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# AUSTRALIA – TWO POLITICAL NARRATIVES AND ONE CHARITY REGULATOR CAUGHT IN THE MIDDLE.

PROFESSOR MYLES MCGREGOR-LOWNDES\*

## INTRODUCTION

After nearly two decades of public discussion and government reports, Australia established a national specialist charity regulator in 2012, the Australian Charities and Not-for-profits Commission (“ACNC”), but a change of government had Parliament considering a bill to repeal the regulator less than two years later.<sup>1</sup> The narrative for legal and regulatory reform steadily developed a theme of reducing the administrative burden on charities, but this discourse was not accepted by the parliamentary opposition parties at the time or by some discrete parts of the charity sector. They argued that the establishment of the specialist regulator was an increased impost on charities, many of which would be publicly filing an annual return with financials for the first time, something which was not part of previous taxation exemption regulation. Further, the opposition parties claimed it was evidence of an unhealthy extension of state power into civil society. They acknowledged chaotic and duplicative regulation at the state level, but argued this was a matter for those jurisdictions to handle, and the Commonwealth should not trespass on their responsibilities. The benefits usually advanced for having a national regulator, such as increased accountability and transparency, promoting enhanced public support, oversight of taxation concessions and anti-terrorist funding measures, were a second order to red tape reduction in the political narrative.

Without the support of minor parties in the Senate, the present government has been unable to progress the disestablishment of the ACNC. Two government inquiries commissioned by the current government and a Senate committee report concerning the fate of the ACNC have clearly

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1. *Australian Charities and Not-for-profits Commission Act 2012* (Cth); Australian Charities and Not-for-profits Commission (Repeal) (No.1) Bill 2014 (Cth).

indicated the depth of support for its continuation in the charity sector.<sup>2</sup> In the meantime, the ACNC has had the unenviable task of fulfilling its statutory functions without the support of the government and having some minority, but powerful, voices within the sector advocating for its abolition. This has destabilized its attempts to create a public register of charities and its work towards other statutory objects. It has been a regulator under siege!

This article examines how, in an environment that all sides agreed was overburdened with unnecessary and duplicative red tape, the charities regulator instituted with a clear statutory objective to reduce regulatory obligations could instead be seen as part of the problem. It seeks to understand this paradoxical position by first tracing the discourse about regulatory obligations through nearly twenty years of public debate and government reports on the issue of charity reform. Second, it examines evidence-based research as to the actual nature of the regulatory burden faced by nonprofit organizations both before and after the ACNC establishment. Thirdly, it examines how the current government has proposed to approach the issues at hand. Finally, some observations are made to explain the apparent paradox.

## II. THE NARRATIVE OF ACNC ESTABLISHMENT AND RED TAPE

A report on charitable organizations by the Industry Commission, released in 1995, was the first of a series of reports over the next twenty years that made recommendations about regulatory issues of the sector.<sup>3</sup> The Industry Commission was an independent government research body with a strong economic focus, given briefs by the Commonwealth government often with input from state and territory governments, to assess industry policy reform. The brief on charitable organizations was one of the first outside the manufacturing, infrastructure and utility industries for the Commission (although now, as the Productivity Commission, it reports regularly on social welfare issues).

2. AUSTRALIAN DEP'T OF SOC. SERVS., AUSTRALIA'S CHARITIES AND NOT-FOR-PROFITS CONSULTATION REPORT 8 (2014); CIVIL SOC'Y, NAT'L CTR. FOR EXCELLENCE, FINAL REPORT: RECOMMENDATIONS 4 (2014) (Austl.) [hereinafter CIVIL SOCIETY FINAL REPORT]; SENATE ECONS. LEGIS. COMM., AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION (REPEAL) (No.1) BILL (2014).

3. See INDUS. COMM'N, CHARITABLE ORGANISATIONS IN AUSTRALIA xv (1995) (Austl.); see also, e.g., IAN SHEPPARD ET AL., REPORT OF THE INQUIRY INTO THE DEFINITION OF CHARITIES AND RELATED ORGANISATIONS (2001) (Austl.); SENATE STANDING COMM. ON ECONS., DISCLOSURE REGIMES FOR CHARITIES AND NOT-FOR-PROFIT ORGANISATIONS (2008) (Austl.); VICTORIA ST. SERVS. AUTH., REVIEW OF NOT-FOR-PROFIT REGULATION: FINAL REPORT xi (2007) (Austl.); PRODUCTIVITY COMM'N, CONTRIBUTION OF THE NOT-FOR-PROFIT SECTOR: RESEARCH REPORT xli (2010) (Austl.); AUSTRALIA'S FUTURE TAX SYS. REVIEW PANEL, REPORT TO THE TREASURER v (2009); SENATE ECONS. LEGIS. COMM., TAX LAWS AMENDMENT (PUBLIC BENEFIT TEST) BILL (2010) (Austl.).

The terms of reference do not allude to regulatory costs and were focused on the efficiency of charitable service delivery. Submissions received from the sector described numerous instances of overlapping regulation between jurisdictions in relation to association incorporation, fundraising, tax concessions and the cost of duplicative information requirements of government funders. It also noted that Australia's tax agency, the Australian Taxation Office ("ATO"), did not receive any annual report or financial statements from tax concession charities, and most charities self-assessed their own concessional taxation status. It is difficult in relation to charity tax concessions to conceive of a lower red tape regime. The final report accepted the sector's assertions that government administration should be streamlined in regulating state-based tax concessions, nonprofit corporate structures and fundraising, as well as reporting to both state and federal government funders. While not identifying specific reforms, it recommended:

- Harmonizing inconsistent taxation definition concessions between federal and state jurisdictions;<sup>4</sup>
- Harmonizing fundraising regulation;<sup>5</sup>
- Creating accounting standards for the nonprofit sector;<sup>6</sup>
- Creating a specific form of Commonwealth incorporation for charities that would centralize public financial reporting;<sup>7</sup> and
- Increasing the ATO's role as a central regulator.<sup>8</sup>

The Commission's recommendations were not implemented, as its publication coincided with a change of government, and the recommendations were not part of the new conservative government's policy agenda.

It was not until a new Commonwealth government decided to introduce a broad-based goods and services tax ("GST") in 1999 that red tape was placed back on to the political agenda. Charities faced the transition from being completely exempt from Wholesale Sales Tax to a limited concession regime based upon the character of the specific transaction.<sup>9</sup> This tax reform also established a national register of organizations subject to the GST. Previously, concessional nonprofit organizations had been allowed to self-assess their status without any formal registration or annual

4. CHARITABLE ORGANISATIONS IN AUSTRALIA, *supra* note 3, at 307.

5. *Id.* at 235.

6. *Id.* at 216.

7. *Id.* at 218, 244.

8. *Id.* at 151, 309.

9. Myles McGregor-Lowndes & Denise Conroy, *The GST Regulation Impact Statement and Nonprofit Organisations*, 5 J. AUSTL. TAX'N 413, 413-14 (2002).

returns. In order to pass the reform legislation introducing the GST, minor party senators, who held the balance of power, required the government to hold an inquiry about the suitability of concessional charity definitions. The inquiry, known as the Charity Definition Inquiry (“CDI”), mainly recommended a codification of the common law definition of charity and devoted a chapter to administering the definition.<sup>10</sup> Many submissions to the inquiry had given examples of overlaps in the administration of the definitions between the Commonwealth and the states and suggested an independent administrative body or a specialist body within the ATO as a single point of decision-making.<sup>11</sup> There were contrary views, and the report noted that:

A number of submissions strongly opposed the establishment of a new body to oversee the sector. The Asthma Foundation of Queensland argued that the charitable sector does not need any more regulation, claiming that existing State and Commonwealth legislation, if administered effectively and diligently, already contains sufficient regulatory powers. The Foundation did not support the establishment of an independent Charity Commission unless it would be able to support and facilitate the work of charities and reduce their workload. It argued also that the States would be unlikely to cede their existing authority to the Commonwealth so as to enable a new Commission effectively to bring uniformity to the sector.<sup>12</sup>

This was supported by the Catholic Church, which argued against an independent charity commission but suggested a specialist advisory body to make recommendations about charitable status.<sup>13</sup> The CDI report made recommendations for a national uniform charity definition with a regulator independent of the ATO with a sector education function.<sup>14</sup>

After receiving the recommendations of the CDI Inquiry Report, the federal government announced in 2003 that it intended to legislate a statutory definition of charity for all federal purposes, including income tax exemption, and requested that the Board of Taxation prepare a report on a draft bill, which was released for consultation in May 2004.<sup>15</sup> The Board of Taxation is a body independent of government, which reviews potential taxation legislation and advises the government on improving its design and effectiveness. The Board was to consult, not about the announced poli-

10. SHEPPARD ET AL., *supra* note 3, at 275-94.

11. *Id.* at 282.

12. *Id.* at 280.

13. *Id.* at 283.

14. *Id.* at 291, 294, Recommendations 24, 25, 26, 27.

15. Media Release, Peter Costello, Treasurer, Commonwealth of Australia, No. 059: Release of Charities Definition Exposure Draft (July 22, 2003), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2003/059.htm&pageID=003&min=phc&Year=2003&DocType=0>.

cy of the government, but about its workability as enacted in the draft legislation. The Board drew attention to possible defects in the draft and reported widespread opposition to the bill as presented amongst charities and their professional advisors.<sup>16</sup> The bill differed from the CDI recommendations in some key areas, which made many in the sector uncomfortable.<sup>17</sup> The Board devoted a short chapter of its report to the administrative burden of the proposed bill.<sup>18</sup> While finding it difficult to identify any extra administrative burden as a result of the bill's alteration of the definitional boundary of charity, it was a notable topic in the discussions the Board had with sector participants. It recommended that the extent of the administrative burden be established through research, and a post-implementation review be considered.<sup>19</sup> The Treasurer finally brought a much shorter, revised bill before Parliament to amend the definition of charity in a very limited way, ignoring most of the CDI recommendations.<sup>20</sup> Active charity reform went into abeyance until the election of a new federal government in 2007, but the nonprofit red tape narrative continued to develop during this period.

Three influences can be identified that assisted 'red tape' in gradually becoming a dominant nonprofit reform narrative in the sector. First, isomorphic pressures have played a part, as the business sector had successfully campaigned on red tape reduction to both sides of politics since 2000. The tangible benefits to the business sector—from significant industry reforms, to nationalizing or harmonizing previously inconsistent state regulations—were significant. Corporate law, financial institution and securities law, national building construction codes, uniform competition and consumer law, and standard business reporting ("SBR") were all red tape cost savers for businesses.<sup>21</sup> For example, SBR streamlined business-to-government reporting by removing duplicate information from government forms, using business software to fill forms automatically with relevant information,<sup>22</sup> providing an electronic interface to report to state and feder-

16. BD. OF TAXATION, CONSULTATION ON THE DEFINITION OF A CHARITY (2003) (Austl.), [http://taxboard.gov.au/files/2015/07/definition\\_of\\_a\\_charity\\_report.pdf](http://taxboard.gov.au/files/2015/07/definition_of_a_charity_report.pdf) [hereinafter BOARD OF TAXATION CONSULTATION].

17. These key concerns included unrelated business income, public benefit scope limitations and limits on advocacy.

18. BOARD OF TAXATION CONSULTATION, *supra* note 16, at 45–46.

19. *Id.* at 46, Recommendation 8.12.

20. *See Extension of Charitable Purpose Act 2004* (Cth) (Austl.).

21. *A Seamless National Economy*, COUNCIL OF AUSTRALIAN GOVERNMENTS (Dec. 9, 2015), [http://www.coag.gov.au/a\\_seamless\\_national\\_economy](http://www.coag.gov.au/a_seamless_national_economy).

22. David Henderson et al., *Understanding the Intention to Adopt XBRL: An Environmental Perspective*, 8 J. EMERGING TECHS. ACCT. 7 (2011); Denise G. Amrhein et al., *REA and XBRL GL: Synergies for the 21st Century Business Reporting System*, 9 INT'L J. DIGITAL ACCT. RES. 127, 128 (2009).

al agencies directly from accounting software, and providing a secure single sign-on for online users.<sup>23</sup> The Productivity Commission estimates \$500 million in potential benefits from this reform over nine years.<sup>24</sup> Few of these reforms benefited nonprofit organizations directly as they were not included in the terms of reference, but they recognized the significant benefits won by business interests.

Second, there was recognition that red tape reviews established in the United Kingdom and Europe included the nonprofit sector in their remit, unlike Australia.<sup>25</sup> The UK's 2005 Better Regulation Task Force report asserted that "[t]oo many third sector organisations are still stuck with unwieldy structures and onerous reporting requirements."<sup>26</sup> On the announcement of the resulting bill in 2006, HM Treasury and UK Cabinet Office explained that they were aiming to "measure how much red tape costs businesses and voluntary organisations so we can cut it."<sup>27</sup> As a result, as part of the cross-government initiative, the Charity Commission of England and Wales had a target of a twenty-five percent reduction in administrative burdens placed on charities by 2010, with its main focus being areas of accounting and reporting.<sup>28</sup>

Third, governments discovered the call for red tape reduction to be politically advantageous. Few oppose the reduction of red tape, and it also allowed these governments to reform their public service administration with an eye on costs. Contracting the delivery of community services to nonprofit organizations was rapidly increasing with government reports identifying significant efficiencies being available through administrative reforms.<sup>29</sup> Some state governments included nonprofit organizations in

23. STANDARD BUS. REPORTING, <http://www.sbr.gov.au> (last visited Feb. 10, 2015).

24. PRODUCTIVITY COMM'N, IMPACTS OF COAG REFORMS: BUSINESS REGULATION AND VET 13 (2012) (Austl.).

25. NAT'L AUDIT OFFICE, WORKING WITH THE THIRD SECTOR 11 (2005) (UK); HOUSE OF COMMONS COMM. OF PUB. ACCOUNTS, WORKING WITH THE VOLUNTARY SECTOR 7 (2006) (UK); ANDRÉ F.M. NIJSEN & NICO VELLINGA, A MODEL TO MEASURE THE ADMINISTRATIVE BURDEN OF BUSINESSES 32 (2002) (UK).

26. BETTER REGULATION TASK FORCE, CABINET OFFICE, BETTER REGULATION FOR CIVIL SOCIETY: MAKING LIFE EASIER FOR THOSE WHO HELP OTHERS (2005) (UK).

27. *New Bill to Enable Delivery of Swift and Efficient Regulatory Reform to Cut Red Tape*, CABINET OFFICE (Jan. 11, 2006), <http://webarchive.nationalarchives.gov.uk/20061211100131/http://www.cabinetoffice.gov.uk/regulation/news/2006/060111.asp?ID=134>.

28. CHARITY COMM'N FOR ENG. & WALES, CHARITY COMMISSION ANNUAL REPORT 2006–07 3 (2007).

29. CHARITABLE ORGANISATIONS IN AUSTRALIA, *supra* note 3; QUEENSLAND AUDIT OFFICE, AUDITOR-GENERAL OF QUEENSLAND, REPORT NO. 6, 1998–99: REVIEW OF THE ADMINISTRATION OF GRANTS AND SUBSIDIES (1999) (Austl.); QUEENSLAND AUDIT OFFICE, AUDITOR-GENERAL OF QUEENSLAND, REPORT TO PARLIAMENT NO. 2 FOR 2007: RESULTS OF PERFORMANCE MANAGEMENT SYSTEMS AUDIT OF MANAGEMENT OF FUNDING TO NON-GOVERNMENT ORGANISATIONS 18 (2007) (Austl.).

their red tape reduction programs.<sup>30</sup> For example, in 2005, the Department for Victorian Communities commissioned an options paper on reforming nonprofit regulation with an emphasis on compliance burdens.<sup>31</sup> As a consequence, in the following year, the Victorian government included the nonprofit sector in its target for reduction of regulatory burdens “by 15 percent [in] three years and [by] 25 percent over five years.”<sup>32</sup>

The incoming Commonwealth government in 2007 (Australian Labor Party) was elected on a platform of charity reform and charged the Productivity Commission with revisiting the reform of charity.<sup>33</sup> While that inquiry was being initiated, the Senate held an inquiry into the disclosure regimes of charities<sup>34</sup> after an online consumer affairs magazine demonstrated lack of transparency and comparability of financial information of a selection of household-name overseas aid charities.<sup>35</sup> The Senate inquiry supported the CDI report in relation to a national regulator but looked further into the annual reporting of organizations. Its concession to increased paperwork burden on organizations was to suggest that it should be proportionate, with three tiers of reporting based on revenue of the organizations.<sup>36</sup>

The Productivity Commission inquiry was finally established several months later in 2009 and reported in 2010 with a detailed reform blueprint to establish an independent charity regulator, and to introduce a new statutory definition of charity.<sup>37</sup> Many submissions pointed to the benefits that for-profit businesses had gained from reforms over recent years, where the focus was on microeconomic reforms to corporate and tax regulation as well as mutual recognition of business licensing between states and territories.<sup>38</sup> Using the phrase “one-stop shop,” the Commission recommended that the multiple reporting requirements, few of which were proportionate to the size of organizations or regulatory risk, be streamlined in a new regulatory framework with a central regulator.<sup>39</sup> The new regulatory body

30. QUEENSLAND DEP'T OF CMTYS. & DISABILITY SERVS., STRENGTHENING NON-GOVERNMENT ORGANISATIONS REPORT (2005) (Austl.).

31. ALLEN CONSULTING GRP., IMPROVING NOT-FOR-PROFIT LAW AND REGULATION: OPTIONS PAPER (2006) (Austl.) (prepared for the Department of Victorian Communities).

32. VICTORIAN DEP'T OF TREASURY & FIN., REDUCING THE REGULATORY BURDEN 7 (2008) (Austl.).

33. AUSTRALIAN LABOR PARTY, THE SOCIAL INCLUSION AGENDA 11 (2007).

34. See DISCLOSURE REGIMES FOR CHARITIES AND NOT-FOR-PROFIT ORGANISATIONS, *supra* note 3, at 6.

35. *Charities*, CHOICE MAG., Mar. 2008.

36. DISCLOSURE REGIMES FOR CHARITIES AND NOT-FOR-PROFIT ORGANISATIONS, *supra* note 3, at 2–3.

37. PRODUCTIVITY COMM'N, *supra* note 3, at xliii, xliv.

38. PILCHCONNECT, SUBMISSION TO THE PRODUCTIVITY COMMISSION'S STUDY INTO AUSTRALIA'S NOT-FOR-PROFIT SECTOR 3, 7 (2009) (Austl.).

39. PRODUCTIVITY COMM'N, *supra* note 3, at xliii.

would replace “equivalent functions in existing regulators” and provide a “single portal for the lodgement, maintenance and dissemination of corporate and financial information proportionate to size and risk.”<sup>40</sup> This portal would also be the single source of truth for government transactions with the sector such as licensing and contracting for community services, reducing duplication through “report once, use often.”<sup>41</sup>

For the first time in any of the reports about the regulatory structure of the Australian nonprofit sector, the Commission identified that the administration costs of government funding of the sector to perform its role of community service provision were significant and considerable efficiencies could be effected.<sup>42</sup> While it made a raft of suggestions for governments of all jurisdictions to reduce these costs for themselves and their nonprofit partners, it also proposed a central repository of corporate information about organizations to eliminate duplication both in filing by the sector and assessment by different government agencies.

The submissions largely reflected this view. The Catholic Church Bishops’ Conference did not mention the issue of a specialist charity regulator but instead made a case for a tiered regulatory schema that would be minimal for small parish organizations.<sup>43</sup> On the other hand, the Catholic health and welfare organizations, not including Catholic hospitals, that made submissions saw the benefit of streamlined regulation for themselves and their clients.<sup>44</sup> The trade body representing most of Australia’s professional charitable trustees wrote:

In the charitable area, inconsistent cross-jurisdictional regulatory requirements add unnecessarily to costs and reduce the funds available to target recipients. As noted by the Senate Economics Committee report, greater efficiency in the NFP sector would be achieved by initiatives such as:

- [m]oving to a national approach to regulation by replacing the various pieces of inconsistent regional legislation (eg: in respect of fundraising) with one piece of Commonwealth legislation, and a single national regulator.
- [d]eveloping a specific financial reporting regime for NFPs.<sup>45</sup>

40. *Id.* at xxvi.

41. *Id.* at 108.

42. *Id.* at 291-96.

43. AUSTRALIAN CATHOLIC BISHOPS CONFERENCE, SUBMISSION FROM THE AUSTRALIAN CATHOLIC BISHOPS CONFERENCE TO PRODUCTIVITY COMMISSION STUDY OF THE CONTRIBUTION OF THE NOT FOR PROFIT SECTOR 8 (2009).

44. CATHOLIC SOC. SERV. AUSTRALIA, SUBMISSION TO THE PRODUCTIVITY COMMISSION STUDY INTO THE CONTRIBUTION OF AUSTRALIA’S NOT FOR PROFIT SECTOR 13 (2009).

45. Letter from Ross Ellis, Exec. Dir., Tr. Corps. Ass’n of Austl., to Productivity Comm’n (May 29, 2009) (on file with Australian Government Productivity Commission).

The Australian Labor Party's 2010 election campaign platform included a scoping study for a "one-stop shop" nonprofit regulator and "greater harmonisation and simplification between the Commonwealth," and state and territory governments on nonprofit sector issues, including regulation.<sup>46</sup> On its re-election, the Treasury was tasked with preparing a scoping study in consultation with the sector. It set out the goals of the regulation with a clear red tape reduction agenda to:

- place minimal costs on NFPs to allow better direction of NFP resources to philanthropic objectives;
- remove current regulatory duplication;
- streamline requirements, including reporting, so as to provide consistency and minimize compliance costs;
- provide a "one-stop shop" for NFP entities, to assist all NFP entities to more easily access information that helps them understand and comply with their regulatory obligations;
- be simple, transparent and flexible;
- provide NFP entities with certainty as to their rights and responsibilities; and
- be proportional to the size and complexity of NFP entities, and to the public monies and risks associated with NFP entities.<sup>47</sup>

The final report found agreement with these goals with only ten out of 161 submissions offering a different view, largely concerned with the impact of changes to regulation of certain types of entities, such as some religious organizations.<sup>48</sup> The report warned that full implementation of a national regulator was dependent on the cooperation of the states and territories.<sup>49</sup>

The bill to establish a national regulator, the Australian Charities and Not-for-Profits Commission Bill 2012 ("ACNC Bill"), was introduced after lengthy public consultation on several draft bills. The government relented to pressure from the sector to add a third object to the ACNC Bill, to promote the reduction of unnecessary regulatory obligations on the nonprofit sector.<sup>50</sup> The government's narrative surrounding the bill was liberally

46. AUSTRALIAN GOVERNMENT DEPARTMENT OF THE PRIME MINISTER & CABINET, RECORD OF ELECTION COMMITMENTS 2010: BRIEF TO THE PRIME MINISTER, THE HONOURABLE JULIA GILLARD MP 8-5 (2010).

47. AUSTRALIAN GOVERNMENT, TREASURY, ESTABLISHING A REGULATOR FOR THE NOT-FOR-PROFIT SECTOR 18 (2011), [http://ris.finance.gov.au/files/2011/05/NFP\\_RIS.pdf](http://ris.finance.gov.au/files/2011/05/NFP_RIS.pdf).

48. *Id.* at 14.

49. *Id.* at 20.

50. *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(1)(c).

peppered with the desire to slash red tape.<sup>51</sup> Introducing the bill, the Assistant Treasurer stated that it was “promoting a reduction in unnecessary regulatory obligations on the sector [which was] currently subject to overlapping, inconsistent and duplicative regulatory and reporting arrangements.”<sup>52</sup> The Minister went on to explain that “[t]his will be achieved in part through initiatives such as the Charity Passport and the development of a ‘report-once, use often’ reporting framework, and through the ACNC Commissioner working and cooperating with other government agencies.”<sup>53</sup>

The Opposition party spokesman on the issue, Kevin Andrews (Liberal Party), took a different view in his speech to the parliamentary debate. Firstly, he presented an understanding of civil society where the state, the government and its bureaucratic agencies should be facilitative—“lightly touch” and regulate only to the extent necessary.<sup>54</sup> While acknowledging that the reason given for the bill was “simplifying and easing the regulatory burden,” he argued that it had gone too far without any meaningful agreements from state jurisdictions to be involved,<sup>55</sup> and concluded:

The sector sees it as a heavy-handed, unwarranted interference in the activities of civil society in Australia. In government, we would have a small body that would act as an educative and training body to help lift standards without the overbearing regulatory and enforcement powers that are being proposed in this bill.<sup>56</sup>

This line of argument followed an address by Andrews a couple of months previously about “reversing the nanny state.”<sup>57</sup> He also indicated that while respecting the role of the state governments, the new body should seek to coordinate all levels of government to standardize financial reporting.<sup>58</sup> In the same speech, commitments were given to cutting red tape in relation to government funded community service provision, including streamlining contract administration with a single contract manager for each charity, and to reduce financial, evaluation and client data reporting

51. See, e.g., Press Release, Treasury Dep’t of Austl., New Era for Charities Sector Begins (Dec. 10, 2012) (on file with the Treasury Portfolio Ministers).

52. Commonwealth, *Parliamentary Debates*, House of Representatives, 23 Aug. 2012, 9723 (Austl.).

53. *Id.* at 9725.

54. Commonwealth, *Parliamentary Debates*, House of Representatives, 11 Sept. 2012, 10256 (Austl.).

55. *Id.*

56. *Id.* at 10263.

57. Kevin Andrews, Address to the Menzies Research Ctr., CPA Austl., The Coalition’s Approach to the Charitable Sector: Empowering Civil Society (June 15, 2012) (video available at <https://www.youtube.com/watch?v=ppPplcccov8>).

58. *Id.*

with longer-term funding contracts.<sup>59</sup> In fact, these appear to reflect what the government at the time sought to achieve with the ACNC Bill, with the unstated difference that it was not to be achieved through a central regulatory agency acting as a facilitator.

The ACNC Bill was subject to three separate parliamentary inquiries during its passage, delaying implementation until December 31, 2012.<sup>60</sup> These inquiries added little to the core contest of ideas outlined in the introduction of the bill into Parliament.

### III. THE RED TAPE BURDEN

What was the evidence behind the rhetoric to reduce red tape? The Australian scholarship about the cost of government imposed paperwork is dominated by the analysis of taxation paperwork burdens in a small business context.<sup>61</sup> Paperwork studies (other than tax) have been regularly attempted by industry bodies to measure self-reported attitudes and perceptions of businesses about government paperwork burdens.<sup>62</sup> The taxation compliance literature has concluded for some time that self-report surveys overstate the compliance burdens for small businesses—asking respondents to recall forms that they completed over a period prompts reporting based on the annoyance factor, such as that provoked by taxation forms. Case studies and other benchmarking tools are preferred.<sup>63</sup> When measuring tax compliance, Ian Wallschutzky and Brian Gibson noted that “compared to other problems faced by small business, such as cash flows, poor sales and high costs, compliance costs are not a first-order problem.”<sup>64</sup>

59. *Id.*

60. HOUSE OF REPRESENTATIVES STANDING COMM. ON ECONS., REPORT ON THE EXPOSURE DRAFT OF THE AUSTRALIAN CHARITIES NOT-FOR-PROFITS COMMISSION BILLS 2012 42 (2012); PARLIAMENTARY JOINT COMM. ON CORPS. & FIN. SERVS., INQUIRY INTO THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSIONS BILL 2012, THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMM. (CONSEQUENTIAL AND TRANSITIONAL) BILL 2012, AND THE TAX LAWS AMENDMENT (SPECIAL CONDITIONS FOR NOT-FOR-PROFIT CONCESSIONS) BILL 2012 42 (2012); *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*, PARLIAMENT OF AUSTR., <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4872%22> (last visited Feb. 13, 2016).

61. C. EVANS ET AL., *TAX COMPLIANCE COSTS: A Festschrift for Cedric Sandford* (2001); C. EVANS ET AL., *A REPORT INTO TAXPAYER COSTS OF COMPLIANCE* (1997).

62. Pre-election Survey Series, AUSTRALIAN CHAMBER OF COMMERCE & INDUS. (1996, 1998, 2001, 2004, 2007); BUS. COUNCIL OF AUSTR., *BUSINESS REGULATION: ACTION PLAN FOR FUTURE PROSPERITY 17* (2005).

63. B. Tran-Nam, *Tax Compliance Costs Methodology – A Research Agenda for the Future*, in *TAX COMPLIANCE COSTS: A Festschrift for Cedric Sandford*, *supra* note 61, at 51–68.

64. I. G. Wallschutzky & B. Gibson, *Small Business Cost of Tax Compliance*, 10 AUSTRALIAN TAX F. 511, 541 (1993).

In 2003, Margot Rawsthorne and Sheila Shaver conducted a self-administered mail questionnaire of a sample of 1,800 Australian community service organizations (including nonprofits, for-profits and local government organizations) to measure hours spent per month completing government forms.<sup>65</sup> They found that twenty-six percent of organizations allocated more than eight days a month to client data reporting, with eighteen percent reporting more than eight days spent on financial reporting and ten percent more than eight days on performance reporting.<sup>66</sup> Organizations perceived an increase of paperwork over the previous five years, but the study did not quantify the cost of such paperwork. The results indicated the burden for nonprofits was located in applying for and acquitting government grants, not in reporting for taxation, corporate or fundraising regulation. The reporting burden related to government funding was confirmed by several qualitative studies in 2006–07.<sup>67</sup>

Myles McGregor-Lowndes and Christine Ryan spent a year collecting compliance data by monthly logs from fourteen diverse nonprofit organizations on all paperwork required for local, state and federal governments in 2005.<sup>68</sup> This study quantified the time and cost of government-generated paperwork (such as applying for grants or grant acquittals) for Queensland nonprofit organizations. It found state government grant administration and acquittal created the bulk of the compliance burden, not core entity accountabilities. Government grants paperwork made up eighty-five percent of the time taken for compliance, amounting to 1.58 percent of an organization's total revenue. By contrast, tax compliance associated with being a nonprofit occupied 7.3 percent of compliance time and 0.07 percent of revenue, as it was a periodic function built into an accounting regime.<sup>69</sup> Further, sixty percent of compliance forms were submitted to state government, compared with thirty-four percent to the Commonwealth. They also took the opportunity to ask participants at the initial interview to recall their last average submission and acquittal and estimate the time taken to

65. MARGOT RAWSTHORNE & SHEILA SHAVER, SOC. POL'Y RESEARCH CTR., GOVERNMENT/NON-GOVERNMENT RELATIONS: THE IMPACT OF DEPARTMENT OF FAMILY & COMMUNITY SERVICES CONTRACTUAL REPORTING AND ACCOUNTABILITY REQUIREMENTS 28, 33, 50 (2003) (Wales).

66. *Id.* at 50–51.

67. ALLEN CONSULTING GRP., *supra* note 31; NAT'L CMTY. SERVS. DATA COMM., CUTTING THE RED TAPE: PRELIMINARY PAPER DETAILING THE PROBLEM OF MULTIPLE ENTRY AND REPORTING BY SERVICE PROVIDERS 6 (2006) (Austl.); MORGAN DISNEY & ASSOCS., A RED TAPE EVALUATION IN SELECTED INDIGENOUS COMMUNITIES: FINAL REPORT FOR THE OFFICE OF INDIGENOUS POLICY COORDINATION (2006) (Austl.).

68. Myles McGregor-Lowndes & Christine M. Ryan, *Reducing the Compliance Burden of Non-profit Organisations: Cutting Red Tape*, 68 AUSTL. J. PUB. ADMIN. 21, 25 (2009).

69. *Id.* at 28.

complete them. The average recollected estimate was forty-six hours for one grant submission and fourteen hours for a grant acquittal, whereas the log forms actually recorded 15.17 and 6.04 hours respectively.<sup>70</sup> This confirms the observations of tax compliance scholarship that self-reported surveys can significantly over-estimate compliance burdens.

Another source of regulatory burden is in the legal establishment of a nonprofit enterprise and obtaining the licenses needed to carry on its business. While this is a one-off cost, it can operate as a significant barrier to entry of new organizations. Using the World Bank's barriers to entry of business methodology,<sup>71</sup> McGregor-Lowndes measured start-up times in 2010 for nonprofit enterprises.<sup>72</sup> Incorporation and fundraising licenses in some jurisdictions could take up to seventy-seven business days. Moreover, the Australian National Audit Office ("ANAO") found the average time for the ATO to process applications for deductible gift recipient ("DGR") status was 36.7 days<sup>73</sup> (compared to the ATO's service standard of twenty-eight days). The ANAO's audit noted that some applications requiring assessment by other Commonwealth agencies could take up to two years.<sup>74</sup> At the time, there were 206 applications (7.8%) which had taken over ninety days, and seven (0.3%) had taken more than two years.<sup>75</sup>

As noted above, the political fanfare introducing the ACNC Bills package emphasized slashing red tape. The formal Parliamentary documentation was far more conservative. The Regulatory Impact Statement ("RIS") for the ACNC Bill was unable to provide any definitive regulatory costs, or even estimations.<sup>76</sup> It included statements such as:

Given informational gaps, it is impossible to estimate current compliance costs faced by the sector and changes in compliance costs that would arise due to the implementation of options considered in this regulatory impact statement.<sup>77</sup>

The Explanatory Memorandum for the ACNC Bill clearly indicated:  
Compliance cost impact: The establishment of the ACNC and related regulatory framework could result in minor transitional compliance costs for the registered charities that will come within the scope of

70. *Id.*

71. See Simeon Djankov et al., *The Regulation of Entry*, 117 Q. J. OF ECON. 1 (2002).

72. Myles McGregor-Lowndes, *Are We There Yet?*, in NOT-FOR-PROFIT LAW: THEORETICAL AND COMPARATIVE PERSPECTIVES 363 (Matthew Harding et al. eds., 2014).

73. AUSTRALIAN TAXATION OFFICE, ADMINISTRATION OF DEDUCTIBLE GIFT RECIPIENTS (NON-PROFIT SECTOR) 23 (2011).

74. *Id.* at 26.

75. *Id.* at 82.

76. ESTABLISHING A REGULATOR, *supra* note 47, at 9.

77. *Id.*

the ACNC. However, the introduction of a streamlined regulatory framework for the NFP sector, which includes a 'report-once, use-often' reporting framework, is expected to reduce compliance costs over the medium to long term.<sup>78</sup>

Given the evidence about the origin of administrative burdens and the objective of the ACNC, what was actually achieved by the new regulator? The following observations are surprising.

#### IV. ACNC'S TRACK RECORD ON REDUCING RED TAPE

As the ACNC Act's third object to reduce red tape was an amendment to the bill, no budget appropriation had been made for its cost and the ACNC had to reprioritize its existing budget. In its first year, the ACNC reached out to the charity sector, Commonwealth and state agencies to develop an agenda of red tape reduction. It was able to include some questions in an established annual sector survey to ask charities whether it should focus on aligning obligations between jurisdictions or streamlining Commonwealth obligations. Twice as many charities opted for alignment between jurisdictions, rather than for streamlining Commonwealth obligations.<sup>79</sup>

Under the auspices of the Department of Prime Minister and Cabinet, the ACNC established a forum that brought together all Commonwealth agencies dealing with nonprofit organizations to map the existing regulatory requirements, agree to a demarcation of responsibilities and progress the development of the charity passport. This was a concept to allow agencies real-time digital access to ACNC registry information, eliminating the need for charities to provide core corporate information to multiple agencies—an example of "report once, use often." It would be a single point of verification for the core information about a charity. An early win to entrench this practice was the Commonwealth Grant Guidelines issued by the Department of Finance and Deregulation, which gave directions to all Commonwealth agencies that:

Agency staff should not seek information from grant applicants and grant recipients that is collected by other Commonwealth entities and is available to agency staff. In particular, agency staff must not request information provided to the Australian Charities and Not-

78. Explanatory Memorandum from the House of Representatives on the Australian Charities and Not-for-profits Commission Bill (2012) (on file with the House of Representatives).

79. AUSTRALIAN COUNCIL OF SOC. SERV., COMMUNITY SERVICES SECTOR SURVEY 44 (2013).

for-profits Commission (ACNC) by an organisation regulated by them.<sup>80</sup>

The ACNC also planned to have over twenty-five working parties with government agencies and the sector to discuss streamlining administrative requirements. It established a non-government schools group and a social services group to identify and reduce areas of duplication. Non-government schools, pre-schools and universities already had significant and detailed reporting requirements far beyond that required by the ACNC, and it was keen not to increase the burden for this group, some of which had already expressed displeasure in anticipation of the prospect.

During the first year of the ACNC's operations, the sector experienced a marked improvement in the time taken for charity tax concessions to be granted. Under the new regime, the ACNC decided whether an organization was legally a charity and then forwarded the application for tax approval to the ATO. First, a combined application form was developed with electronic filing. In early 2013, 98.6% of applications to the ACNC and ninety-five percent of applications to the ATO were finalized within fourteen days of filing.<sup>81</sup> This is a significant achievement, given the introduction of a new process and involvement of two offices with different computer systems. Further, it was a significant reduction on times found in the ANAO's review of the ATO's administration of DGRs as outlined above.<sup>82</sup> In its second year, ninety-one percent of applications were finalized within fifteen days, despite the unsettling effects of its threatened demise during this period.<sup>83</sup> In relation to annual statements, for the first statement the ACNC received ninety-nine percent of those required to submit, a remarkable result for a new regulator, working off an outdated register.<sup>84</sup> It had to cull over 9,000 defunct charities from the ATO's records.<sup>85</sup>

The ACNC also streamlined reporting for charities registered with the company regulators—by becoming registered charities, these corporations no longer have corporate law obligations to file annual financial reports or change of address and directors. South Australia and the Australian Capital Territory (state level jurisdictions) have announced their intention to align

80. DEP'T OF FIN. & DEREGULATION, COMMONWEALTH GRANT GUIDELINES 13 (2013) (Austl.); DEP'T OF FIN., AUSTRALIAN GOVERNMENT GRANTS: BRIEFING AND REPORTING, RESOURCE MANAGEMENT GUIDE NO. 412 (2014).

81. Austl. Tax Office & All Church Nominating Comm. Officers, Presentation at ATO Charities Consultative Committee Meeting, at agenda item 5 (Mar. 26, 2013).

82. ADMINISTRATION OF DEDUCTIBLE GIFT RECIPIENTS, *supra* note 73, at 23.

83. AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMM'N, ANNUAL REPORT 2014–15 32 (2015).

84. *Id.* at 45.

85. *Id.* at 2.

their regulatory and reporting arrangements for charities with those of the ACNC, and two other states are considering following suit.<sup>86</sup> As a transitional measure for the first two years, the ACNC agreed to accept the financial returns provided by charities to their own state government regulators (e.g., for incorporation or fundraising regulators).

A year after its establishment, the ACNC commissioned an independent consulting firm to measure the Commonwealth compliance costs of charities registered with it.<sup>87</sup> Using a case study and survey methodology, it was found that the average annual cost burden imposed by the ACNC was \$150 (equal to 0.1 percent of the total annual burden).<sup>88</sup> This is remarkable given it would have included start-up costs for the first annual return that will reduce in future years. On average, the Commonwealth imposed between \$27,000 and \$38,000 worth of red tape annually on the case study charities, with government funding agreements creating the largest burden.<sup>89</sup> State regulatory burden was not measured, but inconsistencies in key regulatory frameworks across the states and territories were reported.<sup>90</sup> Fundraising regulation and incorporated association reporting were the major concerns.

On the change of government in 2013 the ACNC's red tape program was severely hampered by the government's intentions to abolish the organization completely. The ACNC's 2013–14 annual report noted:

[T]he greatest impediment to red tape reduction, has been the uncertainty regarding its future. This has impacted the commitment of some agencies to work with the ACNC on cooperative initiatives to reduce red tape.<sup>91</sup>

All working parties went into abeyance and discussions with the states faltered. The ACNC managed to have consultations with representatives such as the National Catholic Education Commission and the Independent Schools Council of Australia, but only the Commonwealth Attorney-General's Department continued with the charity passport.<sup>92</sup> The incoming Finance Minister issued new grant guidelines that omitted the 2013 direc-

86. AUSTL. CHARITIES AND NOT-FOR-PROFITS COMM'N, *supra* note 83, at 62.

87. ERNST & YOUNG, RESEARCH INTO COMMONWEALTH REGULATORY AND REPORTING BURDENS ON THE CHARITY SECTOR: A REPORT PREPARED FOR THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION 6 (2014).

88. *Id.* at 6. The definition of red tape used by this study was regulatory and reporting “[o]bligations that are deemed excessive, unnecessary or confusing.” *Id.* at 3.

89. *Id.* at 6.

90. *Id.* at 7.

91. AUSTL. CHARITIES AND NOT-FOR-PROFITS COMM'N, ANNUAL REPORT 2013–2014 62 (2014).

92. *Id.* at 66.

tion to agencies specifically not to duplicate ACNC registry information, and instead directed:

Officials should not impose obligations on recipients to provide information which is available from other sources, such as regulatory bodies, the Australian Bureau of Statistics, peak bodies or publicly available material.<sup>93</sup>

Many took this as code to disregard the ACNC which was marked for abolition. Key performance processing times also started to lengthen, as ACNC staff facing retrenchment left for other employment and it became difficult to recruit staff for a doomed agency. At this point, it is appropriate to examine the disestablishment of the ACNC, under the new government's policy to reduce red tape.

## V. DISESTABLISHING THE ACNC

A conservative coalition government came to power in September 2013. Its formal policies announced before the election did not specifically include the abolition of the ACNC, although then shadow minister, Kevin Andrews, made some speeches promising its abolition.<sup>94</sup> The ACNC's demise was not one of the "first 100-days action items" published by the new government. The administrative arrangement continued, with the Assistant Treasurer as the Minister having portfolio responsibility for the ACNC, but the Minister for Social Services, Kevin Andrews, was assigned policy leadership of the nonprofit arena.<sup>95</sup> It was Andrews who drove the disestablishment agenda over the next year until a cabinet re-shuffle removed him from his ministerial post.

The new government had a wide and ambitious red tape reduction policy with the objective of reducing the cost of red tape for businesses, community organizations and individuals by at least \$1 billion per year.<sup>96</sup> The planned implementation included the establishment of portfolio deregulation units and ministerial advisory councils, the conduct of regulatory audits across portfolios, and quantification of the regulatory burden. There was also a planned biannual "bonfire of red tape," with the first Repeal Day in March 2014, removing 10,000 pieces of unnecessary or redundant statu-

93. DEP'T OF FIN., COMMONWEALTH GRANTS RULES AND GUIDELINES 23 (2014) (Austl.).

94. LIBERAL PARTY OF AUSTRALIA, OUR PLAN REAL SOLUTIONS FOR ALL AUSTRALIANS (2013) (election policies are available at <http://www.liberal.org.au/our-policies>); Kevin Andrews, Shadow Cmty. Minister, Address to the National Press Club (Aug. 23, 2013).

95. *Amendments to the Administrative Arrangements Order 2012* (Cth) (Austl.) (text found at <https://www.comlaw.gov.au/Details/C2014Q00003>).

96. OFFICE OF DEREGULATION, <http://www.dpnc.gov.au/office-deregulation> (last visited Feb. 21, 2016).

tory regulation,<sup>97</sup> although subsequent Repeal Bills have had a more difficult passage through parliament.<sup>98</sup>

The Australian Charities and Not-for-profits Commission (Repeal) (No.1) Bill 2014 was introduced into Parliament by the Minister for Social Services in March 2014. This appeared to be the first bill in a two-stage repeal process, as it referred to an Australian Charities and Not-for-profits Commission (Repeal) (No.2) Bill 2014 to be introduced at a later stage (which has not yet happened). The first bill would repeal the ACNC legislation, but would not come into effect until the second bill commenced, with the Minister appointing by regulation any “successor agency.” The second bill would have to deal with amending thirty-seven separate pieces of federal legislation which facilitated a uniform definition of charity for Commonwealth agencies. The Queensland Law Society described the first bill as “somewhat problematic, given the current government’s intention to reduce obsolete legislation on the statute books by adopting a two-stage legislative process.”<sup>99</sup> The rationale in the bill’s Explanatory Memorandum was:

The Government believes it should not be imposing unnecessary regulatory control over the civil sector; rather, Government should work with and support the sector to self-manage. Vesting powers in a separate entity to over[see] and regulate charities runs counter to the deregulation approach, which takes a risk-based approach to over[see]ing the institutions of civil society, whether they are for-profit or not-for-profit.<sup>100</sup>

And,

In the absence of harmonisation across all jurisdictions, the ACNC has added compliance burdens on the charitable sector from additional oversight and reporting obligations.<sup>101</sup>

These assertions were backed up with the claim that 6,000 incorporated associations that are charities are burdened with duplicative reporting due to the ACNC.<sup>102</sup> The claim does not acknowledge that the ACNC Commissioner agreed to accept financial reports filed with state and territo-

97. Josh Frydenberg, *Red Tape That's Choking Us Just Got a Bit Looser*, JOSHFRYDENBERG.COM.AU (Oct. 29, 2014), <http://www.joshfrydenberg.com.au/guest/opinionDetails.aspx?id=155>.

98. Commonwealth, *Parliamentary Debates*, House of Representatives, 12 Nov. 2015, 13014 (Jim Chalmers, MP) (Austl.).

99. Letter from Ian Brown, President, Queensland Law Soc’y, to Chair, Senate Standing Comms. (Apr. 9, 2014) (on file with the Queensland Law Society).

100. Explanatory Memorandum from the House of Representatives, *supra* note 78.

101. *Id.*

102. *Id.*

ry regulators while harmonization progressed,<sup>103</sup> and the ACNC's transitional arrangements with other Commonwealth agencies already receiving detailed annual returns from schools, universities and research bodies. Expecting a worthwhile evaluation of harmonization outcomes within fifteen months of the ACNC commencing is arguably not reasonable, particularly given the uncertainty that the change of government brought with it. Moreover, the ACNC legislation already mandated a review at five years.

As for the immediate red tape savings of the first bill, the Explanatory Memorandum noted that:

Since stage one does not detail the alternative arrangements, there are no direct impacts that can be quantified as costs and benefits faced by the civil sector. As a result, no indicative costings are provided in this RIS.<sup>104</sup>

The new government did not have a majority in the Senate (upper house) and relied upon either the opposition or minor parties and independents to pass legislation. The bill was referred to a Senate committee for consideration. After written and oral submissions, the committee produced a report divided along party lines with dissenting reports.<sup>105</sup> The key issue in the majority report was red tape, with other issues being the excessive powers granted to the ACNC and the suitability of returning responsibility for defining charities to the ATO. The majority report pointed to duplicative reporting for universities, Catholic schools, medical research institutes and trustee companies, all of which had significant reporting obligations with other agencies. On harmonization with state and territory legislation, the majority report stated that “[g]iven the Commonwealth’s limited legislative powers in this area, and the low probability of achieving nationally consistent regulation, the Act should be repealed.”<sup>106</sup> But after noting the progress that the ACNC had made in just fifteen months, it conceded that the “ACNC has shown what can be done when there is a commitment to achieving national harmonisation of charities regulation. Were the bill to pass, another Commonwealth agency . . . could and should build on the work of the ACNC in this area.”<sup>107</sup> And with ACNC transferring some functions to the ATO, the majority commented that “the ATO could learn much from the way the ACNC has interacted with the not-for-profit sec-

103. *Transitional Reporting Arrangements*, AUSTL. CHARITIES & NOT-FOR-PROFITS COMM’N, <http://www.acnc.gov.au/ACNC/Manage/Reporting/ReportTransitional/ACNC/Report/ReportTransitional.aspx?hkey=61d173e0-cabb-4be4-82d5-0bf37fa55c7c> (last visited Feb. 21, 2016).

104. Explanatory Memorandum from the House of Representatives, *supra* note 78.

105. SENATE ECONS. LEGIS. COMM., *supra* note 2, at 1, 31.

106. *Id.* at 18.

107. *Id.* at 20.

tor.”<sup>108</sup> Both dissenting reports supported the retention of the ACNC, praising its impressive achievement in red tape reduction in its very short life and its strong support for its work in the charitable sector.<sup>109</sup>

Phil Saj subjected the majority report, written submissions and oral testimonies to rigorous content analysis.<sup>110</sup> He found that the majority report “ignored the overwhelming consensus view of the sector, its professional advisors, knowledgeable academics and others, in favour of partisan and sectional interests.”<sup>111</sup> Only seven of the 154 written submissions supported the repeal bill and these seven submissions made up “61% of the evidence cited by the majority Committee . . . .”<sup>112</sup> The seven submissions consisted of three stakeholder groups: education, encompassing universities and Catholic schools; health, encompassing Catholic hospitals and medical research institutes; and professional charitable trustees. Education and health charities were already required to provide comprehensive reporting to Commonwealth departments. The ACNC had waived the need for duplicative reporting during the transition, and was working towards a long-term sharing of filed data with other departments in line with its principle of “file once, use often.”

As noted above, the professional charitable trustees with significant management of philanthropic trusts had previously acknowledged the burden of overlapping regulation before the ACNC was established,<sup>113</sup> but now joined another peak body advocating for the ACNC’s abolition. They now claimed that the ACNC would result in an added reporting burden. Some connected this change of attitude to the fact that the group had been accused of “gouging fees” from testamentary charitable trusts,<sup>114</sup> and a Commonwealth inquiry had recommended that the ACNC or some other body initiate audits of their administration.<sup>115</sup>

108. *Id.* at 29.

109. *Id.* at 37, 40.

110. Phil Saj, *A Critique of the Majority Report of the Senate Economics Legislation Committee Review of the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (Provisions)*, 20 THIRD SECTOR REV. 107 (2014).

111. *Id.* at 132.

112. *Id.* at 133.

113. Letter from Ross Ellis to Productivity Commission, *supra* note 45.

114. J. Murphy, *Charities Attack “Fee-gouging” Trustee Companies*, AUSTL. FIN. REV. (Jan. 14, 2013), <http://www.afr.com/news/politics/national/charities-attack-fee-gouging-trustee-companies-20130113-jibcy>; M. Secombe, *Andrews Leads Fight to Abolish Charities Commission*, SATURDAY PAPER (Mar. 29 2013), [www.thesaturdaypaper.com.au/news/politics/2014/03/29/andrews-leads-fight-abolish-charities-commission/1396011600](http://www.thesaturdaypaper.com.au/news/politics/2014/03/29/andrews-leads-fight-abolish-charities-commission/1396011600).

115. CORPS. & MKT. ADVISORY COMM., ADMINISTRATION OF CHARITABLE TRUSTS 1 (2013) (Austl.).

## VI. FINDING A REPLACEMENT FOR THE ACNC

In July 2014, the Department of Social Services, under the direction of Minister Andrews, released a public consultation paper about replacement arrangements following the planned abolition of the ACNC.<sup>116</sup> The paper was placed in the context of the Government's

broader deregulation agenda which is designed to boost productivity by reducing the cost of excessive, red and green tape on business, community organisations and individuals by at least \$1 billion per year. The Government is committed to a risk-based, proportionate approach to the oversight of the charitable and not-for-profit institutions that make up Australia's civil society.<sup>117</sup>

Having considered eighty-eight submissions and conducting face-to-face consultations, the Department released its final report some six months later.<sup>118</sup> It noted that "many stakeholders spoke of the benefits of having a dedicated charities register" and "strong support for retaining the Charities Register or a form of public register."<sup>119</sup> The paper was entitled *Options for Replacement Arrangements* but only one option was proposed. It consisted of self-reporting arrangements, under which charities and other nonprofit organizations that received government funds or tax concessions would be required to maintain a publicly accessible website displaying the names of their board members, financial reports and details of all funding from any level of government. Organizations with regulators that already made information public, such as schools, universities and aged care institutions, would be exempt. The paper added that "only cases of wilful non-compliance with reporting requirements will be investigated."<sup>120</sup> It appeared to recognize in the responses to submissions that there was a loss of efficiency and security that a one-stop shop ACNC register had brought and difficulties in assuring the integrity and consistency of self-disclosed financial information. Some submissions pointed to the cost of establishing and maintaining a website for small organizations.<sup>121</sup> A suggestion was for government departments to disclose grants on their websites to reduce the costs for nonprofit organizations.<sup>122</sup>

116. DEP'T OF SOC. SERVS., OPTIONS PAPER – AUSTRALIA'S CHARITIES AND NOT-FOR-PROFITS (2014).

117. *Id.* at 2.

118. AUSTRALIA'S CHARITIES AND NOT-FOR-PROFITS CONSULTATION REPORT, *supra* note 2, at 2.

119. *Id.* at 8.

120. OPTIONS PAPER, *supra* note 116, at 7.

121. *Re: Australia's Charities and Not-for-profits: Options for Replacement Arrangements Following the Abolition of the Australian Charities and Not-for-profits Commission*, JUST. CONNECT (Aug. 20,

2014), [https://www.dss.gov.au/sites/default/files/documents/04\\_2015/16\\_justice\\_connect.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2015/16_justice_connect.pdf).

122. AUSTRALIA'S CHARITIES AND NOT-FOR-PROFITS CONSULTATION REPORT, *supra* note 2, at 4.

The determination of charitable status function would be returned to the ATO, but with some alterations. The ATO would centralize the function into a single administrative unit, which could address the problems found by the Auditor-General, with decentralized offices making inconsistent decisions.<sup>123</sup> The paper offered two solutions to the suggestion that, as a revenue office, the ATO had a conflict of interest potentially affecting its judgement. One was to establish an independent panel that would be a first point of appeal for disputed definitional issues and that would have the power to make non-binding recommendations to the Tax Commissioner. This would be in addition to the usual appeal processes. The other proposal was for ATO administrative arrangements to include an internal appeal to ATO staff who were not involved in the administrative areas where the initial definitional decision was made. The responses noted by the Department indicated that both options would involve greater costs and delays for all parties, possibly exacerbated further by adherence to the rules of natural justice in the review process.<sup>124</sup>

The consultation paper made the argument that Commonwealth agencies such as the ATO and the Australian Securities and Investment Commission (“ASIC”) already had sufficient powers to provide a regulatory compliance framework, as did state and territory regulators, and nothing further was needed. In response, the sector made several points:

- the ACNC had developed a regulatory approach that was proportionate, risk-based and effective, and future nonprofit regulators should adopt its measures;
- state and territory laws were out of date and no longer fit for purpose; and
- harmonization of laws across all jurisdictions was required to reduce the administrative burden on charities.<sup>125</sup>

The transitional arrangements outlined in the paper were scant. Once the bill abolishing the ACNC was passed and proclaimed, charities would have until the new financial year to establish a website with the required information. Information collected by the ACNC would be archived and passed on to other regulators for their use. The ATO and ASIC would revert to their previous regulatory roles immediately upon the legislation’s assent. The government has not publicly responded to a summary of the submissions prepared by the Department.

123. ADMINISTRATION OF DEDUCTIBLE GIFT RECIPIENTS, *supra* note 73, at 13.

124. AUSTRALIA’S CHARITIES AND NOT-FOR-PROFITS CONSULTATION REPORT, *supra* note 2, at 6.

125. *Id.* at 7.

At about the same time, the Department of Social Services also commissioned an academic center to develop a model for a National Centre of Excellence (“NCE”).<sup>126</sup> The Minister at the time, Kevin Andrews, had suggested when in opposition that what was needed was “a small body that would act as an educative and training body to help lift standards without the overbearing regulatory and enforcement powers.”<sup>127</sup> The report recommended that a joint venture of existing organizations be established to deliver sector capacity building, with a focus on how to provide evidence-based measures of social outcomes. It would be funded by a \$100 million endowment, funded by the community, possibly facilitated through a special purpose government bond issue.<sup>128</sup> The brief given to the consultants expressly excluded canvassing the retention of the ACNC, but they found that if it were a choice between an NCE and the ACNC, the sector would choose the ACNC. Further, they remarked that “[T]here is a strong underlying tiredness and cynicism described by participants in this project. People are frustrated with what they perceive as constant change and what they perceive as the lack of listening to the sector’s views about what is needed and wanted.”<sup>129</sup> The government has never publicly responded to the commissioned report, but in June 2015 the Senate passed a motion calling on the government to withdraw the ACNC repeal bill noting that:

(i) . . . over 80 per cent of respondents to Pro Bono Australia’s annual State of the Not for Profit Sector surveys [agree the ACNC] is critical to a well functioning not for profit sector, (ii) the Commission saves charities approximately \$120 million a year in reduced compliance costs, freeing up resources to spend on helping the community, (iii) the Government’s plans to abolish the Commission are creating uncertainty in the charities sector and leading to high staff turnover within the Commission.<sup>130</sup>

Two months later industry press reported that once cabinet approval has been gained, the bill will not be progressed.<sup>131</sup> In the meantime, there has been another cabinet reshuffle with new ministers appointed to both portfolios administering the ACNC.

126. CIVIL SOCIETY FINAL REPORT, *supra* note 2, at 1.

127. Commonwealth, *Parliamentary Debates*, House of Representatives, 11 Sept. 2012, 10262 (Kevin Andrews, MP) (Austl.).

128. CIVIL SOCIETY FINAL REPORT, *supra* note 2, at 4.

129. *Id.*

130. Commonwealth, *Parliamentary Debates*, Senate, 24 June 2015, 4447 (Anne McEwen, Senator) (Austl.).

131. Xavier Smerdon, *Morrison ‘Fudged’ ACNC Announcement*, PRO BONO (Sept. 10, 2015), <http://www.probonoaustralia.com.au/news/2015/09/morrison-fudged-acnc-announcement>.

## CONCLUSION

The rhetoric of reducing red tape has been employed by both sides of politics in Australia to justify all types of reform, both for external parties and internal administration. The charity sector and different political parties used the red tape burden narrative in the debate about a national regulator for charities, but the same argument led the protagonists to different conclusions. It was clear that establishing the ACNC would initially increase compliance costs from a base-line at which the taxation authorities had allowed self-assessment of concessional charity status and required no annual information return, let alone financial statements. But the argument for establishing a central regulator rested upon the ACNC being able to act as a central repository of charity information that would be filed once and used many times by the other agencies that did require compliance reporting, thus decreasing the overall burden. The other side argued that reduction of the compliance burden did not need a new central agency, which would instead add to the paperwork; instead, the various Commonwealth and state agencies generating the burden should put their houses into order.

Putting the political discourse to one side, the empirical evidence strongly indicated that the compliance burdens of Australian charities derive from applying for and reporting on grants and contracts for services. While this arises at both state and Commonwealth levels, it is predominantly generated at the state level. A secondary burden arises from overlapping incorporation and fundraising regulation at the state level, for charities operating across jurisdictions. The ACNC has played a key role within the Commonwealth jurisdiction to streamline recording of core corporate and financial information to a single point. It has also sought to act as a facilitator to gain cooperation of state and territory governments to improve and streamline charity accountabilities and reduce the paperwork burden arising from government grants and contracts. However, it can do little else to relieve the regulatory burden on charities from state and territory governments.

The organization has clearly been under siege, with abolition hanging over it for most of its short existence. Uncertainty has created serious challenges to its ability to retain and attract suitable staff; charities have been unsure whether they still have to lodge annual filings and comply with its laws, and government agencies have been reticent to progress reform with an agency marked for abolition. In spite of these barriers, the ACNC has achieved significant outcomes. Whether this period will be viewed by history as its prolonged death or a baptism of fire from which the ACNC emerges toughened and resolved depends on factors which are largely be-

yond its control at present. If its future is assured until the scheduled five-year review, there is every reason to believe that it will progress its objectives satisfactorily, including reducing red tape.<sup>132</sup>

132. After this paper was delivered and during editing, the Government announced on March 4, 2016 that having “consulted with, and listened to, all interested stakeholders. While there are a variety of views, within the charitable sector there is sufficient support for the retention of the ACNC.” It further claimed that “The Government will now work with the ACNC to remove duplication and increase accountability and transparency.” Media Release, the Hon. Kelly O’Dwyer MP, Minister for Small Bus., Ass’t Treasurer, Retention of the Australian Charities and Not-for-profits Commission (Mar. 4, 2016), <http://christianporter.dss.gov.au/media-releases/retention-of-the-australian-charities-and-not-for-profits-commission>.

