The Corporations Act 2001 \(Cth\)](#) should be amended to 'turn on' the duties and other provisions previously 'turned off'. The review felt this would reduce the ambiguity about whether directors' duties for charitable companies applied and strengthen the rights of members to act against directors in the case of a breach of duties.
- The review recommended the ACNC can request details on the criminal records of responsible persons to allow it to detect unlawful behaviour and contraventions to the ACNC Act.
- The review recommended the ACNC be well resourced to enforce the law and prevent the misapplication of charitable assets.
- The review recommended the ACNC work with other government agencies, such as the [Australian Transaction Reports and Analysis Centre \(AUSTRAC\)](#) which is responsible for detecting, deterring and disrupting criminal abuse of the financial system including Anti-Money Laundering and Counter-Terrorism Financing.

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- The ACNC should be resourced to enhance its access to criminal intelligence databases such as the [Australian Criminal Intelligence Commission \(ACIC\)](#) to enhance the ACNC's capacity to detect charities with links to criminal behaviour and terrorism.
- The ACNC should be able to disqualify a person from being a responsible person if they have a conviction for terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs or a child sexual offence under Commonwealth, state or territory law.
- Responsibility for the incorporation and all aspects of the regulation of companies, such as companies limited by guarantee registered, which are registered entities should be transferred from the Australian Securities and Investments Commission (ASIC) to the ACNC except for criminal offences.

We will now explore some of the key recommendations which were supported by the Federal government and therefore will likely be implemented.

Responsible Persons

The recommendation to remove the Commissioner's powers to replace a responsible person was not supported by the government as they believe it is important to allow the ACNC to act quickly to prevent the misuse of charitable assets. The government stated they will mandate additional criteria the Commissioner will need to consider when making such a decision. This includes appeal rights to enhance protections for anyone affected by a such a decision.

Authorising the ACNC to request details about criminal records of responsible persons and being able to disqualify individuals if they have a terrorism, money laundering, fraud, illicit drug importation or distribution or child sexual offence conviction has been supported.

The Government has proposed a consultation paper to be released regarding the 'turning on' he duties and other provision in the Corporations Act 2001 (Cth) about whether directors' duties for charitable companies applied and strengthen the rights of members to take action against directors in the case of a breach of duties.

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Secrecy Provisions

Under current legislation the ACNC is not permitted to advise the public any information, such as findings from an investigation or reasons a charity's registration has been revoked. The ACNC can publicise when it revokes a charity's registration but nothing more. The recommended reforms, supported by the Federal government, will allow the ACNC Commissioner to have the discretion to disclose findings from investigations when it is in the public interest. Lifting the secrecy provisions is aimed at improving public confidence that the ACNC is actively pursuing misconduct and to provide other charities with guidance to ensure they are complying with their obligations.

Working with other Government Agencies

Reducing the potential for financial crime is a key focus globally and as such the review recommendation for the ACNC to work with other government agencies was supported by the Federal government. There are two primary agencies seen as the ones the ACNC will actively partner with being the Australian Criminal Intelligence Commission (ACIC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC). The ACNC has already been listed as a designated agency under the relevant Act and given direct access to AUSTRAC information.

As mentioned above AUSTRAC's primary remit is to detect, deter and disrupt criminal abuse of the financial system including anti-money laundering and counter-terrorism financing. The ACIC is the conduit for sharing of criminal information and intelligence between state, territory, and Commonwealth law enforcement agencies.



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Resourcing to Enforce the Law

The Federal government has provided an additional \$1.1 million for the ACNC to issue external conduct standards under the ACNC Act. The standards will give the ACNC a much stronger oversight of charities' and not-for-profits' overseas activities and finances. This is aimed at addressing the risks associated with overseas philanthropy such as money laundering and financing of terrorism activities.

A further \$5.7 million was allocated to the ACNC and the Australian Tax Office (ATO) to enable heightened governance as well as to reduce complexity and improve the integrity of the deductible gift recipient (DGR) framework. The funding will be used by both the ACNC and ATO to conduct additional reviews of DGRs' eligibility to ensure tax concessions remain targeted to only those entities that are entitled.

The additional funding is aimed at ensuring the ACNC has the resources needed to appropriately regulate the sector. Part of the funding is to enable the ACNC to conduct litigation where it is deemed appropriate. The ACNC has stated they are "now properly resourced, should it be necessary to clarify any questions of charity law or regulation through appeals".

Summary

The reforms recommended have largely been supported by the Federal government and many already put in place. Lifting the ability for the ACNC to properly regulate the sector will require all charities and not-for-profits to lift their governance and compliance activities. [The Impact Suite's Social Impact Rating](#) is a great way to check how your charity is performing and identify areas of improvement.

The key goal of the ACNC is to improve transparency and lift public trust after several high-profile incidents which has tarnished the sector as a whole.

To get your organisation's [Social Impact Rating](#) go [here](#).



The Impact Suite was founded with a view that all social impact organisations, irrespective of their location or size, should have access to the best experts and ideas in order to maximise their impact for our community. Too many organisations struggle with limited resources, meanwhile stakeholders and donors tend to focus on simple measures like 'administrative expenses' while missing the value of impact. With founders from all aspects within the sector including charity founders, board/committee members, consultants, technology developers, and analysts - we have developed a proprietary Social Impact Rating which focuses on governance aspects and social impact of Australian charities.

The Impact Suite's proprietary Social Impact Rating is only for Australian Charities and other social impact organisations. We have extensively researched and consider 5 key factors important to an organisation's sustainability and effectiveness in order for them to make a difference in our community. The Impact Suite has taken the symbolism of the lotus flower and used it as a vital measure of an organisation's sustainability with each petal representing the 5 key success factors - Purpose, People, Process, Impact and Review. The Social Impact Rating helps anyone instantly identify good organisations.

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