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# Restoring Public Trust in Charities – Reforming Governance and Enforcement

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This research is funded by the Australian Government through the  
Australian Research Council





# Governance and Regulation of Charities: Context

ARC DECRA Project: Restoring Public Trust in Charities – Reforming Governance and Enforcement

- <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>
- Comprehensive comparative investigation of governance and regulation in the charitable sector in multiple jurisdictions with the aim of making recommendations for legislative and policy reform
- Focus today is on measures to reduce complexity
  - Note that charities face many challenges due to increased regulation in a multitude of areas
  - Note also distinctive nature of charitable sector



# Causes of Complexity - Governance

New ACNC regime in 2012

- Governance Standard 5 – requires registered charities to take reasonable steps to make sure that ‘responsible persons’ comply with a number of duties
- Interface with *Corporations Act*
  - Duties in ss 180-183, 191-193 ‘turned off’
  - Problems
- Multiple layers of overlapping duties and requirements
  - General law duties
  - Statutory duties
  - Indirect duties arising from Governance Standard 5
  - Requirements arising under codes, funding agreements, grant documents



# Complexity and Incoherence - Governance

Inconsistencies, gaps in coverage, problematic interaction

- Rule of law concerns
- ACNC Review Panel: ‘... [T]he current system of different governance requirements is complex and confusing. It is unreasonable to expect volunteer directors working in the sector to understand and comply with multiple jurisdictional and sometimes inconsistent governance requirements ...’
- Reason is constitutional – no referral of power



# Complexity - Regulation

Constitutional limitations also restrict the ACNC's enforcement powers

- Very limited possibilities for pursuing individuals
- Very limited power against charities that are not 'federally regulated entities'
- Lack of power to protect a charity's assets once deregistered

Restrictive secrecy provisions

Role of other regulators

Problematic interaction with ASIC regime

- Filing and registry requirements
- Illegal phoenixing provisions
- Business judgment rule



# Complexity – Reporting and Administration

Deep and widespread concern about complexity and duplicative regulatory burdens

- Reporting
- Administrative and compliance burdens
- Lack of harmonisation and inconsistency across regulatory landscape
- Empirical research: persistent theme of problems caused by complexity, inconsistency and change such as proliferation of standards within and across governments and multiple reporting requirements, as well as the burden of red tape
- However, note moves towards harmonised national fundraising regime and increase in reporting thresholds



# Complexity - Summary

Current system is neither fully national nor fully state-based

- ACNC does not have full power over charitable entities and has very little jurisdiction in relation to responsible persons
- Unsatisfactory interface between ACNC legislation and Corporations Act
- Complexity and uncertainty
- Duplicated reporting requirements
- Increase in reporting requirements
- Note, however, important benefits brought by ACNC

Clear need to combat unnecessary complexity but also to recognise the diversity of charitable organisations and the necessary nuances



# Solutions: Referral of Power

First, and most effective, solution is referral of State power to the Commonwealth to facilitate a national regulatory framework to enable:

- One set of duties for all responsible persons
- One set of regulatory consequences for all regulated charities
- A nationally consistent rule on what is a charity

ACNC Review Panel:

‘Australia currently has eight separate jurisdictions whose regulatory regimes impact upon charities and not-for-profits, with the Government’s regulatory requirements, through the ACNC Acts and the tax system, overlaying each of these. This results in inconsistency, complexity and inefficiency for charities. The Panel is strongly of the view that a national scheme is the best option for the sector going forward, especially in areas such as governance, fundraising and registration. In the absence of a national scheme, the sector will continue to be subject to an unacceptable level of unnecessary red tape.’





# Solutions: Alternatives

## Alternative measures:

- Reactivate the duties in ss 180-183 and 191-193 Corporations Act and assume compliance by charitable companies with GS5
- Enact comprehensive duties for responsible persons of charitable incorporated associations and assume compliance with GS5
- Consider introduction of an optional new legal structure specifically designed for Australian charities – the ‘Australian Charitable Incorporated Organisation’ (or ‘ACIO’)
- Develop central governance standards (next slide) around which other governance duties and requirements could be organised
- Rectify ACNC/ASIC interface
- Amend secrecy provisions



# Solutions: Central Governance Standards

Five core governance principles corresponding to the central duties of fiduciaries based on a purpose-governance model

- Exercise powers in good faith in the way the RP considers would further the charity's purposes
- Act for proper purposes
- Avoid or manage unauthorised conflicts of interest
- Avoid unauthorised profits from, or misuse of, position (including information from position)
- Exercise care and diligence (which incorporates a duty to prevent insolvent trading)

Organise other statutory duties and governance requirements around these central principles and potentially create online workbook



# Solutions: Guidance

Guidance and training aid in combating complexity and uncertainty

- ACNC eLearning modules to be commended
- Also recommend:
  - Introduction of 'Five Minute Guides' and short animated podcasts on governance etc
  - Connection via hyperlink to more detailed ACNC guidance and provision of diagrams, examples and scenarios
- Promotion of Five Minute Guides
  - Particular need amongst younger RPs and those from smaller charities and religious charities
  - Insights from Charity Commission for England and Wales Redesign Program and subsequent initiatives
  - Funding for ACNC to undertake empirical work and data analysis



# Solutions: Other Measures

Measures to combat complexity arising from multitude of regulatory requirements and red tape

- Encourage ACNC to continue provision of information and links on matters relevant to charities
- Reconsider AASB 124 (and AASB 1060) re related party transaction reporting
- Develop sector-specific accounting standard
- Reinvigorate the National Standard of Accounts
- Commonwealth, State and Territory governments cooperate re information-sharing practices backed by suitable IT systems
- Provide national screening and insurance for volunteers
- Provide practical assistance re non-legal matters (eg by grants to sector bodies, new charity advice and assistance body, funding of shared services models)

# Conclusion

Unique nature of Australian charities sector means that some complexity is necessary to allow for diversity and nuance

- Simplicity for the sake of simplicity risks the ability to cater for diversity
- Creation of national regime is more challenging as concerns charities than re, eg, corporations
  - Set of governance principles but additional standards and duties depending on nature, structure and sector of each entity
- Unnecessary complexity due to overlapping and inconsistent requirements
  - Exacerbated by overlay of ACNC regime and problems such as secrecy, unpredictability and inconsistency
    - Harmonisation or referral of power
    - Concerted efforts to reduce red tape
- Given importance of sector and high percentage of volunteers, reducing complexity in the charities regulatory framework is essential