

## CHARITIES ARE THE NEW CONSTITUTIONAL LAW FRONTIER

NICHOLAS ARONEY\* AND  
MATTHEW TURNOUR†

*The regulation of charities under the Australian Charities and Not-for-Profits Commission Act 2012 (Cth) ('ACNC Act') is one of the new frontiers in the exercise of Commonwealth legislative power. The powers conferred upon the Australian Charities and Not-for-Profits Commissioner to compel the publication of information, to give directions, and to remove and replace the leadership of charities in certain circumstances press the scope of Commonwealth law-making to new limits. However, there are questions to be asked about whether such provisions can be supported by the Commonwealth's relevant legislative powers; and when a charity is formed for religious purposes, there are questions as to whether the powers conferred on the Commissioner interfere unconstitutionally with freedom of religion. In this article we review the constitutionality of the ACNC Act in the light of the relevant case law. We focus on the Commissioner's powers in the context of the Act, but as charities are not constitutionally unique, we also ask whether the Commonwealth Parliament can similarly regulate businesses, trusts and individuals outside of a charitable context. In the Revised Explanatory Memorandum to the Australian Charities and Not-for-Profits Commission Bill 2012 (Cth), the Commonwealth maintained that a combination of the taxation, corporations, external affairs, territories and communications powers adequately supported the proposed law. We subject these claims to sustained analysis. We find that differing probabilities of constitutionality attend the complex and ambiguous matrix*

\* BA, LLB (Hons), LLM (UQ), PhD (Monash); Professor of Constitutional Law, The University of Queensland. Thanks are due to Graeme Orr and Elizabeth Shalders, and to the anonymous referees, for comments on an earlier version of this article. The support of ARC Discovery Grant DP120101590 is also gratefully acknowledged.

† BEcon, LLB (UQ), MA, PhD (QUT); Sessional Academic, Queensland University of Technology and solicitor in private practice. Subsequent to the acceptance of this article for publication, Prof Aroney was appointed a member of the panel that will advise the Prime Minister on the extent to which Commonwealth, state and territory laws adequately protect freedom of religion, and Dr Turnour was appointed a member of the panel that will undertake a review of Australian Charities and Not-for-Profits Commission legislation on behalf of the Commonwealth government. The terms of reference for Prof Aroney's panel are available at 'Religious Freedom Review', *Australian Government: Department of the Prime Minister and Cabinet* (Web Page) <<https://pmc.gov.au/domestic-policy/religious-freedom-review/>>, archived at <<https://perma.cc/JW2A-WC6Z>>. The terms of reference for Dr Turnour's panel are available at 'Review of Australian Charities and Not-for-Profits Commission (ACNC) Legislation', *Australian Government: The Treasury* (Web Page) <<https://consult.treasury.gov.au/people-and-communications-division/acnc-legislation-review/>>, archived at <<https://perma.cc/Q7KC-UJFL>>.

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*of regulatory powers conferred by the Act. We suggest that even if those powers can be constitutionally justified, albeit partially in certain contexts, policy considerations suggest the need for a sustained review of the ACNC Act and the powers conferred on the ACNC Commissioner. As the ACNC Act is currently under review, we close by outlining the nature of possible reforms.*

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## I INTRODUCTION

On 3 December 2012, the Commonwealth Parliament pioneered a new frontier. On that date the Australian Charities and Not-for-Profits Commissioner (the ‘Commissioner’) commenced her regulatory and other duties under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (‘ACNC Act’).<sup>1</sup> The Act was passed by the two houses of the Parliament during the Rudd–Gillard Labor governments. However, the constitutionality of the Act establishing the Australian Charities and Not-for-Profits Commission (‘ACNC’) was questioned from the very beginning. During a hearing before the House of Representatives Standing Committee on Economics, Professor Ann O’Connell said she had ‘real problems’ with the constitutional basis of the legislation and suspected that ‘the first time the ACNC tries to remove a trustee there will be a

<sup>1</sup> The inaugural commissioner was Susan Pascoe. Her successor, Gary Johns, was appointed on 7 December 2017: Michael Sukkar, ‘Appointment of Commissioner to the Australian Charities and Not-for-Profits Commission’ (Media Release, 7 December 2017) <<http://mss.ministers.treasury.gov.au/media-release/021-2017/>>, archived at <<https://perma.cc/AA4H-TYM5>>.

challenge.<sup>2</sup> The only way to avoid such problems, she suggested, was to develop a cooperative regulatory scheme with the states.<sup>3</sup> In what was the first formal speech by a government Minister concerning the establishment of the ACNC, Bill Shorten, then Assistant Treasurer, explained the constitutional problems in the following way:

The precise role and functions of a Commonwealth regulator is also complicated. The vast majority of the 600 odd thousand not-for-profits are state based entities, with little or no appetite to operate beyond their immediate domain. As a corporate regulator, the Commonwealth is formally responsible for, comparatively, a handful of entities. And so a truly national regulator would require the cooperation and engagement of the States and Territories.

And not every State may be in the mood to cooperate.<sup>4</sup>

The powers of the ACNC Commissioner are considerable. They are not limited in a manner akin to the powers of the Commissioner of the Australian Securities and Investments Commission ('ASIC'), who is able to disqualify a person from managing a corporation for up to five years but who is not able to appoint a replacement.<sup>5</sup> Under the *ACNC Act*, in addition to issuing directions and suspending or removing directors and trustees,<sup>6</sup> the ACNC Commissioner can appoint a person or persons of the Commissioner's choosing to take control of any entity deemed to be a 'Federally Regulated Entity' ('FRE').<sup>7</sup> FREs are defined in order to bring their regulation within the Commonwealth's corporations power (s 51(xx)) or territories power (s 122).<sup>8</sup> The exercise of this power over entities within the jurisdiction of the Commissioner does not require a

<sup>2</sup> Evidence to Standing Committee on Economics, House of Representatives, Canberra, 27 July 2012, 23. Others expressed similar concerns: at 14–25 (Eve Brown, Senior Policy Manager, Trustees, Financial Services Council), 24–5 (Matthew Dwight Turnour).

<sup>3</sup> *Ibid* 24.

<sup>4</sup> Bill Shorten (Speech, Australian Council of Social Services National Conference, Melbourne Convention Centre, 30 March 2011) <[www.acoss.org.au/images/uploads/Minister\\_Bill\\_Shorten-Reform\\_of\\_the\\_NFP\\_Sector.pdf](http://www.acoss.org.au/images/uploads/Minister_Bill_Shorten-Reform_of_the_NFP_Sector.pdf)>, archived at <<https://perma.cc/9EWW-UEVK>>.

<sup>5</sup> *Corporations Act 2001* (Cth) s 206F.

<sup>6</sup> *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ss 85-5, 100-10–100-15 ('*ACNC Act*').

<sup>7</sup> *Ibid* s 100-30.

<sup>8</sup> An FRE is (a) a constitutional corporation within the meaning of the corporations power, (b) a trust all of the trustees of which are constitutional corporations, (c) a body corporate taken to be registered in a territory, (d) a trust the proper law of which or the law of the trust's administration is the law of a territory, or (e) an entity the core or routine activities of which are carried out in or in connection with a territory: *ibid* s 205-15.

court order or any other form of judicial authorisation or scrutiny.<sup>9</sup> The nearest approximation to this power is found in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The ‘unique regulatory powers’<sup>10</sup> of the Registrar under that Act include the capacity to appoint a ‘special administrator’ for an Aboriginal and Torres Strait Islander corporation.<sup>11</sup> However, these powers, conferred in view of what were said to be ‘the special risks and requirements of the Indigenous corporate sector’,<sup>12</sup> can only be exercised ‘in circumstances that are vital to the continued viability of the corporation’.<sup>13</sup> Under the *ACNC Act*, by contrast, all that is required is that the Commissioner ‘reasonably believes’ that a relevantly regulated entity has contravened the Act or that such a contravention is anticipated.<sup>14</sup> Entities coming within the definition of ‘basic religious charity’ (‘BRC’) are exempt from the operation of the removal and appointment power, but not the direction power.<sup>15</sup> The direction power could, however, arguably be used to the same practical effect.<sup>16</sup> The legislation also requires registered charities to produce considerable information for public scrutiny, and requires the Commissioner to publish such information on the internet unless limited exemption provisions are enlivened.<sup>17</sup>

Concerned about government intrusion into civil society and the extent of the powers conferred under the *ACNC Act*, the Liberal-National Opposition promised in the lead-up to the 2013 federal election that it would, if elected,

<sup>9</sup> Similar powers conferred under state law require prior court approval: see, eg, *Charitable Trusts Act 1993* (NSW) ss 5–8; *Trusts Act 1973* (Qld) s 106.

<sup>10</sup> Explanatory Memorandum, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* (Cth) cl 1.7.

<sup>11</sup> *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 490-1.

<sup>12</sup> Explanatory Memorandum, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* (Cth) cls 1.2, 1.7.

<sup>13</sup> *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 6-50(2). There is no such qualification under the *ACNC Act*.

<sup>14</sup> *ACNC Act* (n 6) s 100-5. The Commissioner’s powers must be exercised having regard to legislated principles, including proportionality: at s 15-10(e). In a policy statement, the Commissioner set out how she anticipated exercising the power to suspend or remove a responsible person: *Commissioner’s Policy Statement: Compliance and Enforcement* (CPS 2013/01, Version 2 — Revised Policy, 12 October 2017) [54]–[56]. See also *Waubra Foundation and Commissioner of Australian Charities and Not-for-Profits Commission* [2017] AATA 2424, [27], [32], [71].

<sup>15</sup> *ACNC Act* (n 6) s 100-5(3). A BRC is an entity registered under the *ACNC Act* whose purpose is the advancement of religion and which is not a body corporate under the *Corporations Act 2001* (Cth) or similar Commonwealth, state or territory legislation: at s 205-35.

<sup>16</sup> See *ibid* ss 85-5–85-10.

<sup>17</sup> *Ibid* ss 40-5–40-10.

abolish the ACNC.<sup>18</sup> Following success at that election, a Bill to repeal the Act was introduced into the House of Representatives on 19 March 2014.<sup>19</sup> The Explanatory Memorandum to the Bill explained that one of the reasons for repeal of the Act was that

[t]he establishment of the Commission has introduced new powers in information collection, monitoring and compliance that are not available to Commonwealth bodies with comparable roles, such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority.<sup>20</sup>

The Bill did not advance to the Senate, however, and almost two years later, on 4 March 2016, Christian Porter, the Minister for Social Services, and Kelly O'Dwyer, the Minister for Small Business and Assistant Treasurer, announced in a joint media release that the government would not be proceeding with abolition of the ACNC.<sup>21</sup> Announcing the change in policy, the Ministers said: 'The Government's 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.'<sup>22</sup>

The establishment of the ACNC was a long time coming. No less than seven reviews, dating back to the 1995 Industry Commission Inquiry Report, *Charitable Organisations in Australia*,<sup>23</sup> had recommended establishment of 'an independent administrative body for charities and related entities'.<sup>24</sup> A persuasive

<sup>18</sup> Kevin Andrews, 'Opening Address to the Building Partnerships between Governments and Not-for-Profits Conference' (Speech, Canberra, 20 May 2014) <[www.formerministers.dss.gov.au/15360/opening-address-to-the-building-partnerships-between-governments-and-not-for-profits-conference-20-may-2014-canberra/](http://www.formerministers.dss.gov.au/15360/opening-address-to-the-building-partnerships-between-governments-and-not-for-profits-conference-20-may-2014-canberra/)>, archived at <<https://perma.cc/5Q5K-QK5H>>.

<sup>19</sup> Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth).

<sup>20</sup> Explanatory Memorandum, Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) 1.

<sup>21</sup> Christian Porter and Kelly O'Dwyer, 'Retention of the Australian Charities and Not-for-Profits Commission' (Media Release, 4 March 2016) <<http://christianporter.dss.gov.au/media-releases/retention-of-the-australian-charities-and-not-for-profits-commission>>, archived at <<https://perma.cc/4LVP-9PGB>>.

<sup>22</sup> *Ibid.* See also Tracy Artiach et al, 'The Legitimising Processes of a New Regulator: The Case of the Australian Charities and Not-for-Profits Commission' (2016) 29 *Accounting, Auditing and Accountability Journal* 802.

<sup>23</sup> Industry Commission, *Charitable Organisations in Australia* (Report No 45, 16 June 1995).

<sup>24</sup> Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012 (Cth) 10–12 [1.31]–[1.43].

case for such a body was developed in the first decade of this century. Six separate reports recommended the establishment of some similar administrative body, focused on the not-for-profit sector but independent of the Australian Taxation Office ('ATO'), although the details varied.<sup>25</sup> Indeed, while there were calls for the establishment of such a body, its precise form and the exact scope of its powers was contested. The Minister initially responsible for the passage of the *ACNC Act*, David Bradbury, observed:

I have dealt with many pieces of legislation in my time as both a Parliamentary Secretary and now as Assistant Treasurer — and I must say this is the most scrutinised piece of legislation I've had responsibility for.

In draft form it was the subject of an inquiry by the House of Representatives Standing Committee on Economics and once introduced into Parliament it was subject to a further two concurrent enquiries by the Parliamentary Joint Committee on Corporations and Financial Services, and the Senate Standing Committee on Community Affairs.<sup>26</sup>

Unsurprisingly, a fixed date for review of the *ACNC Act* accompanied its passage. Consequential and transitional amendments legislation committed the *ACNC Act* to a review five years after its commencement, which will be December 2017.<sup>27</sup>

Despite the controversy that attended the establishment of the ACNC, to date there has been no published academic investigation into whether or not the *ACNC Act* is constitutional.<sup>28</sup> Disinterest in the constitutionality of the

<sup>25</sup> *Inquiry into the Definition of Charities and Related Organisations* (Report, June 2001); Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (Report, December 2008); *Australia's Future Tax System* (Final Report, December 2009); Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010); Senate Economics Legislation Committee, *Tax Laws Amendment (Public Benefit Test) Bill 2010* (Report, September 2010) ('*Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill*'); Treasury, Australian Government, *Scoping Study for a National Not-for-Profit Regulator* (Final Report, April 2011).

<sup>26</sup> David Bradbury, 'The NFP Sector Reforms: Moving Towards Smarter Regulation' (Speech, Thomson Reuters Not-for-Profit Law and Regulation Conference, Sydney Harbour Marriott, 17 October 2012) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2012/011.htm&min=djba&DocType>>, archived at <<https://perma.cc/Q4VF-2WEU>>.

<sup>27</sup> *Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Act 2012* (Cth) sch 1 item 16.

<sup>28</sup> See generally Ann O'Connell, Fiona Martin and Joyce Chia, 'Law, Policy and Politics in Australia's Recent Not-for-Profit Sector Reforms' (2013) 28 *Australian Tax Forum* 289; Myles McGregor-Lowndes, 'Are We There Yet?' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 358; Ian Murray, 'Not-for-Profit Reform: Back to the Future?' (2014) 20(1)

ACNC Act was understandable so long as the legislation was slated for repeal, but the question of the constitutionality of the Commissioner's powers is now an important question. Indeed, if the powers conferred upon the Commissioner in relation to FREs are constitutional — and charities are not in a unique position constitutionally — then it would seem to be possible for the Commonwealth to place the Commissioner of Taxation or the Department of Social Services, to choose two examples, in a similar position. That is, they may also be empowered to gather and publish the financial and personal information of taxpayers and benefit recipients, including the activities they engage in and where those activities are carried out.<sup>29</sup> If the Commonwealth is able to confer on the ACNC Commissioner power to appoint a person or persons of the Commissioner's choosing to take control of a charitable trust when he has a reasonable belief of actual or anticipated breach or non-compliance,<sup>30</sup> might not a similar power be conferred on the Commissioner of Taxation in relation to a unit trust or discretionary trust? While in this article we do not explore the

*Third Sector Review* 109; Marina Nehme, 'Regulation of the Not-for-Profit Sector: Is Another Change Really Needed?' (2014) 39 *Alternative Law Journal* 24; Elen Seymour and Marina Nehme, 'The ACNC, the Senate, the Commission of Audit and the Not-for-Profit Sector' (2015) 38 *University of New South Wales Law Journal* 1186; Matthew Turnour, 'Australia: What Is Happening, Why, and Where Might Regulation of Civil Society Be Headed?' (2015) 13 *International Journal of Charity Sector Law* 59; Artiach et al (n 22); Myles McGregor-Lowndes, 'Australia: Two Political Narratives and One Charity Regulator Caught in the Middle' (2016) 91 *Chicago-Kent Law Review* 1021; Jenny Onyx, Liz Cham and Bronwen Dalton, 'Current Trends in Australian Nonprofit Policy' (2016) 7 *Nonprofit Policy Forum* 171; John Vaughan-Williams, 'The Future of Charity Regulation in Australia: Complexities of Change' (2016) 37 *Adelaide Law Review* 219; Carolyn J Cordery, Dalice Sim and Tony van Zijl, 'Differentiated Regulation: The Case of Charities' (2017) 57 *Accounting and Finance* 131; Marina Nehme, 'Australian Charities and Not-for-Profits Commission: Enforcement Tools and Regulatory Approach' (2017) 45 *Australian Business Law Review* 159. For constitutional issues with charity law, see Rohan Price and John Kong Shan Ho, 'The Charity Commission of England and Wales as a Model: Could Hong Kong and Australia Be Importing a Constitutional Problem?' [2012] *Singapore Journal of Legal Studies* 55; Matthew Turnour and Elizabeth Turnour, 'Archimedes, Aid/Watch, Constitutional Levers and Where We Now Stand' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 37.

<sup>29</sup> See ACNC Act (n 6) s 55-5(1), which requires a registered charity to 'keep written financial records that ... correctly record and explain its transactions and financial position and performance ... so as to enable any recognised assessment activity to be carried out in relation to the entity', and ACNC, *Commissioner's Policy Statement: Annual Information Statements* (CPS 2013/02, Version 5 — Revised Policy, 30 January 2017) 2, which states that the ACNC will publish information provided on Annual Information Statements 'unless otherwise stated, or if the ACNC has agreed to withhold or remove information'.

<sup>30</sup> ACNC Act (n 6) ss 100-5, 100-30.

regulatory implications for those outside the charity sector, these wider implications are impossible to overlook completely, and this analysis may be a catalyst and springboard for such further inquiries.

In the Revised Explanatory Memorandum to the Australian Charities and Not-for-Profits Commission Bill 2012 (Cth), the Commonwealth asserted that a combination of the taxation, corporations, external affairs, territories and communications powers adequately support the *ACNC Act*.<sup>31</sup> In this article, we subject those claims to sustained analysis. We find that there are significant doubts about the constitutionality of several of the powers conferred upon the ACNC Commissioner, although the level of doubt in each case varies. The result is a complex and ambiguous matrix of possible constitutional outcomes with differing probabilities attaching to each. In the light of this uncertainty, we conclude that even if those powers can be constitutionally justified, albeit only partially in certain contexts, policy considerations suggest the need for a sustained review of the *ACNC Act* and the powers conferred on the ACNC Commissioner. As the *ACNC Act* is scheduled for review in December 2017, we close by outlining the nature of possible reforms.

The remainder of this article is organised as follows. Part II offers a brief review of the charity sector and the history of its regulation in Australia. It is important to have a clear view of the nature and significance of the charity sector in Australia, the way in which the sector has traditionally been regulated under Australian law, and how the *ACNC Act* has introduced a wholly new scheme of regulation involving the exercise of very considerable powers. Part III explains the scheme established by the *ACNC Act*, its stated objects, the governance standards introduced to regulate the sector, and some of the challenges that the scheme has enlivened. Part IV then addresses the key constitutional issues. The taxation, communications, corporations and territories powers are closely considered, alongside the executive power of the Commonwealth, and the question whether any provisions of the Act contravene the *Constitution's* guarantee of freedom of religion.<sup>32</sup> Part V concludes by summarising the results

<sup>31</sup> Revised Explanatory Memorandum, Australian Charities and Not-for-Profits Commission Bill 2012 (Cth) 23–8 [2.3]–[2.17].

<sup>32</sup> Other potential constitutional issues are not addressed in this article. The external affairs power is not considered because the ‘External Conduct Standards’ contemplated by the *ACNC Act* have not yet been promulgated. This is not to underestimate the potential significance of the implementation of such standards, especially bearing in mind the far-reaching powers already conferred on government agencies to combat terrorism both in Australia and abroad. In a submission to the Senate Economics Legislation Committee on 2 May 2014, the Financial Services Council tendered advice from law firm Herbert Smith Freehills which briefly considered the corporations, territories and external affairs powers and raised questions about the whether

of the analysis and by considering the kinds of changes that should be made to the scheme to make it both constitutionally sound and legislatively appropriate to the regulation of Australia's charity sector.

## II THE CHARITY SECTOR AND ITS REGULATION

### A *The Charity and Not-for-Profit Sector*

In his speech on the establishment of the ACNC, Bill Shorten referred to '600 odd thousand not-for-profits'.<sup>33</sup> In its 2010 report, the Productivity Commission found that the not-for-profit sector had 'grown rapidly over the past decade' and by 2010 contributed 'just over 4 per cent of GDP (just under \$43 billion), with nearly 5 million volunteers contributing an additional \$14.6 billion in unpaid work'.<sup>34</sup> QUT's Centre for Philanthropy and Nonprofit Studies, relying on 2012–13 figures, similarly pointed out that the sector's contribution to GDP of 3.8% (even without regard to the work of volunteers) was 'more than twice as large as the entire economic contribution of the state of Tasmania; and larger than the agricultural, forestry and fishing industries (2.4 per cent) and the information, media and telecommunications and media industries (3 per cent)'.<sup>35</sup> On the basis of data submitted to the ACNC in Annual Information statements in 2016 there were 52,166 charities:<sup>36</sup> that is, approximately 10% of the not-for-profit sector were registered with the ACNC as charities. Registered charities reported \$142.8 billion in annual revenue in 2017.<sup>37</sup> They employed

the ACNC Commissioner's powers of suspension and removal might involve an unconstitutional exercise of judicial power and whether the provision for compensation for any acquisition of property that might occur by operation of the Act (s 185-10) adequately complies with the just terms requirement of s 51(xxxi) of the *Constitution*: Financial Services Council, Submission No 102 to Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into the Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014* (2 May 2014).

<sup>33</sup> Shorten (n 4).

<sup>34</sup> Productivity Commission (n 25) iii.

<sup>35</sup> Myles McGregor-Lowndes, 'The Not for Profit Sector in Australia' (Fact Sheet No 2014/4, Australian Centre for Philanthropy and Nonprofit Studies, August 2014) <[http://eprints.qut.edu.au/75397/4/75397\(updated\).pdf](http://eprints.qut.edu.au/75397/4/75397(updated).pdf)>.

<sup>36</sup> ACNC and Centre for Social Impact and Social Policy Research Centre, *Australian Charities Report 2016* (Report, 2016) 14 <<http://australiancharities.acnc.gov.au/wp-content/uploads/2017/12/Australian-Charities-Report-2016-FINAL-20171203.pdf>>, archived at <<https://perma.cc/Z2MV-LZBB>>.

<sup>37</sup> ACNC, 'Australian Charity Revenue Jumps to \$142.8 Billion' (Media Release, 6 December 2017) <[https://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_230.aspx](https://www.acnc.gov.au/ACNC/Comms/Med_R/MR_230.aspx)>.

over 1 million Australians<sup>38</sup> and engaged volunteers contributing what is estimated to be more than '\$17.3 billion of unpaid labour in 2012–13'.<sup>39</sup>

Of these registered charities, those advancing religion are the largest category. It has been estimated that about one in three registered charities report their charitable purpose as 'the advancement of religion'.<sup>40</sup> This, however, is believed to understate the number of charities that are religious, because many charities do not report religion as their 'main activity' although the advancement of religion or obedience to religious precepts is certainly one of their motivations.<sup>41</sup> For example, many church-run hospitals, aged-care facilities, schools and community services exist, in part, to advance the religious purposes of the charity, but do not report that as their main activity.<sup>42</sup> Anne Robinson and Brian Lucas have claimed that 23 of the largest 25 community service organisations in Australia are religiously grounded.<sup>43</sup>

Charities advancing religion also engage millions of participants and associated volunteers. There are 1.8 million people attending Australia's approximately 13,000 churches each week and they frequently express their faith through registered charities.<sup>44</sup> As McCrindle research on church attendance in Australia has noted, more people go to church weekly than live in the State of South Australia.<sup>45</sup> An Australian Bureau of Statistics analysis of trends in 2013 suggests that about 20% of participants in Christian denominations, and about 14% of participants in other religions, volunteer.<sup>46</sup>

Any adverse effects of the *ACNC Act* on philanthropists, volunteers and charities, particularly religious charities, is therefore likely to have an impact on thousands of organisations and many millions of Australians.

<sup>38</sup> Ibid 42.

<sup>39</sup> Ibid 46.

<sup>40</sup> Penny Knight and David Gilchrist, *Australia's Faith-Based Charities 2013: A Study Supplementing the Australian Charities 2013 Report* (Report, Curtin Not-for-Profit Institute, 2015) 3.

<sup>41</sup> Ibid 1.

<sup>42</sup> Ibid.

<sup>43</sup> Brian Lucas and Ann Robinson, 'Religion as a Head of Charity' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 187, 190.

<sup>44</sup> 'Church Attendance in Australia', *The McCrindle Blog* (Blog Post, 28 March 2013) <[www.mccrindle.com.au/the-mccrindle-blog/church\\_attendance\\_in\\_australia\\_infographic](http://www.mccrindle.com.au/the-mccrindle-blog/church_attendance_in_australia_infographic)>, archived at <<https://perma.cc/2NPC-65W8>>.

<sup>45</sup> Ibid.

<sup>46</sup> Australian Bureau of Statistics, *Australian Social Trends* (ABS Catalogue No 4102.0, 2013).

### B *The Regulatory Context and the Policy Setting*

At common law and in equity, charities have been treated benignly, as Barwick CJ explained in *Ryland v Federal Commissioner of Taxation*.<sup>47</sup> This benign approach has a long history, with entities pursuing a charitable purpose being exempt from taxation since the first income tax legislation was introduced in England.<sup>48</sup> Those exemptions were taken up in Australian taxation legislation and are now set out in div 50 of the *Income Tax Assessment Act 1997* (Cth). In the judicial interpretation of these exemption provisions, however, a benign approach has not been adopted. In 2012, the High Court held that income tax exemptions are to be interpreted in accordance with the principles of construction ordinarily applied to taxation law, not charity law.<sup>49</sup> As a result, breaches by a charity that might rightly be forgiven or excused by a state court can be grounds for loss of income tax exemption.

Prior to the *ACNC Act*, particular classes of charities, such as those managing hospitals and schools, were supervised by governments due to the special needs of those particular sectors, but state Attorneys-General were the only potential supervisors of charities generally. Such supervision by the Attorneys-General was either *ex officio* or *ex relatione*; that is, on the Attorney-General's own motion or at the instigation of another person concerned that a charity's assets were not being applied to the charity's purposes.<sup>50</sup> The ATO also exercised a de facto supervisory role, as most charities sought, obtained and relied upon income tax exemptions and, in some cases, income tax deductibility.<sup>51</sup> As the supervision exercised by the state Attorneys-General and the ATO was not particularly onerous, however, the practical effect of the *ACNC Act* has been to

<sup>47</sup> (1973) 128 CLR 404, 411.

<sup>48</sup> Jean Warburton, Debra Morris and NF Riddle, *Tudor on Charities* (Sweet & Maxwell, 2003) 305.

<sup>49</sup> *Federal Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655, 668–9 [38]–[41] (French CJ, Gummow, Hayne and Crennan JJ). See also *Income Tax Assessment Act 1997* (Cth), as amended by *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth) sch 11 pt 5; Australian Taxation Office, *Income Tax: Special Conditions for Various Entities Whose Ordinary and Statutory Income Is Exempt*, TR 2015/1, 25 February 2015.

<sup>50</sup> See Hubert Picarda, *The Law Relating to Charities* (Bloomsbury Professional, 4<sup>th</sup> ed, 2010) 932–3. A limited number of common law jurisdictions extended the Attorney-General's power to approach the court to 'any person interested in the due administration of the [charitable] trust': see, eg, *Charitable Trusts Act 1993* (NSW) ss 6–8; *Trusts Act 1973* (Qld) s 106(2)(c). The onus of proof shifted to the charity once a concern was raised: see *Taxation Administration Act 1953* (Cth) s 14ZZK(b)(iii), considered in *Re Bicycle Victoria Inc v Commissioner of Taxation* (2011) 55 AAR 203, 246–7 [108].

<sup>51</sup> See Vaughan-Williams (n 28) 237–9.

transform the charity sector from being one of the least regulated to one of the most highly regulated sectors in Australian society.

### III THE ACNC SCHEME

The *ACNC Act* has established a new regulatory framework for the charities and not-for-profit ('NFP') sector.<sup>52</sup> There are two competing 'perceptions' of the problems to be addressed by the legislation, 'namely that of reducing the regulatory burden and improving transparency and efficiency' — goals which are 'often contradictory'.<sup>53</sup> The statutory objectives of the ACNC are set out in the following terms:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.<sup>54</sup>

The scheme is intended to be both regulatory and enabling. It seeks to introduce a 'report-once, use-often' national framework focused on the establishment of a single register, available to be consulted by members of the public and by all government departments, both state and federal.<sup>55</sup> By locating information about registered entities in one national, publicly accessible place, the scheme is intended to reduce the compliance costs and red tape encountered by charities, as well as to strengthen charities' transparency, accountability and quality of governance.

The scheme thus turns on the registration of NFP entities under the Act. Registration is voluntary, but to access tax concessions and other Commonwealth benefits, entities must be registered.<sup>56</sup> The *ACNC Act* empowers the Governor-General to make regulations establishing governance standards and external conduct standards which NFP entities are required to meet as a condition

<sup>52</sup> Revised Explanatory Memorandum (n 31) 4, 17 [1.81].

<sup>53</sup> O'Connell, Martin and Chia (n 28) 314.

<sup>54</sup> *ACNC Act* (n 6) s 15-5(1)

<sup>55</sup> Revised Explanatory Memorandum (n 31) 4.

<sup>56</sup> *ACNC Act* (n 6) ss 15-5(3), 205(2)–(3). See also O'Connell, Martin and Chia (n 28).

of registration.<sup>57</sup> While external conduct standards have not as yet been issued, governance standards were promulgated under the *Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth) ('ACNC Regulation'). All registered charities except BRCs are required to comply with the governance standards.<sup>58</sup> Breach of the standards triggers the ACNC Commissioner's powers to issue directions, to suspend or remove directors and trustees, and to appoint persons to replace them, provided the entity in question is an FRE.<sup>59</sup> Significant noncompliance must be reported.<sup>60</sup>

The governance standards are vague and at times awkwardly expressed. A charitable entity is required:

- to 'demonstrate ... its purposes and its character as a not-for-profit entity', to 'make information about its purposes available to the public', and to 'comply with its purposes and its character as a not-for-profit entity' (Governance Standard 1);<sup>61</sup>
- to 'take reasonable steps to ensure that ... [it] is accountable to its members' and that its members 'have an adequate opportunity to raise concerns' about how the charity is governed (Governance Standard 2);<sup>62</sup>
- to abstain from any conduct (and to avoid any omission) that may be dealt with as an indictable offence or by way of a civil penalty of 60 penalty units or more (Governance Standard 3);<sup>63</sup>
- to take reasonable steps to remove board members who do not meet these requirements (Governance Standard 4);<sup>64</sup> and
- to take reasonable steps to ensure that its board members know and understand their legal duties, and that they carry out some of the more significant of these duties (Governance Standard 5).<sup>65</sup>

Several questions arise out of these requirements.

<sup>57</sup> *ACNC Act* (n 6) ss 25-5, 45-10, 50-10, 200-5.

<sup>58</sup> *Ibid* s 100-5(3).

<sup>59</sup> *Ibid* ss 85-5, 100-5–100-15, 100-30.

<sup>60</sup> *Ibid* s 65-5.

<sup>61</sup> *Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth) reg 45.5(2) ('ACNC Regulation').

<sup>62</sup> *Ibid* reg 45.10(2).

<sup>63</sup> *Ibid* reg 45.15(2).

<sup>64</sup> *Ibid* reg 45.20(2)(b)(ii).

<sup>65</sup> *Ibid* reg 45.25(2).

Governance Standard 1 refers to the ‘purposes’ and ‘character’ of the entity. The charitable *purposes* of an entity might be stated in its governing rules, but what more is required in order to demonstrate its *character*?

Governance Standard 2 gives examples of how a registered entity might ‘take reasonable steps to ensure that ... [it] is accountable to its members’ and that its members ‘have an adequate opportunity to raise concerns’ about how the charity is governed. These examples are modelled on the kinds of practices that are typically required of companies registered under the *Corporations Act*. However, if a charity for reasons specific to its traditional practices or religious convictions wishes to organise itself differently, it is unclear exactly what it needs to do to comply. For example, if an order of nuns — which is not a BRC and must therefore comply with the governance standards — happens to have a hierarchical rather than a democratic form of government (perhaps with leadership exercised by one person), difficulties in compliance with Governance Standard 2 (as well as Governance Standards 4 and even 5) can be envisaged. These challenges may arise even if the order is extremely well governed. The governance standards do not seem to anticipate the special needs of these kinds of institutions. Whether the standards are likely to be satisfied in such circumstances is difficult to determine.

Governance Standard 3, which requires compliance with Australian laws, would seem to be straightforward. However, ambiguity remains in relation to especially complex areas of Australian law, such as the vexed question of political advocacy by charities. The issues that arise are so difficult to resolve that even the ACNC Commissioner, exercising her guidance and educative function,<sup>66</sup> has not been able to explain when a charity will breach the law by political advocacy or campaigning. In an official document, the Commissioner stated:

[I]t is important to know that political advocacy and campaigning is a complex area for charities. Reasonable advocacy and campaigning depends on the purposes of the charities involved and specific details of their activities in pursuing their stated purposes. As such, it can be difficult to provide simple guidance that applies conveniently to all charities.<sup>67</sup>

A charity concerned about the possible loss of income tax exemption because of its political advocacy will be keen to identify what it must do to maintain compliance with the governance standards. However, that is not an easy task.

<sup>66</sup> *ACNC Act* (n 6) s 110-10(1).

<sup>67</sup> ‘Charities, Elections and Advocacy’, *Australian Charities and Not-for-Profits Commission* (Web Page, April 2016) <[www.acnc.gov.au/ACNC/Reg/Charities\\_elections\\_and\\_advocacy\\_.aspx](http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx)>.

In January 2017, the Commissioner relied upon Governance Standard 3 to de-register a religious charity that engaged in political advocacy.<sup>68</sup> Whatever the merits of this particular decision, far from being straightforward, the application of the governance standards can be fraught with uncertainty. Charities seeking to be compliant with the standards can have great difficulty determining what is required to comply — even with respect to the ostensibly straightforward ‘legal compliance’ obligation.

It is intended that the Commissioner exercise the more draconian powers as a matter of last resort, having regard to the principles set out in the *ACNC Act*.<sup>69</sup> The inaugural Commissioner made it clear that her intent was generally to take a graduated approach.<sup>70</sup> If the current Commissioner does choose to intervene, however, he has a substantial suite of powers and considerable discretion. Thus, the Commissioner’s power to replace the board or CEO of a charity is constrained only by the reasonable opinion of the Commissioner.<sup>71</sup> It would not matter that the entity in question had a different understanding of the law or the governance standards. All that is required to trigger the Commissioner’s enforcement powers is that the Commissioner has a reasonable belief that there has been a breach of the Act or a governance standard, or anticipates such a breach.<sup>72</sup> This power could be particularly problematic for a listed public company that is the trustee of many trusts, some of which may be charitable. As the Financial Services Council has explained, if ‘a trustee company has persisted with a breach of one of the governance standards, say by continuing with a course of action that the Commissioner believes is not in the best interests of the trust, and the trustee disagrees with this’, and continues with this course of action, then the Commissioner may ‘remove the CEO of the company for matters that relate to only one trust.’<sup>73</sup> Moreover, if the entity, being an FRE, is one of Australia’s 13,000 churches *and* one of the 80% or more of char-

<sup>68</sup> See ACNC, ‘Catch the Fire Ministries Inc Loses Charity Status’ (Media Release No 196, 17 January 2016) <[https://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_196.aspx](https://www.acnc.gov.au/ACNC/Comms/Med_R/MR_196.aspx)>.

<sup>69</sup> See *ACNC Act* (n 6) s 15-10.

<sup>70</sup> *Commissioner’s Policy Statement: Compliance and Enforcement* (n 14) [17]–[18], [54]–[56]. See also Nehme, ‘Australian Charities and Not-for-Profits Commission’ (n 28) 187, where Nehme both explains the graduated approach and argues that a power to impose civil penalties should be added.

<sup>71</sup> *ACNC Act* (n 6) s 100-5.

<sup>72</sup> *Ibid.*

<sup>73</sup> Financial Services Council, Submission No 102 (Supplementary Submission) to Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into the Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014*, 5 June 2014.

ities that are not BRCs, the Commissioner is able to exercise his powers to replace the clergy leader, priest, minister or pastor of the entity and to appoint someone of his choosing. That this is the intent was made clear in the Revised Explanatory Memorandum.<sup>74</sup> The *ACNC Act* requires the ACNC replacement appointee to perform *all* of the tasks of the replaced person.<sup>75</sup> Where that person is the CEO of a public company or the clergy of a religious institution, this unqualified power to appoint, although perhaps unintentionally, tests the boundaries of the Commonwealth's power to control and regulate public companies and religious institutions.

Challenging a decision of the Commissioner may be difficult both legally and practically. Legally, the charity bears the onus of proving that the decision 'should not have been made or should have been made differently'.<sup>76</sup> Moreover, all that is required on the Commissioner's part to justify an exercise of the power is that the Commissioner reasonably believed that the registered entity had contravened a provision of the Act or a governance standard, or that it was more likely than not that the registered entity would contravene a provision of the Act or a governance standard.<sup>77</sup> These legal difficulties are compounded by the practical difficulty that the Commissioner's appointee then has control of the funds of the charity that might otherwise have been used to resist the appointment. Further, the reputational damage to the charity caused by the Commissioner's intervention might make its future unviable and the contest not worth the cost. The inaugural Commissioner stated that she would only use such action 'where it is appropriate and necessary to do so'.<sup>78</sup> But the current and any other future Commissioner is not obliged to be constrained by 'necessity' and could withdraw the policy and take a different approach. He or she must have regard to the eight factors listed in the *ACNC Act* but the weighting placed on the factors by a new appointee may vary from that of the inaugural Commissioner.<sup>79</sup> The principles of 'regulatory necessity', 'reflecting risk' and 'proportionate regulation' are grouped as only one of eight factors to which regard must be had. If the Commissioner emphasised the importance of the other seven factors and decided to exercise the full suite of the Commissioner's

<sup>74</sup> Revised Explanatory Memorandum (n 31) [9.42]. Note that the past Commissioner set out when and how she intended to use her powers in *Commissioner's Policy Statement: Compliance and Enforcement* (n 14).

<sup>75</sup> *ACNC Act* (n 6) s 100-55.

<sup>76</sup> *Ibid* s 165-40(b); *Waubra Foundation* (n 14) [45].

<sup>77</sup> *ACNC Act* (n 6) s 101-5(1).

<sup>78</sup> *Commissioner's Policy Statement: Compliance and Enforcement* (n 14) [54].

<sup>79</sup> *ACNC Act* (n 6) s 15-10.

powers more readily, it might be difficult in both law and practice to challenge that use. The AAT has now given guidance on the proper process for challenging the decision. The review is not a *de novo* review of the decision of the Commissioner:

Instead of the Tribunal reviewing the administrative decision on its merits and determining whether the decision of the decision-maker is the correct or preferable decision on the material before it, it is to consider whether the applicant has proved, having regard only to defined grounds, that the decision should not have been made or should have been made differently.<sup>80</sup>

The Revised Explanatory Memorandum states that the intent of the legislation is to transfer responsibility in such matters from judicial control to administrative regulation, ostensibly to lessen the burden placed on NFP entities. The Memorandum explains that ‘a regulator can act in a timely manner, without the need for lengthy court proceedings’ and ‘can provide more cost-effective and accessible redress, negating the need for costly court proceedings.’<sup>81</sup> After offering the assurance that ‘the decisions of regulators are subject to an appropriate review and appeal process throughout the levels of the judicial system,’<sup>82</sup> the Memorandum claims that such a scheme reflects ‘reforms that have occurred internationally, and is a movement that is progressively being adopted in Australia.’<sup>83</sup>

This transfer of responsibility in such matters from judicial control to administrative regulation troubled the Senate Standing Committee for the Scrutiny of Bills, which did not find the explanation in the Revised Explanatory Memorandum, or further information supplied by the Treasurer, satisfying. The Committee concluded that it was ‘not clear what is required to prove that the decision [of the Commissioner] is wrong or should have been made differently.’<sup>84</sup>

The policy foundations for the link between the legislated objects, the regulatory powers and the discretion given to the ACNC Commissioner have not been expounded. Although the taxation power is relied upon to justify the legislation, there is little appeal to the policy principles widely accepted as principles framing tax treatment of entities — such as equity, efficiency, simplicity,

<sup>80</sup> *Waubra Foundation* (n 14) [77]; see also at [59], [70], [75]–[76], [87].

<sup>81</sup> Revised Explanatory Memorandum (n 31) 150 [9.212].

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid* 150 [9.213]

<sup>84</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Thirteenth Report of 2012* (Report, 31 October 2012) 449. See generally Price and Ho (n 28).

sustainability or policy consistency — to justify the obligations imposed on registered charities and the powers conferred upon the ACNC Commissioner.<sup>85</sup> There is an international literature suggesting that, because charities are vehicles for civic expression and very substantial voluntary contributions of time and money, the regulation of such organisations should protect fundamental freedoms,<sup>86</sup> and ‘[i]t is clearly in the interests of proportionality and targeting that a particular regulatory goal is achieved through rules that are no more complex, or greater in number, than necessary’.<sup>87</sup> However, the Revised Explanatory Memorandum does not disclose any engagement with either tax policy principles or the international literature that addresses the regulation of the charity sector.<sup>88</sup>

We turn now to the constitutional issues.

#### IV THE CONSTITUTIONAL ISSUES

The Revised Explanatory Memorandum acknowledges that under the *Constitution* ‘the Commonwealth does not have any legislative power specifically to regulate the not-for-profit (NFP) sector’.<sup>89</sup> It argues, instead, that various Commonwealth powers support particular aspects of the law. In particular, the powers relied on are the taxation power, the communications power, the corporations power, the territories power and the external affairs power. The Memorandum asserts that the combined effect of these powers is to provide sufficient constitutional support for the *ACNC Act*.

In this section of the article, we focus on each of these powers except the external affairs power.<sup>90</sup>

<sup>85</sup> See, eg, *Australia’s Future Tax System* (n 25) pt 2, 205–13; Productivity Commission (n 25) 155–68; *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill* (n 25) 64 recommendation 8; *Scoping Study for a National Not-for-Profit Regulator* (n 25) 27–30.

<sup>86</sup> Leon E Irish, Robert Kushen and Karla W Simon, *Guidelines for Laws Affecting Civic Organizations* (Open Society Institute, 2<sup>nd</sup> ed, 2004) 9 (referring to ‘the fundamental freedoms of expression, association, and peaceful assembly’).

<sup>87</sup> Jonathan Garton, *The Regulation of Organised Civil Society* (Hart Publishing, 2009) 118.

<sup>88</sup> There is now an emerging Australian literature that can also be engaged: see n 28.

<sup>89</sup> Revised Explanatory Memorandum (n 31) 23 [2.2].

<sup>90</sup> The Revised Explanatory Memorandum claims that the external affairs power is relevant only to the ‘external conduct standards’ contained in the *ACNC Regulation* and other, presumably related but unspecified, provisions of the Act and the Regulation that are supported by the external affairs power: *ibid* 26–7 [2.12]–[2.14]. As noted, we do not address the external affairs power in this article because external conduct standards have not to date been promulgated.

### A The Taxation Power

Section 51(ii) of the *Constitution* authorises the Commonwealth Parliament to make laws with respect to taxation. The High Court has adopted a very wide view of the scope of the taxation power.<sup>91</sup> It has been held, for example, to support legislation which not only imposes taxation but which makes liability to taxation depend on performance of certain actions or compliance with certain requirements which are, in effect, regulatory in nature.<sup>92</sup> Using similar techniques, the *ACNC Act* and *ACNC Regulation* do not impose a duty on entities, or even registered entities, to comply with the governance standards and external conduct standards for which the Act makes provision by regulation.<sup>93</sup> Rather, they rely on the fact that an entity must comply with the governance standards and submit to the regulatory powers of the ACNC Commissioner in order to be registered,<sup>94</sup> and that registration is a prerequisite for entitlement to certain tax concessions.<sup>95</sup> It is arguable that there is at least some connection between the imposition of the governance standards and the taxation power. However, there are three matters that need to be considered.

The first is whether the provisions of the *ACNC Act* and *ACNC Regulation* have a *sufficient* connection to the taxation power. This is not only because the *ACNC Act* does not, of itself, impose any obligation to pay tax, although this fact is arguably relevant.<sup>96</sup> The problem is one of remoteness. As Dixon J once put it, a law will not be constitutional if the connection to its head of power is 'tenuous, vague, fanciful or remote'.<sup>97</sup> More recently, it has been affirmed that the connection must not be 'so insubstantial, tenuous or distant' that the law

<sup>91</sup> See Justice Michelle Gordon, 'The Commonwealth's Taxing Power and Its Limits: Are We There Yet?' (2013) 36 *Melbourne University Law Review* 1037.

<sup>92</sup> *Osborne v Commonwealth* (1911) 12 CLR 321; *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1.

<sup>93</sup> See *ACNC Act* (n 6) ss 45-10, 50-10.

<sup>94</sup> *Ibid* s 25-5(3)(b).

<sup>95</sup> *Ibid* s 15-5(3).

<sup>96</sup> See *Luton v Lessels* (2002) 210 CLR 333, 343 [13] (Gleeson CJ), 372 [118] (Kirby J), citing *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 178 [91] (Gleeson CJ and Kirby J), stating that the presence or absence of a legislative objective to raise revenue 'will often be significant'. However, it has also been observed that a legislative objective to raise revenue is not essential; a high tariff may be imposed to protect local industry, not to raise revenue by taxing imports: *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97, 104 [16].

<sup>97</sup> *R v Sharkey* (1949) 79 CLR 121, 151. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79.

‘cannot properly be described as a law with respect to [the] subject matter’.<sup>98</sup> In his important judgment in *Fairfax v Federal Commissioner of Taxation*, Kitto J observed that the question

is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, ‘with respect to’, one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?<sup>99</sup>

Notably, the *ACNC Act* and *ACNC Regulation* do not impose any duty to pay tax; they do not even make registration a condition of entitlement to tax concessions. The *ACNC Act* merely refers, in one of its objects clauses, to this fact.<sup>100</sup> It is in the *Income Tax Assessment Act 1997* (Cth) that registration under the *ACNC Act* is made a condition of entitlement to the taxation concessions.<sup>101</sup> The *Income Tax Assessment Act* is undoubtedly a law with respect to taxation. But the absence of any substantive provision in the *ACNC Act* which connects the registration procedure and conditions to the duty to pay tax makes its connection to the subject matter of taxation remote and distant, and somewhat tenuous; arguably too remote, distant and tenuous to constitute a sufficient connection to the taxation power.

The second question is whether the legislation contravenes the proposition that the taxation power does not enable the Commonwealth to impose an obligation to pay money in an arbitrary manner. The High Court has held that it must be possible to point to ‘criteria by which liability to pay the tax is imposed’, and ‘it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner’.<sup>102</sup> This does not deny that ‘the incidence of a tax may be made dependent upon the formation of an opinion’ by the Commissioner of Taxation,<sup>103</sup> but it does mean that ‘liability can only be imposed by reference to ascertainable criteria with a

<sup>98</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 203 [66], citing *Melbourne Corporation* (n 97) 79.

<sup>99</sup> *Fairfax* (n 92) 7.

<sup>100</sup> *ACNC Act* (n 6) s 20-5(2).

<sup>101</sup> *Income Tax Assessment Act 1997* (Cth) s 50-47.

<sup>102</sup> *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640.

<sup>103</sup> *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 [9].

sufficiently general application and that the tax cannot lawfully be imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation'.<sup>104</sup>

The availability of certain tax concessions is dependent upon registration under the *ACNC Act*. In determining whether there has been a breach of the governance standards, the ACNC Commissioner has substantial discretion. As soon as the standard is breached, or breach is anticipated, entitlement to registration, and consequently tax concessions, can be lost. It is arguable that anticipating not only the requirements of the governance standards but also the reasonable application of the standards by the Commissioner is so vague in application that an entity is deprived of the opportunity to prove in the courts that 'the criteria of liability were not satisfied' in its case.<sup>105</sup>

*ACNC Regulation* reg 45.1 states that the governance standards are meant to provide 'a minimum level of assurance that [registered charities] meet community expectations in relation to how [charities] should be managed'. The regulation goes on to indicate what those community expectations 'may include', such as how an entity 'promotes the effective and responsible use of its resources'. It also explains that the steps a registered charity will need to take to comply with the governance standards 'will vary according to its particular circumstances, such as its size, the sources of its funding, the nature of its activities and the needs of the public'. Accordingly, the governance standards are to be interpreted, it is said, having regard to the objects of the Act and the matters the Commissioner must consider in exercising his or her powers.<sup>106</sup> Moreover, the matters the Commissioner must consider are said in reg 45.1 to include 'the principles of regulatory necessity, reflecting risk and proportionate regulation, as well as the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia'.

These interpretive provisions apply to all of the governance standards. Thus, although some of the governance standards are relatively specific in nature, it will be very difficult for a registered entity to predict how they will be interpreted by the Commissioner in the light of the many diverse factors that reg 45.1 requires to be taken into consideration. Returning to the example of the order of nuns discussed earlier, Governance Standard 2 requires a registered entity to 'take reasonable steps to ensure that ... the registered entity is accountable to its members' and that its members 'have an adequate opportunity to

<sup>104</sup> *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684.

<sup>105</sup> *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 379.

<sup>106</sup> See n 54 and accompanying text.

raise concerns about the governance of the registered entity'.<sup>107</sup> Here the question needs to be asked: what steps would be 'reasonable' for the order of nuns to carry out, and what opportunities to raise concerns would be 'adequate'? This will be particularly difficult to determine when the circumstances of each particular charity must be borne in mind together with the wide range of factors that must be considered pursuant to reg 45.1. The notes to Governance Standard 2 suggest steps that a registered entity might take to meet these requirements, such as holding annual general meetings, including question-and-answer sessions at those meetings, providing members with annual reports, providing elections for responsible entities and enabling members to propose resolutions and vote upon them.<sup>108</sup> These are only suggested steps, but how is a registered entity to know whether its own circumstances, considered in the light of all of the factors referred to in reg 45.1, mean that it must comply with these suggestions, or need not do so, to maintain registration and consequently entitlement to tax concessions?

Given the uncertainty about what the governance standards may mean in practice for each registered charity, the potential for subjectiveness in determinations by the Commissioner is very great, and the factors to be considered are so disparate and diverse, that there is no clear statutory protection against them being applied in an arbitrary manner. In such circumstances, it may be very difficult, if not impossible, for a registered charity to prove in the courts that the criteria set out in the governance standards — which are in effect the criteria according to which its taxation liability will be determined — have or have not been applied in an arbitrary manner.

Now it is true that the decided cases display hesitancy on the part of the courts to find that the criteria established by legislation are so vague that they have this effect. However, the governance standards are so patently and excessively vague in their application there is a persuasive argument that their application could in some circumstances involve the imposition of taxation liability in an arbitrary or capricious manner.

The third and related issue associated with the taxation power concerns what is sometimes called the 'incidental' scope of the power. Griffith CJ put it this way in *D'Emden v Pedder*: 'where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective'.<sup>109</sup> The establishment of the ATO and

<sup>107</sup> ACNC Regulation (n 61) reg 45.10(2).

<sup>108</sup> Ibid reg 45.10 notes 1–2.

<sup>109</sup> (1904) 1 CLR 91, 110.

perhaps by extension the ACNC as agencies to administer taxation law would ordinarily fall within the incidental scope of the taxation power. However, there must be a relationship of appropriateness or proportionality between the means and the end of the legislation. As Dixon CJ explained in *Burton v Honan*, there must be ‘a reasonable connection between the law which is challenged and the subject of the power under which the legislature purported to enact it’.<sup>110</sup>

The *ACNC Act* empowers the Commissioner to regulate entities and exercise considerable powers over them. This gives rise to the question whether there is a sufficient connection between the taxation power and the regulatory powers conferred upon the ACNC. For example, the Commissioner is empowered to disqualify a responsible entity if he or she ‘reasonably believes that the disqualification is justified having regard to the objects of the Act’.<sup>111</sup> The connection between such powers of intervention in the management of registered charities is very remote from the administration of taxation. The connection is sustained through the relationship between a charity’s entitlement to taxation concessions and its registration under the Act. The Act lays down conditions for registration and these conditions are enforced by the Commissioner. However, the Commissioner’s power to intervene is not premised on the breach of any specific conditions, but rather on the basis of the Commissioner’s belief that disqualification of a responsible entity is justified having regard to the objects of the Act. This suggests that there are several steps between the subject matter of ‘taxation’ and the Commissioner’s intervention into the affairs of the registered charity. Each step makes the link between the constitutional power and the exercise of the discretion increasingly difficult to sustain.

This problem of establishing a sufficient connection between the taxation power and the ACNC’s regulatory powers seems to have been acknowledged in the Revised Explanatory Memorandum to the *ACNC Act*, which limits the aspects of the *ACNC Act* that are said to be authorised by the taxation power to those related to the establishment of a registration scheme as a prerequisite for entitlement to tax concessions, including the prescription of standards that entities need to meet in order to be registered.<sup>112</sup> Notably, this is not the same as saying that the taxation power supports the Commissioner’s intervention into the affairs of a registered charity. Such powers of intervention are not standards that an entity must meet in order to be registered. Rather, they are powers that an entity is subjected to as a consequence of its registration under the *ACNC Act*. The exercise of such powers is very remote from the conferral of taxation

<sup>110</sup> (1952) 86 CLR 169, 179.

<sup>111</sup> *ACNC Regulation* (n 61) reg 45.20(4)(c).

<sup>112</sup> Revised Explanatory Memorandum (n 31) 23–4 [2.3].

exemptions on registered charities, arguably too remote to be constitutionally supported by the taxation power.

### B *The Communications Power*

Section 51(v) of the *Constitution* authorises the Commonwealth to make laws with respect to ‘postal, telegraphic, telephonic, and other like services’. The Revised Explanatory Memorandum relies on what it calls the ‘communications’ power to support the establishment of an electronic database of registered entities to be made available for public inspection on the internet.<sup>113</sup> It also claims that this power supports the capacity of the Commissioner and ACNC officers to obtain information and undertake monitoring for the purpose of determining whether information provided by an entity and included in the register is correct.<sup>114</sup> The register includes information about each entity, such as its name, its ABN, its directors and trustees (as applicable), as well as information supplied by the entity, such as financial reports and information statements. The *ACNC Act* requires that ‘the Register is to be made available for public inspection on the internet.’<sup>115</sup> It is arguable that there is an insufficient connection between the communications power and this particular requirement.

The first point to be noted is that the subject matter of the head of power is described in the *Constitution* as ‘postal, telegraphic, telephonic, and other like services’. The reference is to a particular class of ‘services’, not ‘communication’ per se. The High Court has held that ‘other like services’ include radio and television broadcasting.<sup>116</sup> The Commonwealth also appears to have relied on the power to support regulation of aspects of the internet.<sup>117</sup> The cases have held that the head of power enables the Commonwealth to control the provision of such services by establishing a licensing system which prescribes conditions for the holding of such licences. These conditions can include the content that is communicated using such services, provided there is a proportionate relationship between the purposes of the legislation that connect it to the head of power and the means adopted by the legislation to achieve those purposes.<sup>118</sup>

Such laws regulate the provision and use of broadcasting and telecommunication services. It is thus possible to characterise them as laws that regulate

<sup>113</sup> Ibid 24 [2.5].

<sup>114</sup> Ibid 24 [2.6].

<sup>115</sup> *ACNC Act* (n 6) s 40-5(4).

<sup>116</sup> *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v Commonwealth [No 2]* (1965) 112 CLR 206.

<sup>117</sup> See, eg, *Interactive Gambling Act 2001* (Cth).

<sup>118</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29.

those particular types of technology considered as *services* provided to the public. However, s 40-5(4) of the *ACNC Act*, interpreted in the context of the Act as a whole, is not a law that regulates the provision and use of such services. Rather, it prescribes that certain information is to be made available for public inspection, and it makes use of the internet as an effective way in which the information can be disseminated.

As noted earlier, the High Court has consistently maintained that there must be ‘a sufficient connection between the law and the head of power’.<sup>119</sup> The connection must not be ‘so insubstantial, tenuous or distant’ that the law ‘cannot properly be described as a law with respect to [the] subject matter’.<sup>120</sup> The question that must be asked of the law is this: ‘is it in its real substance a law upon, “with respect to”, one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?’<sup>121</sup>

Again, in applying this test, the character of the Act must be determined by reference to ‘its operation and effect: its operation by reference to the rights, duties, powers or privileges that the Act creates or affects; its effect by reference to its operation in the circumstances to which it applies’.<sup>122</sup> Thus, Stephen J once observed that an accurate characterisation of a law for constitutional purposes must necessarily involve a detailed account of the several elements that constitute it, such as the person or class of persons to whom the law is directed, the activity or activities that are proscribed or prescribed, and the conditions under which the law applies.<sup>123</sup> His Honour continued:

Once it is recognized that a law may possess several distinct characters, it follows that the fact that only some elements in the description of a law fall within one or more of the grants of power in s 51 or elsewhere in the *Constitution* will be in no way fatal to its validity. So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more of such grants of power then, however else it may also be described, the law will be valid. If a law enacted by the federal legislature can be fairly described both as a law with respect to a

<sup>119</sup> *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492.

<sup>120</sup> *Mulholland* (n 98) 203 [66].

<sup>121</sup> *Fairfax* (n 92) 7.

<sup>122</sup> *Leask v Commonwealth* (1996) 187 CLR 579, 590–1 (citations omitted).

<sup>123</sup> *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 190–4 (‘*Actors Equity*’).

grant of power to it and as a law with respect to a matter or matters left to the States, that will suffice to support its validity as a law of the Commonwealth.<sup>124</sup>

The orthodox approach to characterisation that is now applied by the Court has accordingly been described in these terms:

[A] single law can possess more than one character in the sense that it can properly be characterized as a law with respect to more than one subject-matter. It suffices for constitutional validity if any one or more of those characters is within a head of Commonwealth legislative power. In determining validity, it is not necessary to single out the paramount character. It is enough that the law ‘fairly answers the description of a law “with respect to” one given subject-matter appearing in s 51’ regardless of whether it is, at the same time, more obviously or equally a law with respect to some other subject-matter ...<sup>125</sup>

Section 40-5(4) of the *ACNC Act* consists of several elements: its subject matter is the register; the person upon whom the obligation is imposed appears to be the Commissioner; the obligation is to make the register available on the internet; and the purpose for which this is done is to enable public inspection of the register. Following the approach described above, it might be possible to characterise the law as a law with respect to any one of these elements. It is only the use of the internet as a means of dissemination that potentially connects the law to the relevant head of power. However, this is only one characteristic of the law among several others and, more importantly, it is arguably the least significant. Rather, the point and purpose of the law is to impose a duty on the Commissioner to make the register available for public inspection; the use of the internet is only a convenient means to achieving this purpose. Accordingly, although there is a conceivable connection between the law and the head of power, it is arguable that this connection is so insubstantial, tenuous and distant that the law cannot properly be described as a law with respect to ‘postal, telegraphic, telephonic, and other like services.’ It is arguable, in other words, that the law’s use of such services is so incidental to the law that it does ‘not in truth ... affect its character.’<sup>126</sup>

This argument is reinforced by the fact that the subject matter of the power in s 51(v) of the *Constitution* is a particular set of ‘services.’ It is not a power to legislate with respect to the internet in the abstract. It is a power to legislate with respect to particular technologies conceived as services. However, s 40-5(4) is

<sup>124</sup> Ibid 192.

<sup>125</sup> *Re F; Ex parte F* (1986) 161 CLR 376, 387–8, quoting *ibid* 194.

<sup>126</sup> *Fairfax* (n 92) 7.

not concerned with the internet regarded as a particular service provided to the community. Rather, the internet happens to be an efficient and effective way of making information available to the public. In this respect, the question bears an analogy to the issue that arose in *Williams v Commonwealth [No 2]*.<sup>127</sup> There, the High Court had to consider the meaning and application of s 51(xxiiiA) of the *Constitution*, which confers power to make laws with respect to the provision of a range of social security benefits, including ‘sickness and hospital benefits’ and ‘benefits to students’. The Court held that the term ‘benefits’ had a restricted meaning: namely, the provision of payments to alleviate the ‘human wants’ of persons that arise from the specific circumstances or condition in which they find themselves, such as the provision of specifically identifiable sickness and hospital benefits given to particular patients.<sup>128</sup> The Court rejected the argument that the term ‘benefits’ could be interpreted more widely, to encompass the provision of some ‘advantage or good’ conceived generally.<sup>129</sup> By parity of reasoning, it is arguable that the power in s 51(v) is limited to postal, telegraphic, telephonic and similar technologies conceived as ‘services’ that may require regulation *as such*, and does not extend to a law that bears some incidental connection to the use of such technologies as a means of regulating some other matter or achieving some other objective.

The Revised Explanatory Memorandum also claims that the communications power supports the power of the Commissioner to monitor and to obtain information to determine whether information provided by an entity and included in the register is correct.<sup>130</sup> However, the connection between this and the communications power is even more tenuous.

Moreover, while the Revised Explanatory Memorandum relies upon the communications power to empower and require the ACNC Commissioner to publicise the information, no such justification is provided for compelling a charity itself to ‘make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients’.<sup>131</sup> That obligation has no necessary connection to the internet or any other particular form of communication contemplated by the communications power whatsoever. A persuasive case can be mounted that this particular obligation is not authorised by the communications power.

<sup>127</sup> (2014) 252 CLR 416.

<sup>128</sup> *Ibid* 458–9 [43]–[44].

<sup>129</sup> *Ibid* 458–9 [43].

<sup>130</sup> Revised Explanatory Memorandum (n 31) 24 [2.6].

<sup>131</sup> *ACNC Regulation* (n 61) reg 45.5(2)(b).

The constitutional authority for the legislation provided by the communications power is therefore particularly weak. As noted earlier, however, it needs to be recalled that despite the fact that the Revised Explanatory Memorandum relies on the communications power to support these provisions, it may nevertheless be argued by the Commonwealth that the taxation power provides the necessary authority to enact them. The Commonwealth may argue that the *ACNC Act*, in effect, makes publication of information on the internet a condition of charitable status for taxation purposes, and therefore is authorised by the taxation power. If such an argument were to be accepted, it would seem that the Commonwealth Parliament could rely on the taxation power to require publication of all taxpayers' information, not only registered charities but generally.

### C Executive Power

The Commonwealth might take the view that once it, or one of its agencies, has a taxpayer's information it is constitutionally free to publish it on a public register, and can do this without the need for statutory authorisation, just as it is able to undertake inquiries and perform other acts associated with its constitutional functions. However, the High Court's recent decision in *Williams v Commonwealth* ('*Williams [No 1]*') suggests that the Commonwealth will need to point to a specific source of executive power in order to do so.<sup>132</sup>

The executive power of the Commonwealth extends to the execution and maintenance of the *Constitution* and of laws validly enacted by the Commonwealth, and it includes certain prerogative powers of the Crown attributed to the Crown in right of the Commonwealth.<sup>133</sup> Apart from the possibility of validly enacted legislation authorising the Commonwealth to make certain information public, none of these other aspects of the executive power would seem to authorise publication of information. It is not part of the prerogative and it is not an aspect of the execution and maintenance of the *Constitution*. In *Williams [No 1]*, the Court appeared to reject the proposition that, apart from the aspects of the executive power just noted, which would include acts necessary for the administration of government departments, the Commonwealth also has the ordinary capacities of a natural person.<sup>134</sup> Although natural persons have legal capacity to enter contracts and spend money, the Court reasoned that

<sup>132</sup> (2012) 248 CLR 156.

<sup>133</sup> *Constitution* s 61.

<sup>134</sup> Nicholas Aroney, 'A Power "Singular and Eccentric": Royal Commissions and Executive Power after *Williams*' (2014) 25 *Public Law Review* 99, 100–1, 107.

the Commonwealth did not have such capacities as such, but would have to rely on specific constitutional or statutory authorisation to do so.<sup>135</sup> Similar considerations seem to apply to the publication of information held by the Commonwealth. The executive power does not of itself authorise it, so it can only be authorised by a validly enacted statute.

The application of *Williams [No 1]* to other circumstances has not been tested in the courts. It may be argued that contracting and expenditure in accordance with contractual obligations are acts which have legal significance and require legal capacity, and it may be questioned whether mere publication of information would involve the exercise of a legal capacity in the same sense. However, what is at stake is not a decision by the Commonwealth simply to publicise information, but an act done by a Commonwealth agency in the performance of its governmental functions. As members of the High Court have observed in relation to royal commissions, the powers exercised by agencies of the executive government should not be viewed merely as ‘capacities’ which the government has in common with natural persons.<sup>136</sup> A persuasive case can be mounted that the executive power does not provide sufficient authority for the ACNC, as an instrumentality of the Commonwealth, to publicise the information apart from the authority to do so constitutionally conferred by the *ACNC Act*.

#### D Corporations Power and Territories Power

As noted earlier, the limited nature of the Commonwealth’s power to regulate the NFP sector is acknowledged in the Revised Explanatory Memorandum and in the structure of the *ACNC Act* itself. In particular, several aspects of the *ACNC Act* apply only to FREs, which are defined as entities that the Commonwealth has power to regulate under the corporations and territories powers.<sup>137</sup>

Section 51(xx) of the *Constitution* authorises the Commonwealth to make laws with respect to certain types of corporations: specifically, ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. Section 122 of the *Constitution* authorises the Commonwealth to ‘make laws for the government of any territory’. Corporations falling

<sup>135</sup> *Williams [No 1]* (n 132) 193 [38] (French CJ), 237–9 [155]–[159] (Gummow and Bell JJ), 253–4 [204] (Hayne J), 352 [518] (Crennan J), 373–4 [595] (Kiefel J).

<sup>136</sup> See, eg, *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25, 155–6.

<sup>137</sup> *ACNC Act* (n 6) s 205–15.

within these two heads of power are frequently called ‘constitutional corporations’, and the *ACNC Act* uses this terminology in its definition of FRES.<sup>138</sup>

Two constitutional questions arise in relation to the Act’s regulation of FRES: first, on what criteria will an NFP entity be determined to be a ‘constitutional corporation’ or, more specifically, a ‘trading corporation’ within the meaning of s 51(xx); and second, does the corporations power authorise the additional measures that apply to FRES under the *ACNC Act*?

The High Court has held that a corporation will be a ‘trading corporation’ within the meaning of s 51(xx) if a ‘sufficiently significant proportion’ of its activities are trading activities.<sup>139</sup> Trading activities include not only the buying and selling of goods and services, but also the exchange of intangible things such as money, credit and information.<sup>140</sup> While such exchange will ordinarily be for the purpose of earning revenue, it is not essential that the corporation is seeking to make a profit; it has been held that a constitutional corporation’s dealings may be ‘marked by a degree of altruism which is not compatible with a dominant objective of profit-making.’<sup>141</sup> Whether the trading activities are sufficiently significant is a question of fact and degree,<sup>142</sup> and it is not entirely clear whether ‘substantiality’ is a relative or absolute measure.<sup>143</sup> Nonetheless, on this basis, sporting clubs, universities, public utilities, government agencies, and charities, such as the Australian Red Cross, have been held to be trading corporations within the meaning of s 51(xx).<sup>144</sup> Even if corporations are

<sup>138</sup> *Ibid* s 205-20.

<sup>139</sup> *R v Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)* (1979) 143 CLR 190, 233 (‘*Adamson’s Case*’). See also *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 303–4. The objectives and purposes of a corporation are especially relevant, however, where the corporation is newly formed and has not yet undertaken any activities: *Fencott v Muller* (1983) 152 CLR 570, 601–2.

<sup>140</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 381–2 (‘*Bank Nationalisation Case*’).

<sup>141</sup> *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134, 167. See also *Adamson’s Case* (n 139) 235; *E v Australian Red Cross Society* (1991) 27 FCR 310, 345.

<sup>142</sup> *Adamson’s Case* (n 139) 234.

<sup>143</sup> *Australian Red Cross Society* (n 141) 345; *Quickenden v O’Connor* (2001) 109 FCR 243, 271 [101].

<sup>144</sup> In addition to the cases cited above, see *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’); *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10; *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101; *United Firefighters’ Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346; *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc* (2002) 120 FCR 191; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171.

formed primarily for charitable purposes and do not have trading activities as their most important objective, provided that a sufficient proportion of their activities are of a trading character, they will be considered to be constitutional corporations.<sup>145</sup>

It will be recalled from the previous section that in relation to FREs, the *ACNC Act* empowers the Commissioner to issue warning notices, give enforceable directions, accept enforceable undertakings, and seek court injunctions in respect of contraventions and non-compliance by registered entities.<sup>146</sup> The *ACNC Act* further empowers the Commissioner to suspend or remove a responsible entity (ie the director of the company or the trustee of the trust) of a registered entity in respect of contraventions and noncompliance by registered entities, and to appoint acting responsible entities to replace those suspended or removed, these having all of the rights and powers of the removed or suspended responsible entities.<sup>147</sup> The *ACNC Act* also creates an offence if a FRE fails to comply with a direction.<sup>148</sup>

On first analysis, it seems likely that these aspects of the *ACNC Act* would be upheld under the corporations power in respect of their application to NFP entities deemed to be trading corporations. This is because, in essence, the High Court has adopted a very broad interpretation of the corporations power. Despite disagreement that persisted for several decades about whether or not the power is limited to the regulation of the trading activities of trading corporations and the financial activities of financial corporations,<sup>149</sup> the Court has upheld legislation which imposes all kinds of duties on constitutional corporations, whether or not those duties have some connection to the trading or financial activities of such corporations.<sup>150</sup> The Court has also upheld legislation that prohibits conduct by some other party that is intended or likely to cause

<sup>145</sup> Some incorporated charities will not fall within this definition of constitutional corporations. For example, in Queensland there are hundreds of corporate entities established by letters patent for religious, educational and charitable purposes. These entities were incorporated under the *Religious Educational and Charitable Institutions Act 1861* (Qld) and many do not engage in trading activities to any significant extent. The corporations power will not authorise laws regulating such entities: see, eg, *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241.

<sup>146</sup> *ACNC Act* (n 6) ss 80-5, 85-5, 90-10, 95-15.

<sup>147</sup> *Ibid* ss 100-10, 100-30, 100-55.

<sup>148</sup> *Ibid* s 85-30.

<sup>149</sup> See, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 346.

<sup>150</sup> See, eg, *Tasmanian Dam Case* (n 144); *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*').

loss or damage to a constitutional corporation.<sup>151</sup> Where the Court has drawn the line is that the law must have a sufficient connection to a constitutional corporation, meaning that the law must have some ‘significance for the corporation’; ‘[i]t is not enough ... that the law merely refers to or operates upon the existence of a corporate function or relationship or a category of corporate behaviour’.<sup>152</sup> While not casting doubt on this particular proposition, in the *Work Choices Case* a majority of the Court affirmed that it would be enough if the law imposes a duty or confers a right on a constitutional corporation, singling it out ‘as the object of statutory command’.<sup>153</sup> The majority also endorsed the dictum of Gaudron J in her (dissenting) judgment in *Re Pacific Coal*, in which her Honour said:

I have no doubt that the power conferred by s 51(xx) of the *Constitution* extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business. More relevantly for present purposes, I have no doubt that it extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.<sup>154</sup>

Although the regulatory regime imposed on FREs by the *ACNC Act* is extensive, given the very expansive view of the corporations power adopted by the High Court, it seems on first analysis very likely that these provisions would be held to be authorised by the corporations power in their application to constitutional corporations. As the majority of the Court said in the *Work Choices Case*, because it is within the corporations power to regulate employer–employee relations, ‘it also is within power to authorise registered bodies to perform certain functions’ and ‘to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their

<sup>151</sup> *Actors Equity* (n 123).

<sup>152</sup> *Re Dingjan* (n 149) 369 (McHugh J); see also at 334–5 (Mason CJ), 339 (Brennan J).

<sup>153</sup> *Work Choices Case* (n 150) 115–16 [179]–[181], 121 [198].

<sup>154</sup> *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 [83], quoted in *ibid* 114–15 [178].

affairs.<sup>155</sup> Moreover, such intervention would certainly seem to be of great ‘significance’ for such corporations, particularly in view of the affect that it would have on their ‘activities, functions, relationships or business.’<sup>156</sup>

However, a problem remains. In the first substantial High Court decision on the corporations power, *Huddart, Parker & Co Pty Ltd v Moorehead*, Isaacs J observed that

[t]he creation of corporations and their consequent investiture with powers and capacities was left entirely to the States. With these matters, as in the case of foreign corporations, the Commonwealth Parliament has nothing to do. It finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other.<sup>157</sup>

Drawing on this reasoning, in the more recent *Incorporation Case* the Court held that the corporations power does not authorise the Commonwealth to provide for the formation or dissolution of corporations, and also struck down provisions that required the submission of ‘activities statements’ to establish that the corporation was or would be engaged in trading or banking activities.<sup>158</sup> The basis of the Court’s finding was that the corporations power refers to trading and financial corporations already ‘formed’ under state law.<sup>159</sup>

What this underscores is that the formation of a corporation depends, at the least, on some process by which certain natural persons initiate its creation, and that the conditions for the formation of a corporation are integrally associated with the conditions of its dissolution. Traditionally, the formation of a corporation has depended on the subscription by its original members to a memorandum of association. But further, as Isaacs J pointed out, if the corporations power is to deal with corporations that already exist, the very concept of a corporation involves an artificial entity that has distinct legal personality and is invested with powers and capacities commensurate with that status. Some system of internal governance, by which those powers and capacities can be

<sup>155</sup> *Work Choices Case* (n 150) 153 [322].

<sup>156</sup> See *Re Dingjan* (n 149) 371. For the view that a connection of sufficient ‘significance’ between the law and a constitutional corporation is still required, even after the decision in the *Work Choices Case*, see Tony Blackshield, ‘New South Wales v Commonwealth: Corporations and Connections’ (2007) 31 *Melbourne University Law Review* 1135.

<sup>157</sup> (1909) 8 CLR 330, 394. Isaacs J was speaking here of the corporations power in particular; he was not denying that the Commonwealth may have power to incorporate companies for purposes that arise under other heads of power.

<sup>158</sup> *New South Wales v Commonwealth* (1990) 169 CLR 482, 499–503 (*‘Incorporation Case’*).

<sup>159</sup> *Ibid* 498.

exercised by the corporation, must also necessarily exist. Under current law, such systems of internal governance are constituted by the authority primarily invested in general meetings of shareholders and boards of directors of such corporations.

In the *Work Choices Case*, the majority rejected Isaacs J's distinction between the internal affairs and external relations of a corporation as part of their reasoning that the corporations power extends to the regulation of the relationship between the corporation and its employees.<sup>160</sup> The integral relationship between a corporation and its shareholders and directors is, however, arguably a different matter. The majority in the *Work Choices Case* did not specifically address the implications of the *Incorporation Case* for the integral functions of shareholders and directors within corporations.<sup>161</sup> And what they said about shareholders per se is arguably obiter dicta and inconclusive in any case.<sup>162</sup>

If, as the Court held in the *Incorporation Case*, the corporations power does not extend to the incorporation of companies, the question arises: what other aspects of a trading corporation, integral to its *existence* as an object of regulation under the corporations power, might also lie beyond the powers of the Commonwealth? As Leslie Zines argued, if states have 'sole authority to create ... trading and financial corporations' then it would seem to follow that 'those matters that are part and parcel of creating a corporation and without which the corporation would be an empty shell, incapable of functioning as a juristic person at all' would similarly be beyond Commonwealth power.<sup>163</sup>

The Commissioner's power to remove and appoint responsible entities of registered charities involves an unprecedented degree of intervention into the affairs of such organisations. It is at least arguable — and we think it is not an inconsequential argument — that despite the far-reaching implications of the *Work Choices Case*, the corporations power only addresses corporations that already exist, and that the very existence of a corporation as a distinct legal person depends on its capacity to make decisions and exercise legal capacities

<sup>160</sup> *Work Choices Case* (n 150) 77–9 [64]–[67], 87–9 [88]–[95].

<sup>161</sup> *Ibid* 102 [137].

<sup>162</sup> See *ibid* 87 [90].

<sup>163</sup> Leslie Zines, *The High Court and the Constitution* (Butterworths, 1981) 78. See also James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 132. For a contrary view, see Graeme Orr and Andrew Johnston, 'Does the Corporations Power Extend to Reconstituting Corporations?' (2011) 39 *Federal Law Review* 71. Orr and Johnston's analysis does not consider several relevant matters, however, including the existence of the power to incorporate banks under s 51(xiii), relevant passages in the *Bank Nationalisation Case* and the *Incorporation Case*, and the full features of the legislation that were struck down in the *Incorporation Case*.

through its shareholders and directors. It is thus arguable that the provisions of the *ACNC Act* that, in effect, authorise not only the removal of officers of such corporations, but also the appointment of replacement officers, trespass into a field that is reserved to the states by the terms of the corporations power itself.<sup>164</sup>

Although there is, therefore, doubt about the capacity of the corporations power to support the more intrusive aspects of the regulation imposed on FREs under the *ACNC Act*, there is little if any doubt that the territories power supports the application of the provisions of the *ACNC Act* to charities incorporated or operating in one of the Australian territories. The territories power has been held to be a plenary power to make laws with respect to the territories,<sup>165</sup> and it has been affirmed that the laws made under the power can operate throughout the Commonwealth, provided the requisite connection to a territory is established.<sup>166</sup>

The result, at present, is a regime that imposes regulation on FREs that is much more onerous than that which is imposed on other registered entities, especially BRCs. Even if there is good constitutional basis for doing so, it is clearly questionable whether such differential treatment is good policy.

This is all subject, however, to the possible application of the freedom of religion guarantee in s 116 of the *Constitution*, particularly as it applies to constitutional corporations and in the territories. For s 116 undoubtedly limits the legislative powers of the Commonwealth under s 51, including the corporations power; and while the matter has not been decisively resolved, the preponderance of judicial opinion is that it also applies to legislation enacted under s 122.<sup>167</sup>

<sup>164</sup> Such an argument is not ‘reserved powers’ reasoning in its classic sense. The Court has frequently upheld limits on the scope of particular heads of power based on the language of the particular head of power in question: see Nicholas Aroney, ‘Constitutional Choices in the *Work Choices Case*, or What Exactly Is Wrong with the Reserved Powers Doctrine?’ (2008) 32 *Melbourne University Law Review* 1.

<sup>165</sup> *Lamshed v Lake* (1958) 99 CLR 132, 153–4, cited in *Bennett v Commonwealth* (2007) 231 CLR 91, 106 [30]; *Spratt v Hermes* (1965) 114 CLR 226, 242; *Berwick Ltd v Gray* (1976) 133 CLR 603, 607; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 271.

<sup>166</sup> *Lamshed* (n 165) 141; *Berwick* (n 165) 607.

<sup>167</sup> See *Lamshed* (n 165) 143; *Teori Tau v Commonwealth* (1969) 199 CLR 564, 570; *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 621 (Murphy J), 660 (Wilson J) (‘*DOGS Case*’); *Kruger v Commonwealth* (1997) 190 CLR 1, 85 (Toohey J), 122 (Gaudron J), 160 (Gummow J).

### E Freedom of Religion

The main provisions of the *ACNC Act* that potentially contravene s 116 of the *Constitution* are those which empower the Commissioner to suspend or remove a responsible entity of a registered entity (ie the director of a company or the trustee of a trust) in respect of contraventions and noncompliance by registered entities, and to appoint acting responsible entities to replace those suspended or removed<sup>168</sup> — noting that the ACNC appointee has all of the rights and powers of the removed or suspended responsible entities and the obligation to perform all of their functions.<sup>169</sup> Secondly, there is the power to issue directions to a registered entity,<sup>170</sup> which ostensibly could be used to similar effect, as it includes the power to direct individuals not to participate in making decisions on behalf of an entity.<sup>171</sup> The removal, suspension and appointment powers can be exercised in circumstances where the Commissioner reasonably believes that an FRE has contravened or not complied with a provision of the Act, a governance standard or an external conduct standard, or it is more likely than not that the entity will do so.<sup>172</sup> The directions power seemingly can apply to BRCs that are not FREs.

In the case of a religious organisation, such as a charitable entity established and controlled by a particular church, the exercise of such powers would have the effect of taking away the control of the charitable entity from the church and placing it in the hands of persons appointed by, and accountable to, the ACNC Commissioner, as well as requiring them to perform all of the functions and duties of the replaced persons. While it would be extraordinary if this were to include liturgical functions such as the administration of sacraments and preaching, it could certainly include wider governance functions which are equally important to the integrity of religious organisations. Religions adopt corporate structures and declare trusts as intrinsic means by which they pursue their religious goals. Corporate structures enable religious believers to realise their collective religious identity and trusts enable them to dedicate their finances to religious purposes.<sup>173</sup> Self-governance according to religious convic-

<sup>168</sup> *ACNC Act* (n 6) ss 100-10–100-15, 100-30.

<sup>169</sup> *Ibid* s 100-55.

<sup>170</sup> *Ibid* s 85-5.

<sup>171</sup> *Ibid* s 85-10(2)(a).

<sup>172</sup> *Ibid* s 100-5(1).

<sup>173</sup> Indeed, the idea of the religious community as a ‘corporation’ is an important feature of Roman Catholic canon law and the religious law of several other Christian denominations: Harold J

tion is often as important to religious believers as other religious beliefs, practices and activities. These include religious views about the qualifications, appointment and identity of religious leaders. Australian charity law and corporations law, until December 2012, when the *ACNC Act* commenced, rightly accommodated religious purposes and organisations in this way.

The removal, suspension and appointment powers do not apply to registered entities that are BRCs. As noted, BRCs are charities that are not formed or constituted as corporations under the *Corporations Act 2001* (Cth), the various state Associations Incorporation Acts or similar Acts.<sup>174</sup> Most of the major established religious denominations, such as the Roman Catholic Church, the Anglican Church, the Uniting Church and the Presbyterian Church, are BRCs, in part because they are unincorporated associations in the eyes of state law and their statutory property-holding bodies are not incorporated under the particular statutes mentioned. It tends to be the newer denominations and religions that are incorporated under the *Corporations Act 2001* (Cth) or under the state Associations Incorporations Acts and which cannot, for this reason, be BRCs.<sup>175</sup> This has the effect of distinguishing between the older established denominations and many other religious groups and organisations entirely on the basis of the manner of their incorporation.

Two constitutional questions arise. The first is whether the conferral of such powers upon and the performance of such functions by an ACNC appointee is consistent with the guarantee of freedom of religion in s 116 of the *Constitution*. The second is whether the discrimination in the Act between two different categories of religious organisation is contrary to the prohibition on the establishment of religion in s 116 of the *Constitution*.

Given the broad definition of religion adopted by the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,<sup>176</sup> it is effectively established that s 116 protects a very wide array of religions. It is also clear that s 116 not only protects individuals but also religious groups, associations and incorporated bodies.<sup>177</sup> No laws have as yet been held invalid under s 116, but it

Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 215–24. See generally Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Brill, enlarged ed, 1998); FW Maitland, *State, Trust and Corporation*, ed David Runciman and Magnus Ryan (Cambridge University Press, 2003).

<sup>174</sup> *ACNC Act* (n 6) s 205–35.

<sup>175</sup> *Ibid* s 205–35(2).

<sup>176</sup> (1983) 154 CLR 120.

<sup>177</sup> For an analysis of the relevant cases, see Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153.

seems clear that s 116 prohibits Commonwealth laws that would authorise taking control of a religious organisation unless it can be justified having regard to the manner and circumstances of the intervention. The critical case is *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* ('*Jehovah's Witnesses Case*').<sup>178</sup> There, the High Court held that Commonwealth regulations that provided for the dissolution of the Adelaide Company of Jehovah's Witnesses and the forfeiture of its assets did not contravene s 116. The important context of that case, however, was that Australia was at war and the very existence of the Commonwealth of Australia as a body politic was potentially in jeopardy, and it was believed that the Jehovah's Witnesses were undertaking activities that were prejudicial to the war effort. Whether this was a sound judgment or not, it was upon this premise that a majority of the Court held that the regulations did not contravene s 116.<sup>179</sup> As Latham CJ put it, although s 116 protects the free exercise of religion and is therefore not limited to the protection only of beliefs,<sup>180</sup> the section presupposes the ability of the state to maintain a degree of social order without which the guarantee of freedom of religion would be meaningless.<sup>181</sup> However, the circumstances in which the removal, suspension and appointment powers can be exercised under the *ACNC Act* are not of the same order.<sup>182</sup> They contemplate a situation where the Commissioner reasonably believes that a relevant contravention of the *ACNC Act* or non-compliance with the governance standards has occurred or is more likely to occur than not. Such circumstances are hardly comparable to those that had to be addressed in the *Jehovah's Witnesses Case*.

In the *Jehovah's Witnesses Case* Latham CJ observed that s 116 prohibits laws 'for prohibiting the free exercise of any religion' and that this meant that the purpose of the legislation 'may properly be taken into account in determining whether or not it is a law of the prohibited character'.<sup>183</sup> In *Attorney-General (Vic) ex rel Black v Commonwealth* ('*DOGS Case*'), a case concerning the establishment clause in s 116, Barwick CJ went further: he said that a law "for establishing any religion" ... must have that objective as its express and ... single

<sup>178</sup> (1943) 67 CLR 116.

<sup>179</sup> However, aspects of the regulations were struck down because they were not authorised by the defence power (s 51(vi) of the *Constitution*): *ibid* 150 (Rich J), 154 (Starke J), 167 (Williams J).

<sup>180</sup> *Ibid* 124.

<sup>181</sup> *Ibid* 126–7.

<sup>182</sup> We put aside here the possibility that the federal government may in the future use the external conduct standards to prevent Australian NFP entities from funding overseas terrorist organisations.

<sup>183</sup> *Jehovah's Witnesses Case* (n 178) 132.

purpose'; it must, in other words, be 'intended and designed' to do so.<sup>184</sup> Wilson J similarly said that the words 'for establishing' speak 'of the purpose of the law in terms of the end to be achieved'.<sup>185</sup> Gibbs J also considered that s 116 directs attention to the purpose of the law; however, he nonetheless reasoned as if the question was whether the law had the purpose or the *effect* of establishing any religion.<sup>186</sup> Mason J and Stephen J likewise thought that the word 'for' gave s 116 a narrower meaning than the word 'respecting' in the First Amendment to the *United States Constitution*, but Stephen J did not say that s 116 was therefore strictly purposive,<sup>187</sup> while Mason J said that s 116 was therefore concerned with the 'purpose or *result*' of the law.<sup>188</sup> In his dissenting judgment, Murphy J maintained that there is no relevant difference between s 116 and the First Amendment, and that the former prohibits the Commonwealth from enacting laws which have the *effect* of prohibiting the free exercise of any religion or establishing any religion.<sup>189</sup>

Differing approaches to the purposive element in s 116 were again manifest in *Kruger v Commonwealth*.<sup>190</sup> Brennan CJ said that a law 'must have the purpose of achieving an object which s 116 forbids'.<sup>191</sup> Gummow J similarly thought that s 116 'directs attention to the objective or purpose of the law'; however, he also acknowledged the possibility that a law may contain a 'concealed means or circuitous device' by which an end prohibited by s 116 is attained.<sup>192</sup> Toohey J also considered that the purpose of the law must be considered, but he said that a law may have more than one purpose, so that the question is whether one of those purposes is to prohibit the free exercise of religion.<sup>193</sup> Gaudron J likewise considered that laws can have several purposes, and

<sup>184</sup> *DOGS Case* (n 167) 579, 583 (emphasis in original). It is arguable that Barwick CJ had the particular nature of an establishment of religion in mind, and not necessarily the scope of the free exercise clause. He observed that 'a law establishing a religion could scarcely do so as an incident of some other and principal objective': at 579.

<sup>185</sup> *Ibid* 653. Whether the same could be said of a law prohibiting the free exercise of any religion was arguably left open: see *Kruger* (n 167) 133 (Gaudron J).

<sup>186</sup> *DOGS Case* (n 167) 598, 604.

<sup>187</sup> *Ibid* 609.

<sup>188</sup> *Ibid* 615 (emphasis added).

<sup>189</sup> *Ibid* 622, 632–3.

<sup>190</sup> *Kruger* (n 167).

<sup>191</sup> *Ibid* 40.

<sup>192</sup> *Ibid* 160–1.

<sup>193</sup> *Ibid* 86.

that a general purpose which is legitimate may nonetheless subsume a subsidiary purpose which contravenes s 116.<sup>194</sup> In such circumstances, she said, the question would be whether any interference with freedom of religion as an incidental side-effect of a law could be justified because the law was nonetheless appropriate and adapted to achieving a legitimate objective.<sup>195</sup>

The better view is that while s 116 directs attention to the purpose of the law, it is widely acknowledged that laws can have more than one purpose, and that all that is necessary to contravene s 116 is that a law has as one of its purposes the prohibition of the free exercise of religion in a manner or to an extent that is disproportionate. Moreover, in any case, when seeking to identify the purpose or purposes of a law, the courts inevitably have to reckon with the practical effect of the law.<sup>196</sup>

It is likely that a court would hold that the relevant provisions of the *ACNC Act* are directed to legitimate purposes, such as the maintenance of good governance standards and the provision of accurate financial information to the public by registered NFP entities. However, given the prevalence of religious charities in the NFP sector, it can hardly be suggested that the Parliament did not have in its contemplation the impact that the exercise of the removal and appointment powers would have on such charities. If so, on Gaudron J's approach, the question would then be whether the provisions authorising the Commissioner to remove and replace the responsible entities of an FRE, or to give directions which could well amount to the removal and replacement of the religious leaders of an organisation, are disproportionate means to secure the admittedly legitimate objectives of the legislation, especially bearing in mind what members of the High Court have said about the importance of religious liberty in a free and democratic society.<sup>197</sup>

In order to assess whether such measures are reasonably proportionate, it is relevant to consider the existing law concerning the duties of trustees and directors of companies in circumstances where there has been a breach of duty. It has been noted that the Commissioner's discretions exceed those of ASIC, which are limited to the removal and banning of directors.<sup>198</sup> Under state law,

<sup>194</sup> Ibid 133.

<sup>195</sup> Ibid 134. On proportionality tests, see Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85.

<sup>196</sup> For a trenchant criticism of an exclusively purposive approach, see Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*' (2016) 44 *Federal Law Review* 505.

<sup>197</sup> *Church of the New Faith* (n 176) 130.

<sup>198</sup> *Corporations Act 2001* (Cth) s 206F.

any action in relation to trustees, be they charitable or otherwise, requires an order of a court. Queensland, for example, makes particular provision for wide-ranging orders in relation to charitable trusts but even then the replacement of trustees is not listed. The court is empowered to:

- (a) give directions in respect of the administration of the trust; and
- (b) require any trustee to carry out the trust, or to comply with a scheme (if any); and
- (c) require any trustee to satisfy the trustee's liability for any breach of the trust.<sup>199</sup>

The Queensland legislation requires notice to be given to the Attorney-General and the trustees and such other persons as the court directs.<sup>200</sup> There is therefore a clear intent embedded in the legislation for any interference in the discharge by trustees of a charitable trust to occur only pursuant to judicial review based on submissions from all interested parties. Even then, removal and replacement of trustees is not an option for which legislative provision is made. This framework for the regulation of directors and trustees stands in stark contrast to the regime established by the *ACNC Act* where, it will be recalled, relatively minor breaches of laws or breaches of the governance standards provide the basis for the Commissioner to take control of a religious charity, provided it is an FRE but not a BRC. The better view, we submit, is that such far-reaching intrusions into religious faith and practice, based on such potentially minimal grounds as these, are contrary to the protections afforded by s 116.

The second issue is whether the discrimination in the Act between religious organisations is contrary to the prohibition on the establishment of religion in s 116 of the *Constitution*. In the *DOGS Case*, the High Court considered the meaning of an 'establishment of religion'. While a majority considered that the clause prohibits laws which have as their purpose establishment of a state church,<sup>201</sup> the decision of the Court was limited to the proposition that the clause does not prohibit the granting of 'non-discriminatory financial aid to churches or church schools'.<sup>202</sup> Mason J considered that the establishment clause 'was the expression of a profound sentiment favouring religious equality',<sup>203</sup> just as John Quick and Robert Garran had said the clause prohibits not

<sup>199</sup> *Trusts Act 1973* (Qld) s 106(1).

<sup>200</sup> *Ibid* s 106(3).

<sup>201</sup> *DOGS Case* (n 167) 582 (Barwick CJ), 597–8 (Gibbs J), 606–10 (Stephen J), 653 (Wilson J).

<sup>202</sup> *Ibid* 610 (Stephen J); see also at 613 (Mason J).

<sup>203</sup> *Ibid* 615.

only the establishment of a state church but also the conferral of ‘special favours, titles, and advantages to one church which are denied to others.’<sup>204</sup> Wilson J said that ‘establishment involves the deliberate selection of one to be preferred from among others, resulting in a reciprocal relationship between church and state which confers and imposes rights and duties upon both parties.’<sup>205</sup>

Since the *DOGS Case* was decided, individual Justices have expressed support for the idea that the establishment clause prohibits preferential treatment of particular religions or religious denominations. In *Canterbury Municipal Council v Moslem Alawy Society Ltd*, McHugh JA considered that a court should be reluctant to give legislation an interpretation which in effect gives preference to one religion over another, and he observed that the principle of religious equality was expressed in s 116 of the *Constitution*.<sup>206</sup> In *Nelson v Fish*, however, French J accepted that decisions under the *Marriage Act 1961* (Cth) to refuse to register a small religious sect as a recognised denomination entitled to solemnise marriages did not contravene the non-establishment clause.<sup>207</sup> While special leave to appeal to the High Court was refused on procedural grounds, Deane J reportedly indicated he was willing to hear argument on the issue.<sup>208</sup> In *Street v Queensland Bar Association*, Brennan J also suggested that the authority of the narrow precedents on s 116 was less than strong.<sup>209</sup>

The upshot is that this particular area of law is quite uncertain. The *DOGS Case* adopted a narrow view of the establishment clause, but there are statements of high authority questioning that precedent. It is not unlikely that today’s High Court would adopt a relatively wider view of the establishment clause: that is, to proscribe preferential treatment among religions. If that were the case, the Court could well find that the differential treatment of religions under the *ACNC Act* is unconstitutional unless some rational basis for the discrimination could be identified. It would seem to be very difficult, however, for the Commonwealth to articulate a cogent policy reason for the differential treatment under the *ACNC Act*.

<sup>204</sup> Ibid 612, quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 951.

<sup>205</sup> Ibid 653.

<sup>206</sup> (1985) 1 NSWLR 525, 543–4.

<sup>207</sup> (1990) 21 FCR 429, 434–5.

<sup>208</sup> Reid Grant Mortensen, ‘The Secular Commonwealth: Constitutional Government, Law and Religion’ (PhD Thesis, The University of Queensland, 1995) 244–5.

<sup>209</sup> (1989) 168 CLR 461, 518–19, 588.

Even if these aspects of the *ACNC Act* do not contravene s 116, the principle of legality may require the courts to adopt an interpretation of the Act that minimises its impact on freedom of religion. In a speech in 2016, her Honour Susan Kiefel, prior to her appointment as Chief Justice of the High Court, stated that the courts have evolved ‘two great working corollaries’: a ‘presumption in favour of liberty’ and the principle that infringements of liberty must be justified ‘by reference to the law’.<sup>210</sup> The Court starts from the premise, she explained, ‘that Parliament does not intend to take away fundamental rights or freedoms’ and that a ‘statute must express such an intention with “irresistible clearness” before the Court will conclude that that intention is present’.<sup>211</sup> ‘This is not a low bar’, she observed.<sup>212</sup> These remarks reflect an emerging tendency among members of the High Court to construe statutory interferences with rights narrowly and to scrutinise such interferences closely. The Full Court of the Federal Court of Australia put the point forcefully in *Minister for Immigration and Citizenship v Haneef* when it observed that ‘[f]reedom is not merely what is left over when the law is exhausted’<sup>213</sup> but that ‘[t]he common law ... has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal’.<sup>214</sup>

The High Court has affirmed the application of these constitutionally protected common law freedoms to charities, at least in so far as they relate to political communication.<sup>215</sup> However, the scope of the common law freedoms and their application to charities generally remains an open question and, in any case, the doctrine only applies ‘in the absence of clear words or necessary implication’.<sup>216</sup> The statutory distinction between BRCs and other religious charities, even though it treats religious groups differently without any apparent justification, is clearly established by the *ACNC Act*, and it is difficult to conceive of an interpretation that can avoid the plain meaning of the law. The Commissioner’s power to appoint an alternative leader of a registered charity is also

<sup>210</sup> Justice Susan Kiefel, ‘How the Common Law Has Protected and Promoted Liberty’ (Speech, Queensland Law Society President’s Dinner, Brisbane, 19 February 2016) 1, citing *Ex Parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 79.

<sup>211</sup> *Ibid* 3, citing *Potter v Minahan* (1908) 7 CLR 277, 304.

<sup>212</sup> *Ibid*.

<sup>213</sup> (2007) 163 FCR 414, 444 [113].

<sup>214</sup> *Ibid*, quoting TRS Allan, ‘The Common Law of the Constitution: Fundamental Rights and First Principles’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148.

<sup>215</sup> *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 555–6 [44]–[45].

<sup>216</sup> *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 66 [148]. See also *Coco v The Queen* (1994) 179 CLR 427, 437.

plainly prescribed by the Act. In such circumstances, there may be little that the principle of legality can do. As Gageler and Keane JJ observed in *Lee v New South Wales Crime Commission*,

[t]he principle [of legality] at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve.'<sup>217</sup>

And as French CJ similarly observed,

[t]he common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms.<sup>218</sup>

## V CONCLUSIONS

The *ACNC Act* has made charities a new constitutional law frontier. While different views may be taken of the constitutionality of the powers given under the *ACNC Act* to the Commissioner, we propose that the better view is as follows.

Firstly, in relation to all registered charities, and particularly religious charities, there is real doubt whether the taxation power supports the establishment of a registration scheme under which charities must comply with numerous regulatory requirements, such as the governance standards, and under which the Commissioner is granted extensive regulatory powers. This is because the connection between the taxation power and the regulatory regime established by the *ACNC Act* is very remote and tenuous, and because the application of the *ACNC* regime could in some circumstances involve the imposition of taxation liability in an arbitrary or capricious manner.

Secondly, neither the taxation power nor the communications power supports the provision in the *ACNC Act* for the compulsory publication of charities' information by the Commissioner and by the charities themselves. The

<sup>217</sup> (2013) 251 CLR 196, 310–11 [314], quoting *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43].

<sup>218</sup> Chief Justice Robert French, 'The Courts and the Parliament' (Speech, Queensland Supreme Court Seminar, Brisbane, 4 August 2012) 16.

taxation power authorises a law which empowers the Commissioner to obtain information necessary to assess entitlement to income tax exemptions, deductibility and other tax-related matters. It does not support the making public of that information compulsory. Similarly, while the communications power arguably extends to the regulation of modes of communication such as the internet, it contemplates laws that address such communication technologies considered as 'services', and not as convenient means of communication that may be used by a government agency such as the ACNC. The connection between the *ACNC Act* and the communications power is so distant and insubstantial that the law cannot properly be described as a law with respect to such services.

Thirdly, while the territories power provides constitutional support for the powers exercised over FREs pursuant to the *ACNC Act*, there is doubt about whether the corporations power provides sufficient support for some of the more intrusive aspects of the law, such as the removal of office-holders and their replacement by others appointed by the Commissioner. Moreover, it is arguable that the Commissioner's power, in effect, to take control of an FRE that is a religious entity but not a BRC violates the protections afforded by s 116 of the *Constitution*. These provisions have a disproportionate impact on the capacity of religious organisations to practise their religion and they discriminate between religious entities based on the manner of their incorporation.

We acknowledge that each of these claims is contestable. Our larger hope, though, is to carry discussion forward regarding the future of the ACNC and the *ACNC Act*. We suggest that there needs to be fresh consideration of the objectives of the *ACNC Act* and the powers needed to give effect to those objectives, considered in the light of the powers that might be better exercised by other Commonwealth agencies such as the ATO or ASIC. The various constitutional problems with the ACNC scheme have different implications for its regulation of charities, depending on whether they are FREs or non-FREs, and whether they are BRCs or religious organisations that are not BRCs.

If the constitutional problems are to be alleviated, we argue that such changes should be extended generously, rather than frugally, to include all of the various kinds of charities and NFP entities that are regulated under the Act. In our view, it is more equitable, efficient and simple to treat all charities the same. It is poor regulatory practice for the Commonwealth to extend the reach of its laws in a piecemeal fashion based on artificial extensions of its heads of power. If wider powers are required to regulate a sector adequately, cooperation with the states is a better way to do this. And if the states are not willing to cooperate, then that suggests there is insufficient consensus across the Australian community for such changes to be legitimately implemented.

Bearing all these matters in mind, we suggest that the Commissioner's powers in relation to all charities be wound back at least (a) to no more than those of the Commissioner of Taxation in relation to the production of information — that is, to produce the information but not to make it public — and (b) to no more than those of the ASIC Commissioner — that is, the power to ban a person from acting in a leadership role in a charity but not the power to replace that person with someone of the Commissioner's choosing. And this should apply not only to BRCs and religious charities generally, but to charities that are FREs as well. They are all charities and arguably are entitled, as a matter of principle, to be treated alike.

While the constitutional issues we have raised might ultimately have to be tested by the High Court, litigation is not an ideal way of resolving these issues. We submit that the preferable path is for the Parliament to carefully review the constitutionality of the ACNC's powers. If the better view is that the powers do in fact exceed those authorised by the *Constitution*, we propose that the Parliament should act without the need for judicial determination to bring the *ACNC Act* securely within its constitutional powers. We also suggest that, for principled reasons, the fundamental freedoms enjoyed by BRCs and other religious organisations ought to be extended to all registered charities. To do so might then be seen as an articulation of common law freedoms of which the constitutionally protected religious freedoms are a written expression.