Ian Murray[1]

Regulating Charity in a Federated State: The Australian Perspective

[1] University of Western Australia, Law School, Western Australia 6009, Crawley, Australia, E-mail: ian.murray@uwa.edu.au. https://orcid.org/0000-0001-7896-3550.

Abstract:
The last few decades have witnessed radical reform of charity regulation around the world. Australia has not been untouched and has developed several unique approaches. First, unlike many other federations (such as the US and Canada), Australia relies on a charities commission rather than its federal tax authority to act as the principal regulator, resulting in a very different scope of responsibility and the likelihood of greater interaction with state regulators. Second, unlike many other jurisdictions that have implemented a charities commission (such as England and Wales), the Australian commission is ultimately intended to apply to a broader pool of not-for-profits than just charities, which raises fundamental questions about the ways in which charities differ from the not-for-profit sector more broadly. This paper outlines the historical and political reasons for reform in Australia and the shape of that reform. As the reforms have now achieved broad political and sector support, the chief focus of this paper is on the out-workings of the reforms, with particular attention to the challenges and opportunities posed by Australia's federal system of government and by the charity commission's potential to regulate the broader not-for-profit sector.

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1 Introduction

This article reflects on charity reform in Australia since 2012. Those years tell a story of initial elation and an ambitious and comprehensive reform process, followed by government attempts to unpick the changes and, recently, acceptance of the reforms in the face of widespread and vocal support by the charity sector. The article outlines the reasons for reform and the shape of that reform, in particular the adoption of a statutory definition of charity and the creation of a national regulator, the Australian Charities and Not-for-profits Commission ('ACNC').

As the reforms now seem to have achieved broad political and sector support, Australia appears to be at the start of a process of determining the out-workings of the reforms. The chief focus of this article is therefore on the current and future effects of the reforms, with particular attention to the challenges and opportunities posed by Australia's federal system of government and by the ACNC's potential, still inchoate, to regulate the broader not-for-profit ('NFP') sector. These foci reflect several unique aspects of the Australian regulatory arrangements when compared with broadly comparable common law liberal democracies such as the US, Canada and the UK (cf Phillips and Smith 2014). First, unlike many other federations (such as the US and Canada), Australia relies on a charities commission rather than its federal tax authority to act as the principal regulator, resulting in a very different scope of responsibility and the likelihood of greater interaction with state regulators. Second, unlike many other jurisdictions that have implemented a charities commission (such as England and Wales), the Australian commission is ultimately intended to apply to a broader pool of NFPs than just charities.

Such a focus is timely as a statutory five-year review of the ACNC legislation was completed in 2018 (McClure et al. 2018, '*Strengthening for Purpose Report*'), providing the potential to respond to the challenges and opportunities.

2 Regulatory Reform

The recent significant Australian reforms of charity regulation have occurred predominantly at the Commonwealth, rather than the state and territory level. The history and impetus for the adoption of a statutory def-

Ian Murray is the corresponding author.

inition of charity and national regulator by the Commonwealth are thus considered in Part 2.2. Part 2.3 then examines the nature of those reforms and evaluates their effectiveness generally, noting the material debilitation caused in the first few years of the reforms by a change of government which resulted in sustained, now abandoned, attempts to abolish the new regulatory arrangements. First, however, it is useful to know something of the Australian charity sector and also the Australian federation.

2.1 Context

In Australia, whether under statute or at common law, a charity must be not-for-profit, have purposes that are all 'charitable' purposes (such as relieving poverty, advancing education, advancing religion, or advancing other purposes beneficial to the community)[1] and be for the public benefit.[2] In addition, a charity cannot be governmental or an individual.[3] There are over 55,000 charities, employing, in 2016, 1.3 million staff (10.6 % of all Australian employees) and using the services of almost 3 million volunteers (Powell et al. 2017, 44–7). From a financial perspective, total charity revenue for 2016 was $142.8 billion and charities also held significant assets, with net assets of $197.6 billion (Powell et al. 2017). Charities form a subset of the broader NFP sector, an extremely broad and diverse array of entities that has been estimated to comprise more than 600,000 entities (Productivity Commission (Cth) 2010, 53). Beyond their economic contribution, charities and the NFP sector also make very important social and political contributions.

What these headline numbers do not show is that Australian charities differ markedly. They do so in their levels of income and assets and in their legal forms, comprising, for example, companies limited by guarantee, incorporated associations, trusts and unincorporated associations (Cortis et al. 2016). Individual charity activities also demonstrate significant diversity within an extensive range, including: religious activities; education; social services; grant-making; economic, social and community development; culture and arts; health services, emergency relief and aged care (Powell et al. 2017, 26–7). This is broadly consistent with the wide range of purposes that can be pursued by charities, with some of the more common being: advancing religion, advancing education, advancing social or public welfare, advancing health and advancing culture (Powell et al. 2017, 34).

Not only do Australian charities make material contributions, but societal and governmental expectations of the NFP (including charity) sector's role in delivering public goods is increasing. This is partly a result of the retreat of the welfare state, with the rise of 'new public management' and its focus on decentralised and market-based decision-making and a smaller role for government (Brinkerhoff and Brinkerhoff 2002, 5; Productivity Commission (Cth) 2010, 303). In Australia, for instance, there has been a significant increase in the degree to which non-government bodies, particularly charities, have been funded by all levels of government to provide human and community services, along with other functions (Productivity Commission (Cth) 2010, 300). Increased demands are also partly due to growing expectations of the minimum conditions for a good life (Anheier 2014, 496–7; Henry et al. 2009, 5–6) as reflected in Australian developments such as the National Disability Insurance Scheme. They are also due to higher anticipated standards of managerial professionalism resulting from the adoption of market sector practices in the charity sector (Anheier 2014, 134–5).

As a federal system of government, Australia comprises the Commonwealth (or federal government), six states and several territories. Powers are distributed across these levels of government with the Commonwealth having some exclusive, but mainly concurrent, heads of power. These include powers with respect to taxation, external affairs, the provision of a range of old-age and unemployment pensions and benefits, interstate and international trade and trading and financial corporations (Commonwealth Constitution: section 51). There is no head of power for the charity or NFP sectors as such. The state parliaments typically have plenary powers, albeit subject to some constraints in the Commonwealth Constitution,[4] such that the states have wider powers in relation to matters including education, health and the environment (as to the role of the states in the federation, see Aroney et al. 2015). However, the states' wider powers (and responsibilities) are matched with a lesser ability than the Commonwealth to raise revenue. This situation has been termed 'vertical fiscal imbalance' and has resulted in around 45 % of state and territory revenue being provided by the Commonwealth, frequently subject to grant conditions that enable the Commonwealth to extend its influence into areas like health and education for which it does not have a direct power.

Accordingly, many areas in which charities operate, such as health, education and the environment, involve a mix of Commonwealth and state and territory funding and regulation. Likewise, regulation based on legal form is also split between the Commonwealth and the states and territories as the Commonwealth has power with respect to trading or financial corporations, but not generally, for instance, in relation to charitable trusts, or unincorporated associations. Specific activities, such as fundraising (Part 3.3) frequently also cut across Commonwealth and state/territory legislation, not to mention local government requirements. Most charities therefore operate in both state/territory and Commonwealth jurisdictions and while most small charities operate in only one state or territory, at least 20 to 48 % of large to very large charities operate across multiple jurisdictions (Powell et al. 2017, 21–2), with some charities also fundraising online across multiple jurisdictions

(Crittall et al. 2017, 20–9). It is the large to very large charities that hold around 90 % of charity assets and incur more than 90 % of charity expenditure (Powell et al. 2017, 57, 98).

Prior to the establishment of the ACNC, in a similar fashion to the process presently existing in Canada and the US, the Federal Commissioner of Taxation (through the Australian Taxation Office – 'ATO') was the de facto national charity (and NFP) regulator. However, in contrast to jurisdictions such as Canada and the US, charities and NFPs were not generally required to provide annual reports even to the ATO.[5] Accordingly, the ATO's attention was primarily engaged at the time that an entity applied for tax concession endorsement, or, reactively, in circumstances where a breach was drawn to its attention by an informant or by the media. Although even in those jurisdictions such as the US and Canada involving more fulsome annual reporting, there are resourcing, information-sharing, timing (due to annual reporting rather than at the time of breach) institutional and political pressure impediments to making use of the data (Owens 2017, 91–2; and the discussion at the outset of Part 3).

2.2 History of and Impetus for Reform

After more than fifteen years of reviews and inquiries into reform of NFP sector regulation, 2012 to 2013 witnessed a flurry of activity. The reform agenda incorporated a comprehensive range of governmental administrative architecture, regulatory and more substantive legal form and tax reforms, in contrast to previous incremental and piecemeal efforts (see O'Connell, Martin, and Chia 2013, 291–2). In particular, the reforms included the creation of Australia's first independent federal NFP-focused regulator (the ACNC) and the adoption of a comprehensive statutory definition of 'charity' at the federal, but not state, level. The governmental administrative architecture included the creation of an office (Office for the Not-for-profit Sector) within the federal government to provide a coordinating body at the centre of government. Additionally, the agenda initially involved various intergovernmental initiatives such as reform of fundraising regulation across Australia, reviewing legal and reporting requirements under government grant agreements and considering the adoption, by the states and territories, of the Commonwealth definition of 'charity' (Murray 2014).

The reasons for the sudden surge and the breadth of the reforms can be understood using Kingdon's policy windows of opportunity approach, involving an alignment of problems, policy and politics (O'Connell, Martin, and Chia 2013; Seymour and Nehme 2015). The strong policy stream included the evidence and policy base provided by the historical reports, the ability to learn from the experience of reform in other jurisdictions and several decisions of Australia's highest court (the High Court of Australia) which helped delineate the boundary between the NFP sector on the one hand and government and commerce on the other.[6] The key problems were the perceived lack of robust governance and accountability arrangements for NFPs and concerns over the nature of NFP regulation, while the political stream was reflected in a renewed political focus on social inclusion by the former Labor government.

Following the creation of the ACNC and the passage of legislation to define 'charity', there was a change in the federal government, with the conservative parties (the Liberal and National Coalition) gaining power in 2013. The Coalition sought to unwind many of the reforms, disbanding the Office for the Not-for-profit Sector (*Administrative Arrangements Order 2013* (Cth)), weakening the federal government's capacity to implement some of the reforms, and attempting for several years to abolish the ACNC.[7] Initially, the Coalition also sought to defer the commencement of the *Charities Act 2013* (Cth) ('*Charities Act*'). By 2016 the Coalition's stance had softened, with the announcement that the ACNC would be retained, that announcement implicitly endorsing the statutory definition of charity and explicitly recognising the ACNC's partial role in acting as a coordinating body to improve the regulation of charities and NFPs (Porter 2016). In 2017, the Coalition appointed a new Commissioner, Dr Gary Johns, to replace the inaugural Commissioner, Susan Pascoe AM. Inevitably, such a change of leadership brings some uncertainty for the sector and a change of emphasis.[8] The change has occurred at a time of increased global focus on charity advocacy, with the Australian rejection of the political purpose doctrine in *Aid/Watch Inc v Commissioner of Taxation*[9] contributing to a Parliamentary review of environmental organisations (Standing Committee on the Environment 2016, [4.83]), electoral legislation reform[10] and repeated questioning of the ACNC about charity electioneering (Joint Standing Committee on Electoral Matters 2018, 7–9).

2.3 Regulation Following Reform

A key reform was the creation in 2012 of a national charities regulator, the ACNC. At the federal level, opting in to the ACNC regime by becoming a registered charity is a necessary precondition to unlock the various federal tax concessions, such as the income tax exemption. The objects of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*') are to support 'public trust and confidence' in NFPs; 'support

and sustain' the sector; and champion a decrease in 'unnecessary regulatory obligations' (*ACNC Act* s 15–5(1)). The second and third objects represent a markedly different approach to regulation than the compliance and accountability focus enshrined in the first object and in the objects of other charity commissions, such as the Charity Commission for England and Wales (*Charities Act 2011* (UK) c 25 s 14). This also reflects an institutional difference to tax authority-based charity regulators (eg the US and Canada), which often adopt a command-and-control regulatory approach based on minimising harm to the revenue and, potentially to the broader public, or at least the perception of such an approach (Phillips and Smith 2014, 1157; De March 2017, 119–22; Owens 2017, 82; Part 4.1). It must be acknowledged, however, that the second and third objects were added to the *ACNC Act* fairly late in its development and that the ACNC has not been directly funded to carry them out, meaning it has had to be careful with its resources (McClure et al. 2018, 24–5).

In implementing these objects, the ACNC (not the Commissioner of Taxation) determines charity status and registers eligible entities (*ACNC Act* s 15–5(2), pt 2–1); undertakes an educational role for registered charities (*ACNC Act* ss 15–5(2)(b)(iii), 110–10(1)); monitors and enforces registered charities' obligations (*ACNC Act* s 15–5(2)(b)(ii), ch 3, ch 4); and maintains a public register containing information on registered charities (*ACNC Act* pt 2–2). Registered charities are subject to regular financial and non-financial reporting and the ACNC has significant additional information gathering and monitoring powers (*ACNC Act*, pt 4–1 and div 60). Registered charities must also comply with the ACNC governance standards. The governance standards enshrine minimum outcomes in respect of the practices and procedures adopted by an entity to govern its operations (*Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.1).

Given the number of government actors under Australia's federation and the diversity in Australian charities' forms, activities and sizes, it is unsurprising that charities are also potentially subject at both the federal and the state and territory level to a range of additional regulatory regimes (Treasury (Cth) 2011b, 63). The Federal Commissioner of Taxation continues to enforce the additional tax endorsement conditions for tax concessions, ACNC registration being merely one of several requirements. Separate tests apply at the state and territory level for charity fiscal concessions such as payroll tax, stamp duty, land tax and council rates (Dal Pont 2017, 139–45). Further, there are other regulators based on legal form, such as the Australian Securities & Investments Commission ('ASIC') for companies limited by guarantee, state and territory departments of commerce or offices of fair trading for incorporated associations and state and territory attorneys-general for charitable trusts. Additional regulators and duties may also be relevant to particular types of charities based on their activities. For instance, charities that conduct fundraising or that undertake regulated services such as the provision of many health or education services.

However, as noted in Part 2.2, prior to the introduction of the ACNC, there had been various concerns about the practical enforcement of charity controller duties by the relevant regulators. For instance, that loss of tax concessions was frequently too punitive (and often harmful to potential benefit recipients) to be a realistic option for the Federal Commissioner of Taxation (Murray 2013) and that the charity sector was not a high priority for ASIC given its many other responsibilities (Treasury (Cth) 2011b, 66). Further, there were concerns that state and territory attorneys-general and incorporated association regulators lacked sufficient resources and information to effectively pursue breaches and that court intervention, where required, imposed onerous procedural burdens (Treasury (Cth) 2011a: 10–11; Senate Standing Committee on Economics (2008), 70). Indeed, unless engaged in fundraising, many charitable trusts and unincorporated associations, as well as some incorporated associations did not have to report to any regulator.

The ACNC has only now been operating for 6 years and its capacity was hampered until March 2016 by the Coalition government's attempts to abolish the ACNC. This was because the uncertainty over the ACNC's future led to staff attrition and to government agencies becoming reluctant to engage in cooperative initiatives (McGregor-Lowndes 2016, 1036–7). Nevertheless, in terms of public trust and confidence, the ACNC's improved information base and resources, and its express focus on charities has the potential to render regulation of charities far more effective than it has been in the past (see Kantar Public 2017 discussed below and in the US context, cf Manne 1999).[11] Further, as the information collected from registered charities by the ACNC is placed on a freely accessible public register (*ACNC Act*, div 40) market mechanisms of accountability should also be bolstered. This move to transparency reflects a broader trend in the UK, Canada and the US (Phillips and Smith 2014, 1148–9). It is relevant that, following a transitional approach focussed on education and cooperation, the ACNC has now started to impose sanctions for breach of governance standards in a small but growing number of cases and also for failure to lodge information statements (ACNC 2017; Nehme 2017, 183–6).

The ACNC's approach to date has thus been consistent with responsive regulation and of the need to build new charity mores, which reflects the principles the ACNC articulated in its regulatory strategy from its inception (ACNC 2018e). It is still relatively early on to have a clear sense of the ACNC's impact on public trust and confidence and of how it will manage to balance its support of the charity sector (in accordance with its second object) against the need for stricter responses where charities and their controllers breach their obligations. There have been a number of recent examples of allegations of fraud or mismanagement against prominent

charities in the Australian media, featuring negative comments about the ACNC's regulation (see Guilliatt 2017). Key criticisms are that the ACNC has been too lenient in its enforcement and that it has not published details of the outcomes of investigations into charities, even when enforcement action has been taken (Guilliatt 2017, 19).

However, details of compliance action against some of the charities featured in the media, such as Returned and Services League charities (ACNC 2018b), have since been provided and the ACNC has also suggested to the statutory five-year review panel that it be given broader powers to release such information (ACNC 2018a, 5). Further, the ACNC, under the direction of its new Commissioner, has also proposed that the *ACNC Act* be amended to include additional objects focussed on promoting the effective use of resources and on enhancing accountability (ACNC 2018a, 4). This indicates that the ACNC is likely to increase its emphasis on compliance. In any event, a 2017 survey of public trust and confidence in the charity sector indicated that while overall trust in charities has decreased over time, Australian charities are well trusted relative to other categories such as parliament and the news media and that awareness of the ACNC increased public trust and confidence (Kantar Public 2017, 41–3, 52).

In terms of supporting and sustaining the sector and reducing unnecessary regulation, the ACNC has implemented a regulatory approach informed by the principles of responsive regulation (ACNC 2018e); commissioned extensive research into the charity sector and into red tape reduction; and implemented coordinated reporting arrangements with other regulators. The ACNC has also engaged with all state and territory governments with a view to further harmonising reporting, fundraising licensing and charity status requirements; supported the adoption of a standardised tool for NFPs to record and report financial information (National Standard Chart of Accounts); and made material progress on a 'charity passport' being a package of up-to-date verified corporate, financial and activity data about a charity that can be used by all government departments in place of repeated requests for the same information (ACNC 2018d, 58).

Funding contracts with state and federal government agencies are one of the major sources of compliance costs for NFPs (Ernst & Young 2014, 6–7; McGregor-Lowndes and Ryan 2009) and it is therefore noteworthy that, at the federal level, revised Commonwealth grant contract guidelines have been adopted that (Department of Finance and Deregulation (Cth) 2017):

- 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 ACNC's efforts have been materially affected by the initial uncertainty over its existence and, more troublingly, by the difficulties faced by a federal government body in seeking to persuade state and territory governments to harmonise their approaches. Not only was the ACNC initially perceived by states as an unwarranted federal government intrusion (Pascoe 2017), but states have also been wary in protecting their sovereignty and revenue bases. Still, a reflection of the effectiveness of the ACNC is demonstrated by the progress outlined in Parts 3.2 and 3.3 toward harmonisation of reporting and fundraising licensing for the purposes of state and territory consumer affairs. Harmonisation of charity status, especially for fiscal purposes, is moving slowly as discussed in Part 3.1, albeit that it appears robust discussions are taking place with state and territory treasury departments and revenue commissioners (Pascoe 2017, 215).

There are, however, several flaws in the ACNC legislation that may necessitate future change, a number of which were emphasised in the *Strengthening for Purpose Report*. First, the legislation largely omits to articulate the functions that the ACNC is intended to carry out in pursuit of its objects (McClure et al. 2018, 30–3). Second, and more fundamentally, as an additional regulatory regime, but one that relies on only partial constitutional authority with respect to charities, the *ACNC Act* creates both regulatory duplication and gaps, resulting in the *Strengthening for Purpose Report* recommending the adoption of a national scheme of charity regulation (McClure et al. 2018, 111–14), involving:

- the states and the Commonwealth seeking to shift (through referral of powers, or harmonised administration) most registration and reporting responsibilities to the ACNC – see Parts 3.1 and 3.2;
- the divergent state fundraising regimes should be replaced with a nationally consistent approach under consumer protection legislation, the Australian Consumer Law, which is enforced by both a national regulator, the Australian Competition and Consumer Commission and state and territory agencies (cf McClure et al. 2018, 96–103) – see Part 3.3; and
- the states referring powers to the Commonwealth to enable ACNC enforcement of duties and protection of charity assets, but potentially with continued state/territory enforcement and with some state ability to set

divergent governance duties, to be enhanced by a presumption of compliance with the ACNC governance standards arising from the application of state duties – see Part 3.4.

Third, not all charities are registered with the ACNC and some religious charities are also exempted from a range of obligations. While the loss of federal tax concessions is likely to mean that most charities with material assets are registered, some charities will not fall within the ACNC's mandate and some religious charities may not need to report or meet ACNC governance standards. Accordingly, reliance will continue to be placed on other regulators, although, as discussed in Part 3.4, the existence of the ACNC may mean that these regulators can better target their limited resources. The *Strengthening for Purpose Report* also recommended reviewing the religious charity exemptions (McClure et al. 2018, 64–70).

Fourth, the current reporting requirements impose extensive obligations on many charities that are still relatively small, such that the *Strengthening for Purpose Report* recommended reducing those obligations for a larger group of small charities, albeit that all charities would continue to report some financial and non-financial information annually and that all charities should disclose related party transactions (McClure et al. 2018, 51–63). Fifth, there is the ACNC's inability to publicly provide reasons for taking enforcement action against charities, although there is clearly a need for a balance here between the public benefits from disclosure and the harms disclosure might cause.[12] Finally, as explored in Part 4, the *ACNC Act* contemplates regulation of the entire NFP sector. When and how this will be achieved is not articulated, although the *Strengthening for Purpose Report* recommends expanding regulation to certain income tax exempt and donation concession NFPs with annual revenue of more than $5 million (McClure et al. 2018, 89–92).

3 Commonwealth and State Interactions

As outlined above, a range of regulatory regimes apply to charities and NFPs more broadly. However, until recently, this regulation has largely developed in an uncoordinated fashion to serve a range of purposes (Treasury (Cth) 2011a, 6–7). For instance, in 2011 the Scoping Study for a National Not-for-profit Regulator identified over 178 pieces of legislation across all levels of government in Australia, which required 19 separate government bodies to determine charity status (Treasury (Cth) 2011a, 7). The multiple different approaches adopted by the various states and territories, which often seem to reflect form rather than substance, are a major contributor to this lack of coordination and complexity.

In addition to reporting costs under government funding contracts as discussed above, the areas of incorporated association reporting, charitable fundraising and eligibility for tax concessions are three of the most significant areas of compliance costs for charities, amounting to $35 million annually for the sector, let alone the administration costs for government departments (Deloitte Access Economics 2016, 2–3). Charity status is primarily relevant to the final item, though it is also relevant in most jurisdictions to the ability to form an incorporated association and to the obligation to obtain a fundraising licence. The interaction between state and federal definitions of charity and the potential for harmonisation is thus considered first below.

This Part then examines the reporting/information gathering and fundraising overlaps, before concluding with a discussion of several key constitutional and administrative impediments to the ACNC as a national regulator in a federation. While not framed through Mayer's regulatory theory lens of 'effectiveness in achieving regulatory goals', 'efficiency' and 'accountability to [the] political system [in Australia's case, as in the US, a federal system] and the public' (2016, 944–5), the discussion is cognisant of the North American discourse.[13] Moreover, the recommendations of this Part 3 are broadly consistent with that discourse in suggesting that charity regulation ought to remain fragmented between different levels of government and different agencies within a federation, but that there is room for harmonisation of definitional aspects for the purposes of registration, centralisation of information gathering and reporting, and greater coordination in governance enforcement. Part 3.3 moves slightly beyond in relation to fundraising, but that is justified by differences of greater cross-state activities by charities in Australia (as noted in Part 2.1) and by the already existing state/Commonwealth consumer protection regime that deals with misleading or deceptive conduct, amongst other issues, under the Australian Consumer Law.[14]

3.1 Registration/Creation and Multiple Definitions of Charity

From January 1, 2014, the codified definition of charity in the *Charities Act*, applies for the purposes of all federal legislation, unless the contrary intention is specifically provided. Charity status is determined by the ACNC, resulting in a unified and coordinated determination mechanism at the federal level. However, it is the common law[15] meaning of charity, with varying degrees of statutory modification, that applies at the state and territory

level for state and local government tax concessions such as pay-roll tax, stamp duty, land tax and council rates (see, e. g. ACNC 2016). More fundamentally, charities in the form of charitable trusts (and incorporated associations, to the extent that charitable purposes are one of a list of permitted purposes for which such an association can be created) must comply with the common law concept of charity to be validly created.

From the foregoing it is apparent that the charity concept is both facilitative, in that it enables certain legal forms to be used to carry out activities and incentivising by way of encouraging those activities with tax concessions. What is less obvious is that recognition as a charity serves an 'expressive' function in that the public recognition imbues that organisation with greater public trust and confidence (Harding 2014, 38–41, 44; ACNC 2016, 8–9). The compliance costs arising from inconsistency in the charity definition for fiscal purposes reduce the incentive function of those concessions. Further, it also seems reasonable to assume that there are costs associated with inconsistent public recognition of charity status, since this may serve to undermine public trust and confidence and the expressive function of charity law (ACNC 2016, 10–11). In terms of the facilitative function, the potential need to comply with both the common law concept and the statutory definition (assuming that entities wish to obtain federal tax concessions) for charitable trusts and some incorporated associations, may make these legal forms less attractive compared with federally created companies limited by guarantee, which need only meet the statutory definition. Affecting behaviour in this way has the potential to reduce the efficiency of the charity sector.

The problems outlined above will grow as the degree of divergence increases between the various definitions of charity as well as in their application by the various administrators. It is therefore useful to consider the extent of those differences.

Under sections 5 and 6 of the *Charities Act*, a charity is defined as an entity which is not-for-profit, with purposes that are charitable purposes (as defined) for the public benefit. Any other purposes must be incidental or ancillary to, and in furtherance or in aid of, such charitable purposes. Further, the entity must not be an individual, a political party or a government entity and must not have any disqualifying purposes, which are defined to mean: engaging in or promoting activities that are unlawful or contrary to public policy, or promoting or opposing a political party or a candidate for political office (*Charities Act* ss 5, 11). Unlike the position in England and Wales, the presumption of benefit has been broadly retained for the relief of poverty, distress or disadvantage, advancing education, advancing religion, preventing or relieving sickness, disease or human suffering and caring for and supporting the aged, or individuals with disabilities; although the presumption has also been extended to the 'widely available', or 'public', component of the public benefit test (*Charities Act* s 7).

The statutory definition is largely based upon and intended to preserve the pre-existing common law principles, but to make minor changes to modernise and clarify the meaning of charity (Explanatory Memorandum to the Charities Bill 2013 (Cth): 3). Divergence is likely to be constrained in the short term as some purposes, such as 'advancing education' (*Charities Act* s 12(1)(b)) or 'advancing religion' (*Charities Act* s 12(1)(d)), closely reflect the common law. Hence, recourse to common law principles is likely to be appropriate. As well, transitional provisions save all purposes, not entities, which were charitable purposes immediately before the commencement of the *Charities Act* (*Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) sch 2, item 7).

However, material divergence is likely to occur over time for five key reasons. First, the *Charities Act* expressly lists purposes that are considered to fall within the existing common law and those that **expand beyond** the common law – by way of a deemed expansion of selected purposes within the initial list (*Charities Act* pt 3 divs 1 and 2). Additionally, even those purposes considered to come within the existing common law are more numerous and frequently differently worded to those accepted at common law. For example, the purpose of 'advancing social or public welfare' (*Charities Act* s 12(1)(c)) is worded in a broader fashion than common law concepts of the relief of poverty, age or impotence and the relief of human distress. A purpose of 'promoting or protecting human rights' (*Charities Act* s 12(1)(g)) also has the potential to be very expansive. Second, the public benefit presumption is broader, applying as it does to the 'public' component as well as the question of net benefit.

Third, and more fundamentally, courts will approach the interpretation of 'charity' under the *Charities Act* as a matter of statutory interpretation, requiring regard to text, context and statutory purpose. While the pre-existing common law is clearly relevant to the statutory purpose, this approach is a different frame of reference than common law reasoning by way of analogy to earlier authorities (and the *Charitable Uses Act 1601*), coherence with legal principles and considerations of policy (cf Harding 2015, 171–2).[16] For instance, the context is likely to include the deemed expansions of the listed purposes.

Fourth, it is not clear that the common law will develop to mirror the *Charities Act*. 'Coherence' is increasingly being recognised as a key value of the Australian legal system (*Miller v Miller* (2011) 242 CLR 446, [15]-[16] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [23], [34] (French CJ, Crennan and Kiefel JJ); Bant 2015; Grantham and Jensen 2016). While the content of 'coherence'

is still to be clarified it can be thought of as comprising several dimensions, including a requirement that legal rules reflect the principles that underlie those bodies of rules and, potentially, the broader legal system (Balkin 1993; Baum Levenbook 1984; Kress 2010; Raz 1992). However, coherence with the principles underpinning the incentivising function of the federal tax concessions and the expressive function, both of which are primarily served by the *Charities Act* definition, may require a different content for 'charity' than coherence with the principles of the common law of purpose trusts that inform the facilitative function (Harding 2015, 185–7; Parachin 2014). On the other hand coherence would seem to support similar content for the concept of charity employed at the federal level and for the purposes of state and territory tax concessions, both serving an incentivising function.

Fifth, a further constraint on state and territory conceptions of charity moving toward the *Charities Act* definition is that the states and territories have legislated modifications to the common law for various purposes and have typically done so in quite inconsistent ways (ACNC 2016). In relation to tax concessions in particular, a number of the cases that provided impetus for the introduction of the *Charities Act* have raised revenue concerns for states and territories by permitting a broader range of (especially commercial) means to achieve charitable ends (Murray 2016, 57–60). So too have several recent decisions dealing with the degree to which charities may provide private benefits to members (Murray 2016, 57–60). A number of states and territories have therefore recently acted, in dissimilar ways, to remove state tax concessions for some classes of charities, further differentiating their approaches.

While it will require legislative change on the part of the states and territories, a central regulator does create the opportunity for the Australian states and territories to align their own definitions of charity and, not without significance, the administrative determination of charity status. However, any such change would need to be sensitive to state/territory sovereignty and to revenue constraints. For example, while the ACNC could determine charity status, states and territories might separately legislate the relevant classes of charities entitled to tax concessions. This would go some way to reducing compliance costs and also to a more consistent approach to public recognition of charity status, while being consistent with federalism. It would accord with the recommendations of a number of the North American commentators discussed at the start of Part 3 and would be consistent with the *Strengthening for Purpose Report's* recommendation for a national scheme for charity registration. Indeed, in the US context, Mayer notes that there is already significant state employment of federal definitions for the purposes of state tax concessions (2016, 939–40, 949–50). Definitional consistency for the purposes of charity creation is not raised as a significant issue, perhaps due to greater use of incorporated NFPs in the US and less reliance on charitable trusts, such that there may be less need to identify charity status at the state level for the valid creation of an entity (cf Fishman, Schwarz, and Mayer 2015, chap. 2–4).

Some variation in the meaning of 'charity' for tax, fundraising, associations incorporation and trust purposes, might remain justifiable by reference to the different principles and policies underlying those discrete bodies of law and due to local differences between jurisdictions. However, the costs of maintaining difference should be weighed against the benefits of different definitions to the pursuit of the principles and policies and to actual rather than just perceived local differences.

3.2 Reporting & Information Sharing

The creation of the ACNC resulted in reporting obligations for most incorporated associations to both the ACNC and their state/territory consumer affairs regulator (Treasury (Cth) 2011b, 20). As identified above, this has been a major source of duplicated compliance and administrative costs for charities and regulators, especially since incorporated associations are the most common legal form for registered charities, comprising over 40 per cent (Cortis 2016, 104). Incorporated associations are bodies corporate with a separately recognised legal existence from their members. Such organisations are created under state and territory associations legislation that (excepting the Northern Territory) requires associations to be NFP bodies (Dal Pont 2017, 451). The general focus of the regimes on NFP organisations means that the creation and on-going operation of incorporated associations is usually easier and cheaper than for companies limited by guarantee (created under the federal *Corporations Act 2001* (Cth)) (Sievers 2010, 96).

Reform requires state and federal cooperation. As noted in Part 2.3, most states and territories were initially suspicious of the ACNC as a federal body, such that only South Australia and the Australian Capital Territory had agreed in-principle to harmonise reporting (Pascoe 2017). Even then, the cloud hanging over the ACNC's future slowed developments, so that partial 'harmonisation' was achieved in the first instance by the ACNC accepting financial reports submitted to state or territory regulators in place of ACNC-standard financial reports for the financial years ending June 2014 to 2017.[17] The necessity for this measure arose from the different requirements across the various states and territories for preparation and reporting of financial matters, including the applicability of accounting standards. The annual information statement (containing financial and non-financial information) still had to be completed and lodged with the ACNC.

This initiative diminished, but did not eliminate duplication, with registered charities still typically required to report to both the ACNC and their local regulator, as well as potentially being obliged to notify both of changes to committee members or of the organisation's address. However, from 2016 in Tasmania,[18] 2017 in the Australian Capital Territory[19] and South Australia[20] and 2018 in Victoria,[21] registered charity incorporated associations need not prepare and lodge financial reports with their local regulator, nor notify that regulator of changes to committee members or (in the Australian Capital Territory) of address. From 2018 in New South Wales, registered charity incorporated associations may also lodge financial reports only with the ACNC.[22]

It appears that changes by Western Australia and the Northern Territory to permit harmonised reporting are expected soon and that Queensland is working toward harmonisation (ACNC 2018c). This does mean that some Australian states have not yet implemented changes, perhaps reflecting the need for states and territories to cede some of their sovereignty in exchange for the administrative savings and a more efficient charitable sector.

Much of the recent amending legislation also explicitly contemplates on-going information sharing between state and territory regulators and the ACNC (see *Consumer Act Amendment Act 2017* (Vic) s 4; *Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA) s 4; *Red Tape Reduction Legislation Amendment Act 2017* (ACT) s 14), suggesting that a more coordinated approach to regulatory action is being developed. This is also reflected in division 150 of the *ACNC Act*, which permits the ACNC to disclose information to all other state/territory and Commonwealth government agencies if that would assist those agencies to perform their functions or exercise their powers and would also promote the objects of the *ACNC Act* (s 150–40). This has the potential to reduce compliance costs for incorporated associations and to increase public trust and confidence. There also seems reason to hope that cooperation with states and territories on the collection of financial and non-financial information by the ACNC may trim the information required under funding agreements – as noted above, a major source of compliance costs. For instance, the National Standard Chart of Accounts has been accepted by all state and territory governments as an appropriate tool to record and report financial information; and there has been a very material increase (31 % increase since June 30, 2016) in the use of the ACNC's 'charity passport' information by Commonwealth, state and territory agencies, with 61 charity passport accounts for 21 separate agencies (ACNC 2018d, 60). However, this still leaves a very large number of government departments that are not using the passport (14 of 18 at the Commonwealth level) and hence further room to improve (McClure et al. 2018, 107–8).

3.3 Fundraising

Most states and territories regulate charitable collections, with that regulation reflecting very significant divergence in approaches (Treasury (Cth) 2012, 3, 8; Treasury (Cth) 2011b, 41–2). Indeed, the Northern Territory does not have laws regulating charitable collections and other jurisdictions exempt certain entities, sometimes significant classes of entities, from some or all requirements. The inconsistency includes the scope of 'charitable' collections in each jurisdiction and hence whether there is a need for registration, as well as the type of information that must be provided when registering, the time to apply for registration, the scope and timing of disclosure and reporting and the range of regulated activities (Australian Institute of Company Directors et al 2016; Lavarch 2011, 9). Moreover, these regulatory frameworks are insufficiently resourced and very outdated, with most jurisdictions having no coherent legislative or administrative treatment of fundraising over the internet, albeit that some still have detailed rules addressing collections from horse-drawn carriages (Lavarch 2011, 30; McGregor-Lowndes 2017).

In theory, fundraising regulation ought to be directed, in particular, to the objectives of consumer protection, prevention of public nuisance, maximising the efficiency with which donations are used and empowering donors (Treasury (Cth) 2012, 5–6; Productivity Commission (Cth) 2010, 135–6). Leaving aside the public nuisance ground, one might anticipate that regulation by the ACNC and the maintenance of its public register would go a long way to addressing the other three grounds. Even more importantly, Australia already has a state and Commonwealth scheme addressing consumer protection, the Australian Consumer Law, which is applied under the *Competition and Consumer Act 2010* (Cth) and the Australian Consumer Law application Acts of each state and territory. As noted by the Australian Institute of Company Directors and other peak governance, accounting and NFP bodies, the Australian Consumer Law likely already applies to much charitable fundraising and could relatively easily be extended to cover fundraising activities that are currently excluded (Australian Institute of Company Directors et al 2016; in the US context, cf Fremont-Smith 2013, 11). In this context, separate charitable fundraising legislation detracts from the efficient use of donations and its inconsistency, inaptness and inadequate policing detracts from the goal of consumer protection (Productivity Commission (Cth) 2010, 137–43).

Hearteningly, some change has occurred following the creation of the ACNC. From January 1, 2017 in South Australia (*Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA) pt 3) and July 1, 2017 in the Aus-

tralian Capital Territory (*Red Tape Reduction Legislation Amendment Act 2017* (ACT) s 18), charities registered with the ACNC that engage in fundraising will no longer need a fundraising licence, nor to report on their fundraising activities. While there is no fundraising regulation in the Northern Territory and no need for reporting in Tasmania, this does still leave fundraising in most major jurisdictions in the same unsatisfactory state. However, the Australian Consumer Law was recently reviewed with the final report recommending to Consumer Affairs Ministers that the application of the Australian Consumer Law to charitable fundraising be clarified through regulator guidance and that consideration be given to whether it might be necessary to amend the Australian Consumer Law to deal with charitable fundraising (Consumer Affairs Australian and New Zealand 2017, 6–7, 75–6). The *Strengthening for Purpose Report* also recommended that the Australian Consumer Law be expressly applied to charitable fundraising (McClure et al. 2018, 103). A combination of ACNC regulation and consumer protection for charitable fundraising under the Australian Consumer Law offers a material improvement over the present situation.

3.4 Constitutional and Administrative Impediments and Enforcement

As discussed in Part 2.3, the ACNC has a broad range of enforcement actions available so as to protect charity assets and enable a regulatory approach consistent with the principles of responsive regulation. However, most of the ACNC's sanctions, short of deregistration, rely on the relevant charity being a 'federally regulated entity'. These include, issuing warning notices or directions, entering into enforceable undertakings, seeking an injunction, and suspending or removing the controllers of a charity (*ACNC Act* ss 80–5, 85–5, 95–10, 100–5).

Federally regulated entities comprise various 'entities' to which the corporations or territories powers of the Commonwealth Constitution apply: constitutional corporations; trusts if the trustee is a constitutional corporation; and entities that are sufficiently linked to the Northern Territory or the Australian Capital Territory (*ACNC Act* ss 205–15, 205–20). Accordingly, there is a potentially significant constitutional limit on the ACNC's ability to respond to a breach of the *ACNC Act* or governance standards. Many economically significant charities providing goods or services, such as universities, schools and hospitals would likely have a relatively significant proportion of trading activities and thus amount to trading corporations (see Aroney and Turnour 2017; Joseph and Castan 2014, [3.25]). Other economically significant incorporated charities are likely to have substantial investment activities and so potentially amount to financial corporations (see *Quickendon v O'Connor* (2001) 184 ALR 260, 277 (Black CJ and French J), 288–9 (Carr J); Joseph and Castan 2014, [3.30]; Tran 2011, 13–19).

However, unincorporated associations and grant-making or other charitable trusts (both of which are forms taken by many religious organisations, which comprise a large proportion of Australian charities) may not be caught. Where a trustee is a fee-for service entity such as a licensed trustee company, the trustee's status as a constitutional corporation may potentially bring the trust within the federally regulated entity definition. Where the trustees are individuals or a corporation that does not conduct a trustee services business, there is likely to be a gap.[23]

The *Strengthening for Purpose Report* refers also to the ACNC's untested ability to seek sanctions at common law or under state and territory legislation, but it is far from clear that such avenues exist and the report recommends conferral of state and territory enforcement powers on the ACNC (McClure et al. 2018, 34–7). Nevertheless, to the extent a gap exists, the ACNC's resourcing and information base permits fruitful cooperation with other Commonwealth and state regulators and the ACNC has actively sought to adopt this approach (Pascoe 2017, 221–2). Indeed, it has entered into formal memoranda of understanding covering cooperation and assistance in information sharing and enforcement action with some other regulators such as the ATO and ASIC. Accordingly, there may be increased ability for other regulators, such as state attorneys-general to take action. Further, to the extent that state action fills in ACNC gaps, it may involve less of a demand on the resources of regulators such as the attorneys-general, so that they may be more willing to act. This means that at least a modest range of compliance responses (in addition to revocation of charity registration) may still be available for some unincorporated associations and for charitable trusts that are not federally regulated entities.

In this way, the ACNC could be viewed as supporting a fragmented, federalist, approach to charity regulation. The above discussion nevertheless gives a more central role to the national regulator, the ACNC, in coordinating enforcement activities than envisaged in much of the US literature discussed at the outset to Part 3. However, that is justified by the ACNC governance standards being principles-based minimum standards, not so overly prescriptive as to stymie different approaches at the state level consistent with federalism and the advantages of developing locally appropriate solutions (in the US context, cf Mayer 2016, 956–7; Mayer and Wilson 2010, 534–5; Fremont-Smith 2013, 10–11). It is also justified by several advantages that the ACNC has over the IRS, such as its greater ability to share information beyond tax regulators with state and territory attorneys-general and other regulators (see Part 3.2; for the IRS cf Owens 2017, 83; Boris and Lott 2017, 106; Fremont-Smith 2013, 7–8). The ACNC also has an institutional focus on charities and not-for-profits (for the IRS, cf Owens 2017, 82; Boris and Lott 2017, 97); its information gathering on registration and annually for

small charities is superior (for the IRS, cf Brody and Owens 2016, 881–4); and there has been no major scandal about the ACNC's administration of charities, unlike the IRS's purported targeting of politically aligned charities (Treasury (US) Inspector General for Tax Administration 2017).

It may nevertheless be good, from this perspective, if the ACNC (even as the primary coordinator) does not always act as the key enforcer of governance duties and protector of charity assets even if that involves higher administration and compliance costs and so is less efficient. Some caution should therefore be exercised about the *Strengthening for Purpose Report* recommendation to give the ACNC an explicit function of 'enforc[ing] the law of charities' – which goes beyond compliance with the *ACNC Act* – and the suggestion that states and territories confer their asset protection and governance enforcement powers on the ACNC (McClure et al. 2018, 33, 37, 111–14). Though, the report acknowledges that governance duties ought to be able to vary to some extent between jurisdictions and charity types and that the details of a national scheme are still to be worked out, such that a fragmented enforcement approach potentially remains consistent with the recommendation.

Finally, the preceding discussion highlights the work still to be done in implementing a national scheme and in establishing an administrative architecture to identify governance standards and coordinate enforcement. It is thus vitally important to have a body that can undertake a coordination and agenda setting administrative function (in Australia, see Productivity Commission (Cth) 2010, 369, 378; in the US, cf Mayer and Wilson 2010, 505). Following the disbanding of the Office of the Not-for-profit Sector within the Commonwealth government in 2013 and of the Council of Australian Governments NFP Reform Working Group, the ACNC has partially fulfilled this role in Australia. However, it is difficult for a federal regulator to speak too broadly on matters of policy, especially where they involve the states and territories and where they move beyond simple matters of regulatory duplication. Nor is the ACNC directly funded for this role and so Australia does not appear as well positioned in this regard as the US (Mayer and Wilson 2010, 505).

4 Charities and the Broader Not-For-Profit Sector

While the ACNC initially governs only charities, somewhat uniquely in the global context of charity commissions, the regulatory framework was expressly intended to eventually cover all NFPs (*ACNC Act* ss 15–5, 25–5(5)). Indeed, among comparable common law liberal democracies, regulation typically focuses on the charity sub-sector of the NFP sector (Phillips and Smith 2014, 1148; Wyatt 2017, 139). However, regulating only a subset of the NFP sector is not necessarily ideal since many of the reasons for regulating the charity sector, such as protecting public trust and confidence, incentivising the production of public and quasi-public goods and promoting participation and altruism, apply in a similar fashion to the broader NFP sector (Steinberg 2006; Clemens 2006; Garton 2009, 185). Much could be written on this topic. However, the discussion below centres on three issues that have arisen recently: material overlap between regulation by the ACNC and the ATO which has been justified by reference to consistent regulation of NFPs; the potential for greater involvement of the ACNC in regulating entities that access donation concessions; and the broader question raised by the *Strengthening for Purpose Report* of how to start adding non-charity NFPs to the ACNC regulatory regime.

4.1 Income Tax Exemption and the Charities Commission/Tax Office Overlap

The ACNC's creation was intended to result in an independent and primary federal regulator for charities, in part due to a 'perceived conflict of interest' on the part of the ATO (Treasury (Cth) 2011b, 66) and also to reduce confusion and the compliance burden for the NFP sector (Productivity Commission (Cth) 2010). That is, the ACNC was meant to determine and monitor continuing eligibility to be a charity. The Commissioner of Taxation was to have a continued role in determining and monitoring additional endorsement requirements for charities[24] and in determining eligibility, where necessary,[25] and monitoring the income tax exemption requirements for non-charity NFPs.

However, as a result of amendments made in 2013, the income tax exemption conditions require that a charity or relevant type of NFP 'comply with all the substantive requirements in its governing rules' and 'apply its income and assets solely for the purpose for which the entity is established' (*Income Tax Assessment Act 1997* (Cth) div 50). For charities, the income and assets special condition materially overlaps with ACNC governance standard 1, which requires that a registered charity comply with its charitable purposes and its not-for-profit character on an on-going basis (*Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) subdiv 45-B). Further, the governing rules condition also overlaps with ACNC governance standard 1, as well as governance standard 5, which obliges registered charities to ensure that charity controllers comply with a broad range of skill and diligence and good faith and loyalty duties (*Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.25). The overlap with governance standard 5 occurs as a charity's constitution or

trust deed (and, to the extent it is permissible to look to parts of the general law and legislation as adding to a charity's governing rules, such as trustee duties) typically impose duties on charity controllers in operating a charity. Controller duties of loyalty and of care, skill and diligence would appropriately be characterised as 'substantive' requirements (compare Taxation Ruling TR 2015/1, 19–22).

According to the explanatory materials, the tax conditions were amended for the purposes of simplification and standardisation across the various classes of NFPs, including charities (Explanatory Memorandum, Tax Laws Amendment (2013 Measures No 2) Bill 2013 (Cth) 223–4). In circumstances where the ACNC currently applies only to charities, such additional endorsement requirements may be necessary for non-charities. However, for charities, the tax conditions are likely to result in an increased compliance burden for charities, but without any countervailing increase in public trust and confidence or any improvement in tax system integrity (Murray 2013). Further, the Commissioner of Taxation's limited range of enforcement responses (effectively loss of endorsement or nothing, with arguably no discretion), or the risk of disproportionate action, undermines the ACNC's responsive regulation approach even though the ACNC and Commissioner of Taxation have entered into memoranda of understanding relating to mutual assistance (Murray 2013, 264–72). This detracts from the ACNC's goal of supporting and sustaining the charity sector and it is thus unsurprising that the *Strengthening for Purpose Report* accepted, with limited discussion, that the income and assets and governing rules special conditions ought to be repealed for charities (McClure et al. 2018, 119).

4.2 Tax Deductions

In contrast to the situation in many other jurisdictions, donation concessions do not generally follow charity status in Australia. Instead, the concessions are provided to various classes of entities or by way of specific listing in the legislation, with these classes including certain subsets of charities. Deductible gift recipient ('DGR') status means that donors can claim an income tax deduction for gifts or contributions, provided the other deductibility criteria are satisfied (*Income Tax Assessment Act 1997* (Cth) s 30–15(1)). The DGR concessions are currently attracting controversy in Australia. That is because of the intention that all non-government and non-charity DGRs be forced to become charities by July 1, 2019 in order to continue accessing the concessions – subject to transitional arrangements and limited exceptions; and due to initial suggestions (now largely abandoned) for reporting requirements for advocacy activities of charities generally and quantum limits for advocacy expenditure of environmental organisations in particular (Treasury (Cth) 2017, 4–6; O'Dwyer 2017; Treasury (Cth) 2018).

By way of context, there are numerous DGR categories, grouped in overarching classifications, some of which are 'health', 'education', 'research' and 'welfare and rights' (*Income Tax Assessment Act 1997* (Cth) subdiv 30-B). The classes of DGRs are not limited to subsets of registered charities, but also include Australian government agencies, as well as various categories of NFPs that are not explicitly required to be charities. Non-charity DGRs include, for instance, some members of the following classes: public funds operated by an environmental organisation, public funds operated by a cultural organisation, public funds for the purpose of relieving necessitous circumstances, public ambulance committees, museums and school building funds (Treasury (Cth) 2017). There is also no requirement that specifically listed entities be registered charities. While it might be anticipated that many of these entities (or the entities operating the funds) would or could be registered charities, in fact it appears that just over 8 % of the 28,000 DGRs are not currently registered charities or government agencies (Treasury (Cth) 2017).

Other than specific reporting requirements for their particular DGR category,[26] these non-charity NFPs are likely to be subject to the same uncoordinated, incomplete and inadequately resourced regulatory environment which led to the creation of the ACNC (Treasury (Cth) 2017, 5). This detracts from achievement of the purposes that the DGR provisions are intended to incentivise as well as undermining public trust and confidence and hence donations. It also hinders the use of market mechanisms to regulate DGR behaviour since it is difficult for donors to obtain information. Inadequate supervision of DGRs also appears to be relevant to the government's concern over advocacy (Treasury (Cth) 2017, 6–7), such that a more comprehensive regulatory regime might actually result in greater freedom for DGRs.

The ACNC does present a potential solution to these problems. Currently, when determining charity status, the ACNC also determines whether an entity comes within certain charity sub-types (*ACNC Act* s 25–5(5), items 13 and 14), such as a 'public benevolent institution' and a 'health promotion charity'. These sub-types are categories of DGR. The ACNC clearly has administrative experience in characterising an entity and its purposes. If non-government DGRs are generally required to be registered charities as proposed, the sub-type approach could then be expanded, with the ACNC acting as a central point for determining the purpose of entities and hence eligibility for the various DGR categories. As registered charities, these DGRs would then also be subject to the ACNC's relatively comprehensive regulatory regime.

The main problem with requiring all non-government DGRs to be registered charities is that there are likely to be a substantial minority that do not meet the requirements to be a charity. For instance, entities endorsed as DGRs for the purpose of operating a more specifically targeted fund may not themselves be charities, even though the purposes to which the fund is directed might be charitable. For example, member-serving groups such as parents' associations that operate school building funds, or community service groups with purposes too broad to be charities that operate necessitous circumstances funds or public ambulance funds. Some organisations, such as local war memorials, galleries and museums or parents' associations might also be sufficiently governmental to not be charities, yet, due to definitional differences, also not be 'government agencies' for DGR purposes. Further, some specifically listed entities, such as political think tanks, would not qualify as charities. The proposed reforms partially address these concerns as they do not require charity registration for specifically listed DGRs and they also permit existing DGRs to apply to the ATO for an exemption from charity registration on grounds that cover the specifically targeted fund concern, but that do not yet incorporate the government entity/government agency overlap concern (Treasury (Cth) 2018, 2, 9–12). The more pressing issue is that the reform consultation paper is very vague as to the regulatory and governance regime that the ATO is intended to apply to exempt DGRs. For the reasons identified at the outset of this Part 4.2, the regime would ideally be as consistent as possible with that administered by the ACNC, taking account of non-charitable purpose differences. In particular, to support public trust and confidence and sector efficiency, the regime should ideally provide similar information (as that for ACNC registered charities) to the public and to government agencies on specifically listed DGRs and DGRs exempt from charity registration.

4.3 Charity Commission Regulation of Non-Charity NFPs

Given the ACNC was envisaged as being a national NFP regulator, another response to several of the issues raised in Parts 4.1 and 4.2 would be to require all non-government income tax exempt entities or DGRs to be subject to ACNC regulation as categories of registered NFPs, but not necessarily registered charities. The *Strengthening for Purpose Report* took a tentative step in this direction by recommending that the ACNC regulatory regime be extended to NFPs with annual revenues of at least $5 million that are income tax exempt entities or DGRs (McClure et al. 2018, 89–92).[27] The Report's recommendation has the advantage of being risk-based, by focussing on larger NFPs that are currently subject to minimal oversight, and of initially manageable scope, in that it is estimated to affect only 580 entities.

However, registration based primarily on NFP status is likely to place more pressure on the precise bounds of what it means to be 'not-for-profit' than charity registration. That is because the need for a charitable purpose and the public benefit test for charities provide additional ways to restrict the provision of private benefits, with the NFP requirement then largely focussed for charities on the distribution of profits to members (cf Garton 2013, [6.05]). There is, though, no Australian legislative definition of 'not-for-profit'. Indeed, consultation on a statutory definition at the same time as consultation on charities legislation in 2003 demonstrated opposition to a definition and identified several key challenges around NFPs operating in groups and of a self-help nature.[28] The *Strengthening for Purpose Report* suggested that the common law would continue to suffice, provided the ACNC has sufficient test case funding to clarify areas of uncertainty. Yet, if the 'not-for-profit' test becomes the key focus for non-charity NFPs then there may be a much greater need for clarity than envisaged by the report. Further, it is questionable whether courts are well placed to answer uncertainty arising from policy decisions such as whether trading cooperatives or financial mutuals ought to be included within the ACNC regulatory regime.

One potential solution to the pressure on the NFP definition is thus likely to be for the government to consult and for Parliament to legislate, so as to deal with the political and policy uncertainty. In addition and in the meantime, another solution might be to focus on the for-purpose aspects of NFPs, in a similar way to the need for charities to have charitable purposes that are for the public benefit. For example, the Productivity Commission (Cth) has defined NFPs as 'organisations established for a community purpose, whether altruistic or mutual in nature' (2010, 3–8). This might then alleviate some of the pressure on the definition of NFP, which could potentially remain focussed on structure and operation (see, e. g. Salamon and Anheier 1997, 31–4), but be twinned with an additional requirement for the NFP to have a community purpose. Virtually all DGR and income tax exempt entity categories are currently defined explicitly, or implicitly, by reference to a purpose and so it would not be difficult to include those purposes as acceptable types of community purposes. The benefit of this approach is that it highlights the outcomes and impacts NFPs are intended to achieve, rather than what they should not do.

5 Conclusion

Reform at the Australian Commonwealth but not the state and territory level has resulted in material constitutional impediments for enforcement by the ACNC, as well as duplicated reporting and regulation and inconsistent recognition of charity status across jurisdictions. These sorts of difficulties and inconsistencies have also been experienced in other federations, such as the US and Canada. To an extent, though, fragmentation of charity regulation may bring advantages such as support for a federalist system of government and the ability to tailor regulation to local circumstances. However, in Australia, divergence in approaches to charity status is expected to accelerate with time given the existence of differing definitions at the Commonwealth and state/territory levels. These problems detract from public trust and confidence and also render incentives, such as tax concessions, less effective.

The creation of the ACNC and its public register, of itself, appears positive for public trust and confidence in that there is now a regulator with the capacity, information base and interest to enable oversight of the charity sector. This is a far more positive position than that of de facto federal charity regulators in the form of tax authorities in the US and Canada and it is particularly notable that the ACNC has a greater ability to share information beyond tax regulators with state and territory attorneys-general, thus permitting far greater cooperation in enforcement. Further, as the ACNC is endowed with the objective of championing a reduction in the sector's regulatory burden, there is now a coordinating body within government focussed on NFP sector deregulation as a core, rather than a peripheral issue, which has permitted some harmonisation of incorporated association reporting. Steps have also been taken in reducing duplicated reporting under government funding agreements by increasing adoption of the charity passport and new grant contract guidelines at the federal level, though there is still much room to improve. For instance, by further updating the Commonwealth grant guidelines to mandate use of the charity passport by Commonwealth government departments (McClure et al. 2018).

However, the ACNC's lack of dedicated resourcing, or a mandate beyond regulatory simplification, for acting as a coordinating and agenda setting body will cause difficulties in moving to any national scheme for charity regulation as recommended in the *Strengthening for Purpose Report*. In particular, progress has been slow on harmonising the definition of charity, although a two stage approach of ACNC determination of charity status, followed by state/territory selection of charity sub-classes to which tax benefits are accorded, provides a way to preserve state and territory sovereignty, while still achieving a reduction in compliance and administration costs and more consistent public recognition of charity status. Fundraising regulation also remains in need of reform, albeit the Australian Consumer Law provides a relatively safe, rational and risk-based approach.

Nevertheless, while there are areas for improvement, the ACNC and *Charities Act* regimes can thus be viewed as enabling charity regulation to remain fragmented between different levels of government and different agencies within the Australian federation, but as also providing some support for harmonisation of definitional aspects for the purposes of registration, the centralisation of information gathering and reporting, and greater coordination in enforcement.

Finally, the ACNC's potential to regulate the broader NFP sector remains untapped, albeit this may be an area where the previous experience of the ATO and of federal tax regulators in Canada and the US may be instructive. Indeed, in Australia, the need for consistency across income tax exempt NFPs has been used as a justification for effectively re-establishing the Federal Tax Commissioner's oversight of charity compliance, resulting in a significant regulatory overlap at the federal level also. Expanding the ACNC's remit might therefore pave the way to a reduced role for the ATO. Further, the government has recently proposed that DGRs that are not charities or government entities should generally be compelled to become registered charities, so as to ensure appropriate regulatory oversight and transparency. The alternative of expanding the pool of regulated entities to non-charity NFPs, as tentatively recommended in the *Strengthening for Purpose Report*, would enable greater consistency and better information gathering and disclosure for all income tax exempt entities and DGRs, while still permitting some flexibility in the choice of structure. However, this approach will place greater pressure on just what it means to be 'not-for-profit' and invites greater consideration of the for-purpose nature of NFPs – what they do, rather than what they do not do.

Notes

1 As discussed in Part 3.1, the *Charities Act 2013* (Cth) rewords charitable purposes under 12 heads of charity that include, amongst others, advancing health, advancing education, advancing social or public welfare, advancing religion and advancing culture: s 12(1).

2 *Charities Act 2013* (Cth) ss 5, 6; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, [18] (French CJ, Gummow, Hayne, Crennan, Bell JJ). The entity must also not have disqualifying purposes, such as purposes that are unlawful or contrary to public policy: *Charities Act 2013* (Cth) s 11; *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 426 (Dixon J).

3 At common law, see *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 (HCA), 181, 185–6, 187 (Gleeson CJ, Heydon and Crennan JJ), 211, 214–15 (Kirby J, also noting that some bodies formed by and being part of government might potentially be charities), 229–230 (Callinan J). *Charities Act 2013* (Cth) ss 4, 5(d).
4 For example, Commonwealth legislation prevails in the event of inconsistency: Commonwealth Constitution s109.
5 Many charities and other income tax exempt NFPs, particularly larger ones, would nevertheless need to lodge returns or activity statements, in respect of goods and services tax, fringe benefits tax and pay as you go reporting. Reporting also applied for some subcategories of charities.
6 On the government/politics and charity boundary were *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 and *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168. *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 concerned the business/charity boundary.
7 Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (Cth).
8 Some in the charity sector have been concerned about the new Commissioner's historic comments against advocacy by charities and by his economic perspective of the sector (Australian Council for International Development et al.2017).
9 See n 2.
10 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018 (Cth); Foreign Influence Transparency Scheme Act 2018 (Cth). The reforms are primarily based on concerns about foreign influence in Australian elections.
11 The benefits of transparency are also emphasised in the *Strengthening for Purpose Report*, which endorses greater disclosure of matters such as related party transactions and charity controller and senior executive remuneration; McClure et al. (2018): 51–63.
12 Harms could include a reduction in charities' willingness to provide detailed information to the ACNC, or lack of procedural fairness for the charity under investigation. See also McClure et al. (2018): 71–7.
13 See also, Mayer and Wilson (2010), Owens (2013) and the subsequent citations in this paragraph and in Part 3.4.
14 And in any event, see the comments of some US writers discussed in Part 3.3.
15 References to the 'common law' are to case law as opposed to legislation, unless the context requires otherwise.
16 See, e. g. *Cattanach v Melchior* (2003) 215 CLR 1, 42 [102] (Kirby J).
17 Under an administrative order made by the ACNC Commissioner and permitted by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) sch 1 pt 4.
18 *Associations Incorporation Amendment Act 2016* (Tas) ss 5 and 6.
19 *Red Tape Reduction Legislation Amendment Act 2017* (ACT) ss 10, 12, 15.
20 *Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA) s 4.
21 *Consumer Act Amendment Act 2017* (Vic) s 3.
22 Memorandum of Understanding between the ACNC and the New South Wales Office of Fair Trading (2018).
23 Separate consideration would need to be given to whether the trustee can be a financial corporation, even though the assets it holds are subject to a charitable trust.
24 *Income Tax Assessment Act 1997* (Cth) ss 50–52(1), 50–105; *Taxation Administration Act 1953* (Cth) sch 1, div 426.
25 NFPs that are not charities are permitted to self-assess their income tax exempt status.
26 The requirements do impose substantive reporting obligations in some cases. For instance, entities on the register of environmental organisations are subject to extensive reporting.
27 A third class was also contemplated: non-charity scientific research organisations that are entitled to donation concessions under alternative provisions.
28 Exposure Draft Charities Bill 2003 (Cth).

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