

An Analysis of the ACNC's Approach to Compliance and Enforcement

Rosemary Teele Langford and Miranda Webster*

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1. Introduction

As part of a three-year project on governance and regulation of charities in Australia and in England and Wales, the authors have prepared a detailed report that outlines, and critically analyses, the compliance and enforcement activities conducted by Australia's charities regulator, the Australian Charities and Not-for-profits Commission ('ACNC') based on detailed data analysis ('the Report'). The ACNC's compliance and enforcement activities include monitoring the compliance of registered charities with their legislative obligations, investigating non-compliance, and responding to misconduct.¹ In this article, we outline the methodology and content of the Report and highlight the key conclusions that can be derived from our findings. This research will be of interest to many corporate practitioners as a number of charities that are registered with the ACNC (particularly large charities) are companies limited by guarantee.

The Report is made against the backdrop of a review of the ACNC legislation published in 2018² and the Government Response to that Review,³ as well as an audit conducted by the Australian National Audit Office ('ANAO') that was released in 2020⁴ — all of which each made relevant recommendations. We note that compliance and enforcement are simply one aspect of the ACNC's remit given the broad nature of the objects identified in the legislation establishing the ACNC.⁵

2. Methodology

In March 2021, we collected all the data on the ACNC's compliance and enforcement activities that had been published in the ACNC's first eight annual reports, which were published between 2013 and 2020.⁶ We updated our research in April 2022 to include the most recent

*Professor and Research Fellow, Melbourne Law School, University of Melbourne, respectively. This research is funded by the Australian Government through the Australian Research Council.

² Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-Profits Commission Review Legislation Review 2018* (Final Report, 31 May 2018) <<https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf>>.

³ Australian Government, *Government Response to the Australian Charities and Not-for-Profits Commission Legislation Review 2018* (Report, 6 March 2020) <<https://treasury.gov.au/sites/default/files/2020-03/p2020-61958-govt-response.pdf>>.

⁴ Australian National Audit Office ('ANAO'), *Regulation of Charities by the Australian Charities and Not-for-profits Commission*, Auditor-General Report No 29 2019–20 (March 2020) ('ANAO Report').

⁵ These objects are to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector: see *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(1) ('ACNC Act 2012 (Cth)').

⁶ Australian Charities and Not-for-profits Commission ('ACNC'), *ACNC Annual Report 2012–13* (September 2013); ACNC, *ACNC Annual Report 2013–14* (October 2014); ACNC, *ACNC Annual Report 2014–15* (October 2015).

annual report and the ACNC's most recent Regulator Performance Framework Self-Assessment ('RPF Self-Assessment') report.⁷ In particular, we looked at the following: the numbers of and types of concerns about charities received by (and identified by) the ACNC; the numbers of and types of concerns received and assessed by the ACNC's Compliance directorate; the numbers of cases that progressed to a compliance review, risk assessment or an investigation, and the numbers of information-gathering and monitoring notices issued; the length of time taken to finalise compliance cases; and the outcomes of compliance cases. We then also briefly considered the data on compliance action in relation to failure to meet annual reporting obligations, as well as the data on objections by charities to ACNC decisions, and the relevant tribunal and court decisions involving the ACNC.

Although our data analysis has focused on the figures provided in the annual reports, we have also incorporated information from the compliance reports published by the ACNC (which cover the periods December 2012–December 2014, January 2015–December 2016, January–December 2017, and January–December 2018),⁸ the ACNC's RPF Self-Assessment reports,⁹ and the ANAO's report on the ACNC's regulation of charities.¹⁰

3. The Report

The Report, which is available [here](#), does the following.¹¹ After introductory comments, Part 2 of the Report sets out the ACNC's regulatory framework, including discussing the Regulatory Approach Statement, the ACNC's compliance and enforcement powers, and the ways in which charities can challenge the ACNC's decisions. Part 3 details the methodology for our research project on the ACNC's compliance and enforcement activities, and then provides findings. Part 4 outlines developments in the ACNC's compliance approach and some of the ways in which the ACNC's compliance approach has been restricted by its legislative framework. Part 5 sets out our key conclusions.

4. Key Conclusions

The following conclusions can be drawn from our analysis.

4.1 Increased use of ACNC data and proactive compliance

2015); ACNC, *ACNC Annual Report 2015–16* (October 2016); ACNC, *ACNC Annual Report 2016–17* (September 2017); ACNC, *Annual Report 2017–18* (October 2018); ACNC, *Annual Report 2018–19* (September 2019); ACNC, *Annual Report 2019–20* (August 2020).

⁷ ACNC, *Annual Report 2020–21* (September 2021) ('*Annual Report 2020–21*'); ACNC, *ACNC 2020–21 Regulator Performance Framework Self-Assessment* (November 2021) ('*RPF Self-Assessment 2020–21*').

⁸ See ACNC, *Charity Compliance Report: December 2012–December 2014 and Beyond* (March 2015) 28; ACNC, *Charity Compliance Report 2015 and 2016* (March 2017) 9; ACNC, *Charity Compliance Report 2017* (February 2018) 9; ACNC, *Charity Compliance Report 2018* (March 2019) 22 ('*Compliance Report 2018*').

⁹ ACNC, *ACNC 2015–16 Regulator Performance Framework Self-Assessment* (December 2016); ACNC, *ACNC 2016–17 Regulator Performance Framework Self-Assessment* (December 2017); ACNC, *ACNC 2017–18 Regulator Performance Framework Self-Assessment* (December 2018); ACNC, *ACNC 2018–19 Regulator Performance Framework Self-Assessment* (February 2020); ACNC, *ACNC 2019–20 Regulator Performance Framework Self-Assessment* (February 2021); *RPF Self-Assessment 2020–21* (n 7).

¹⁰ ANAO Report (n 4).

¹¹ Rosemary Teele Langford and Miranda Webster, 'An Analysis of the ACNC's Approach to Compliance and Enforcement' (September 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4217817>.

Until recently, the ACNC's compliance program has focused on responding to concerns raised by others about charities, with a very limited number of compliance matters being the product of concerns identified using the ACNC's own data. However, the ACNC is a young regulator and has been increasing its capacity to identify risks within the sector, subject to resources constraints.

In 2020, the ANAO recommended that the ACNC should enhance its compliance framework and operational practices by (a) using its processes for monitoring the annual information provided by charities to support its assessment that charities are complying with the ACNC Governance Standards, and (b) adopting a more proactive approach to identifying charity compliance risk, including drawing more extensively on data collected annually from charities.¹²

While the ACNC appears to be reluctant to increase the regulatory burden on charities by requiring them to declare or demonstrate compliance with the Governance Standards in their Annual Information Statements, in 2021, the Australian Government introduced legislative changes to require all registered charities preparing annual financial reports to disclose related party transactions (from July 2023).¹³ The ACNC responded by requiring that all charities (except basic religious charities) provide a brief description of any 'material' related party transactions in their Annual Information Statements from the 2023 Annual Information Statement onwards.¹⁴ Medium and large charities must also make disclosure in their financial report. Such reporting changes could allow the ACNC to detect potential breaches of the Governance Standards.

The ACNC also appears to be acting upon the ANAO's recommendation to draw more extensively from the Annual Information Statement data. The ACNC seems to be shifting its use of its compliance resources (assisted by three-year government funding provided to the ACNC for field-based compliance reviews) to provide an increased focus on proactive compliance programs (in contrast to reactive compliance responses, which are generally a product of concerns by the public and charities or raised by the media). The ACNC introduced two key proactive compliance programs in 2020–21: the new 'compliance review' program and the 'self-audit' program.¹⁵ The introduction of a new compliance review program and a self-audit program enabled the ACNC to engage with nearly 50% more charities in 2020–21

¹² ANAO Report (n 4) 55.

¹³ From July 2023, all medium and large registered charities preparing annual financial reports will be required to disclose related party transactions (or earlier, if they are required to report remuneration of key management personnel): see *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 60.30(2) as amended by sch 2 item 1, and 305.1(1) inserted by sch 2 item 4 of *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 3) Regulations 2021* (Cth).

¹⁴ See ACNC, 'Related Party Transactions' <<https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/related-party-transactions>> (viewed 25 May 2022).

¹⁵ The ACNC has highlighted that the new compliance review is a short engagement with a charity which focuses on a particular compliance issue, rather than the charity's overall compliance with obligations; in contrast, an investigation involves assessing 'a charity's governance against its full obligations under the ACNC Act and Regulations': ACNC, 'Compliance Reviews Report' (June 2022) <<https://www.acnc.gov.au/tools/reports/compliance-reviews-report>>. The self-audit is similar to the ACNC's self-evaluation compliance response, but the self-audit requires charities to submit the results of their self-assessment to the ACNC (whereas the self-evaluation is voluntary) and the ACNC will often provide education or regulatory advice to the charities based on the results of the self-audit: *Annual Report 2020–21* (n 7) 22.

than in 2019–20, because those programs ‘require fewer resources from both charities and the ACNC’ than investigations.¹⁶

4.2 Response to concerns about charities

The ACNC has received around 2,000 concerns about charities every year since 2017–18. Prior to March 2019, approximately 60 to 70% of concerns received by the ACNC were resolved by the Advice Services directorate. The ACNC then changed its approach, with all concerns that were within the ACNC’s jurisdiction being considered by the Compliance directorate. This shift has meant that now only around one third of concerns appear to be resolved by Advice Services.

The ANAO Report has drawn attention to the fact there have been various stages in the ACNC’s compliance processes that have suffered from backlogs in dealing with compliance matters in a timely manner due to resource constraints. In particular, that report highlighted that the ACNC has had a backlog of concerns that had been progressed to the Compliance directorate but had not been assessed; it had a backlog in taking compliance action in relation to concerns which had been assessed as low or medium risk at the triage stage in its concerns prioritisation process; and the ACNC’s Compliance team also appears to have had a backlog in commencing investigations into concerns that have been assessed as high risk at the risk assessment stage.

4.3 Finalisation of investigations

From its establishment to June 2021, the ACNC finalised 532 investigations and many of them were not completed in a timely manner. From 2014–15 to 2020–21, the ACNC did not meet its target timeframes for completing investigations in any year other than 2015–16. This is despite the fact that the service standards for investigations have been often lowered, to account for the variety and complexity of the ACNC’s compliance activities and to be ‘more realistic based on resources’.¹⁷ For example, the ACNC’s target was dropped from 80% of investigations to be finalised within six calendar months in 2016–17 to 75% of investigations to be finalised within 12 calendar months in 2020–21.

In 2019–20 and 2020–21, the Covid-19 pandemic and the bushfires impacted the finalisation of investigations. There was a significant drop in finalised investigations in 2019–20 (79) and 2020–21 (76) compared to 2018–19 (100).

4.4 Compliance and enforcement outcomes

From December 2012 to June 2021, 216 charities received regulatory advice, 98 were advised to undertake a self-evaluation, 62 charities entered into a compliance agreement, eight charities entered into enforceable undertakings, five charities received directions and three charities received warnings; by contrast, 108 charities had their registrations revoked following a compliance investigation. In 2020–21, there were also 28 self-audits and 23 compliance reviews as part of the ACNC’s new compliance programs.

The ACNC’s use of its revocation power may appear to be disproportionate in comparison to its use of its less serious compliance and enforcement mechanisms. However, the ACNC has revoked the registrations of less than 25 charities every year following compliance

¹⁶ *Annual Report 2020–21* (n 7) 21.

¹⁷ *ANAO Report* (n 4) 52.

investigations — approximately 10 to 25% of compliance investigations result in the charity having its registration revoked. Furthermore, the ACNC's compliance results need to be considered in the context of its proportionate, risk-based compliance approach and the limitations of its legislative powers.

The ACNC's approach to the use of its compliance and enforcement powers can be broadly summarised as follows. First, where a charity is at risk of breaching its obligations under the ACNC legislation — or the charity's non-compliance is not considered to be 'significant' — the ACNC has always focused on assisting the charity to avoid future non-compliance. That is, where a formal compliance response is given, the charity is likely to receive regulatory advice or be advised to undertake a self-evaluation — to help the charity remedy any issues itself. By contrast, where a charity's non-compliance is significant, the ACNC's response will be determined by whether the charity's responsible people (those individuals who govern the charity) are willing and able to correct matters. If they are willing and able, the ACNC may respond by using a compliance agreement, enforceable undertaking or a direction. Compliance agreements and the legislative powers under Part 4-2 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('ACNC Act') (such as an enforceable undertaking or a direction) will only be used following an investigation. Where the ACNC believes that the charity's responsible people will not address the issues of concern, the ACNC could use its enforcement powers under Part 4-2 (to suspend or remove the charity's responsible people) or it will revoke the charity's registration. However, the ACNC has never used its powers against the responsible people of a charity. (We note the reasons for the ACNC's limited use of its Part 4-2 enforcement powers below.)

The revocation of a charity's registration with the ACNC is certainly punitive in that it affects the charity's entitlement and eligibility for tax concessions such as income tax exemption and deductible gift recipient status. It is also concerning given that once the ACNC revokes a charity's registration, the ACNC no longer has any power in relation to that charity (and so it could not protect charitable assets).¹⁸ However, *O'Brien v Commissioner of the Australian Charities and Not-for-profits Commission*¹⁹ did highlight that the revocation power's show cause mechanism provides a prompt for uncooperative charities to engage with the ACNC.²⁰

Although the revocation power is a mechanism of last resort, if the charity is unwilling to cooperate with the ACNC — and the ACNC remains reluctant to test its powers against those individuals governing the charity — revocation does appear to be the only option available (other than perhaps referring the matter to another regulator, if appropriate).²¹

Due to secrecy provisions in the ACNC Act,²² the ACNC has not been able to disclose to the public the reasons for the revocations of charity registrations that have occurred in compliance matters. This means that it is unclear what circumstances will lead to a charity having its registration revoked following a compliance investigation. Additionally, the secrecy provisions mean that it is difficult for the public to know whether the ACNC is using its revocation and

¹⁸ See, eg, ACNC, *Submission to the Review from the Australian Charities and Not-for-Profits Commission* (19 January 2018) 16 ('ACNC Submission to the ACNC Review').

¹⁹ [2021] FCA 632.

²⁰ *ACNC Act 2012* (Cth) s 35-15. The case is discussed in Part 4.4 of the Report.

²¹ *ACNC Submission to the ACNC Legislation Review* (n 18) 15.

²² For outline of the secrecy provisions and options for reform, see The Treasury (Cth), 'Reform of the Australian Charities and Not-for-profits Commission Secrecy Provisions – Recommendation 17 of the ACNC Review' <<https://treasury.gov.au/consultation/c2021-190067>> (viewed 24 April 2022).

enforcement powers appropriately, due to the lack of publicly available data. The secrecy provisions therefore have a significant impact on the transparency of the ACNC's decision-making processes.

4.5 Limited use of Part 4-2 powers

Where a charity's non-compliance is significant, but the ACNC determines that the charity's responsible people are willing and able to correct matters, the ACNC has preferred to use compliance agreements rather than its legislative powers under Part 4-2 of the ACNC Act. Between December 2012 and June 2021, the ACNC used its Part 4-2 enforcement powers only 16 times (eight enforceable undertakings, five directions and three warnings) but entered into 62 compliance agreements. Additionally, the ACNC has not yet used its power to apply for an injunction, or its powers to suspend or remove a responsible person.

There are several reasons for the ACNC's limited use of its Part 4-2 enforcement powers. First, charities are wary of the potential reputational damage that may result from a Part 4-2 action being published on the charity's page on the ACNC's Charity Register.²³ Second, the circumstances in which the powers can be used are quite narrow. In particular, if a charity is not a 'federally regulated entity',²⁴ then the ACNC can only use its Part 4-2 powers to enforce compliance with the external conduct standards. Third, there is uncertainty surrounding the constitutional issues raised by the ACNC's Part 4-2 enforcement powers.

There are two main constitutional questions concerning the use of the Part 4-2 enforcement powers. First, if the charity does not fall within one of the categories of federally regulated entity supported by the territories power, there is a question of whether the charity is a 'constitutional corporation' that is a 'trading or financial corporation'.²⁵ Due to the time and cost involved in determining whether a charity is a constitutional corporation, the ACNC may be reluctant to use the Part 4-2 enforcement powers unless the charity operates within a territory — or if the charity voluntarily provides sufficient information for the ACNC to be satisfied that the charity is a trading corporation. Second, the ACNC's powers to suspend or remove a responsible person of a charity also raise constitutional questions, such as whether the use of the powers would involve an unconstitutional exercise of judicial power.²⁶

This raises the question of whether a referral of power by the states is necessary to resolve the constitutional questions surrounding the use of the ACNC's Part 4-2 enforcement powers. For example, if the ACNC's enforcement powers did not need to be supported by the corporations

²³ The ACNC must publish details of any use of its Part 4-2 powers, and it publishes a summary of such action on the charity's record on the Register. By contrast, the ACNC cannot publish a compliance agreement without consent from the charity. See *ACNC Act 2012* (Cth) s 40-5(1)(f); *Compliance Report 2018* (n 8) 24.

²⁴ Under s 205-15 of the *ACNC Act 2012* (Cth) a 'federally regulated entity' is defined as any of the following: (a) a constitutional corporation; or (b) a trust, all of the trustees of which are constitutional corporations; or (c) a body corporate that is taken to be registered in a Territory under s 119A of the *Corporations Act 2001* (Cth); or (d) a trust, if the proper law of the trust and the law of the trust's administration are 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.

²⁵ For discussion of the circumstances in which charities may be trading corporations, see Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446, 475–476; Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45(2) *Australian Business Law Review* 127, 148–149; Myles McGregor-Lowndes and Sarah Bitomsky, 'Do Non-profit Organisations "Trade" under the New WorkChoices Legislation?' (February 2007) *Keeping Good Companies* 39–44.

²⁶ See Aroney and Turnour (n 25) 448, 453 fn 32, 479–481; see also, Evidence to Standing Committee on Economics, House of Representatives, Canberra, 27 July 2012, 23 (Professor Ann O'Connell).

power and territories power (or the external affairs power, in the case of the external conduct standards), there would be no need for the ACNC to determine whether a charity is a ‘federally regulated entity’ before enforcing the ACNC Act and governance standards.

4.6 Objections to ACNC administrative decisions

The ACNC Act sets out a formal process under Part 7-2 for challenging certain decisions made by the ACNC (described in the ACNC Act as ‘administrative decisions’).²⁷ The person to whom the decision applies (i.e. the charity or the responsible person) must object in accordance with Part 7-2 of the ACNC Act before they may seek redress via other avenues. Objections to compliance decisions make up a very small number of the objections made under Part 7-2. Between December 2012 and June 2021, there were 118 objections to ACNC administrative decisions, and no more than 24 of those concerned compliance decisions (revocations of charity status following investigations). There have never been any objections made to any use of the ACNC’s Part 4-2 enforcement powers. A charity may object to a decision to give a direction or to vary a direction; however, as we have previously noted, the ACNC has only used its direction power five times.²⁸

It is not possible to determine from the publicly available data how many objections made under Part 7-2 have been upheld and how many have been disallowed by the ACNC. However, between December 2012 and June 2021, nine applications were made by charities to the Administrative Appeals Tribunal under Part 7-2 for a review of an ACNC decision.²⁹ There were also two applications to the Federal Court in 2020–21 concerning ACNC decisions, but only one of these was a Part 7-2 application to challenge an ACNC objection decision — and the proceedings were withdrawn following an unsuccessful costs application.³⁰ In the context of objections to ACNC administrative decisions, the ACNC has been criticised for not funding any test cases. Specifically, commentators have suggested that the ACNC should agree to cover its own costs in cases that would assist in clarifying charity law and where the charity lacks the resources to cover the ACNC’s legal costs were the charity to be unsuccessful.³¹ Charity sector

²⁷ Part 7-2 of the *ACNC Act 2012* (Cth) applies if a provision of the Act or of the ACNC Regulations provides that an entity that is dissatisfied with a decision may object against it in the manner set out in Part 7-2: *ACNC Act 2012* (Cth) s 155-5(1). See *ACNC Act 2012* (Cth) ss 30-35 (refusal to register), 35-20 (revocation), 85-25 (direction), 100-10(10) (suspension), 100-15(7) (removal), 175-60(3) (refusal to remit penalty: *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.20(6) (disqualification)). Such a decision is referred to as an ‘administrative decision’: s 155-5(2).

²⁸ A responsible person may object to their own suspension or removal — but the ACNC has never used these powers.

²⁹ If a charity (or responsible person) has made an objection and disagrees with the Commissioner’s ‘objection decision’ in response to their objection, they may then either apply to the Administrative Appeals Tribunal for review of the objection decision or appeal against the decision to a designated court: *ACNC Act 2012* (Cth) ss 160-15, 160-25.

³⁰ *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] FCA 435. The other application to the Federal Court involved an unsuccessful attempt by a charity and one of its directors to use the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to challenge a proposed decision to revoke the charity’s registration: *O’Brien v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] FCA 632.

³¹ *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the Australian Charities and Not-for-profits Commission*, ACPNS Legal Case Reports Series (July 2021) <https://eprints.qut.edu.au/212130/1/2021_55_Australians_for_Indigenous_Constitutional_Recognition_Ltd_v_Commissioner_of_the_Australian_Charities_and_Not_for_profits_Commission_2021_FCA_435.pdf>.

participants argue it would also be beneficial to have cases that clarify and develop the law in the context of compliance revocations and the use of the ACNC's Part 4-2 enforcement powers.

5. Conclusion

Compliance and enforcement activity plays an important role in achieving the first object of the legislation establishing the ACNC, namely 'to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector'. Overall, the regulatory approach adopted by the ACNC appears to have developed over time as the ACNC has matured and as new standards and requirements have been introduced, as well as in response to reports, such as the ANAO audit. An increased compliance focus and increased engagement with charities are noticeable. The transparency, predictability and accountability of the ACNC's compliance activities are, however, hindered by the secrecy provisions, which we recommend be revised. Without a referral of power, the ACNC's toolkit is limited for constitutional reasons — and such referral would enable a more comprehensive, and potentially more effective, regime for a number of reasons. It should be noted, however, that enforcement is just one aspect of the ACNC's remit — the ACNC's role in supporting charities, particularly in light of increasingly burdensome and complex regulatory requirements, is important.