

20 August 2021

Ms. Jacky Rowbotham  
Assistant Secretary  
Not-for-profits and Tax Administration Branch  
The Treasury

via email: [charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Ms Rowbotham

### **Reform of the Australian Charities and Not-for-profits Commission secrecy provisions**

Thank you for the opportunity to provide comments on the consultation paper **Reform of the Australian Charities and Not-for-profits Commission (ACNC) secrecy provisions – Recommendation 17 of the ACNC Review** (the **Consultation Paper**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 46,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small businesses and the government sector.

The NFP sector is a major focus of the AICD's work with a significant majority of our members involved in the governance or work of NFPs, many of them making contributions as directors on a voluntary basis. The AICD is committed to advocating for a fit for-purpose regulatory regime for the NFP sector that supports and promotes good governance, is streamlined, and is national.

### **Executive Summary**

The AICD is supportive of measures to improve the transparency of decision making by the ACNC. Greater information on ACNC activities, including completed investigations and registration decisions, will assist the ACNC in meeting its objective to 'maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector'.<sup>1</sup>

1. While supportive of greater transparency on ACNC enforcement outcomes, the AICD does not support the proposal to disclose information relating to ongoing investigations. Disclosing impending or current investigations could have a very detrimental impact on the respective registered entity's access to natural justice and permanently damage its reputation. We are also concerned that rather than improving public confidence in the sector, the disclosure of ongoing but unresolved investigations may undermine public confidence in the charity sector overall with a resulting impact on charity giving.
2. The AICD does not support the use of a public interest test with respect to disclosing information about ongoing investigations. In exceptional circumstances where the registered

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<sup>1</sup> See <https://www.acnc.gov.au/about>

entity provides consent to disclosure or there is a pressing concern of imminent public harm disclosure may be warranted. However, we would expect such cases would be very rare and subject to careful consideration by the ACNC Commissioner prior to any disclosure.

3. The AICD supports the ACNC releasing information on registration decisions conditional on it being deidentified.
4. The AICD supports the release of finalised information on completed investigations and any resulting compliance actions.

### Area 1: Reasons for registration decisions

This section responds to **Area 1: Reasons for registration decisions**. It does not specifically respond to the questions in the Consultation Paper but provides high level comment on the issues that were canvassed.

We agree that greater understanding of the ACNC's registration decision making, including refused applications, would provide some educational benefit to the NFP sector. There would be particular educational value where refusals go to key concepts or definitions under the relevant legislation, for example interpretation of NFP status for the purposes of Chapter 2 of *Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act)*.

However, we do not support the identification of an applicant or party to a registration. Identification could be very detrimental to the reputation of the organisation and is unnecessary to achieve the broader educational benefit. Additionally, disclosure may inadvertently discourage organisations to seek registration or for an individual organisation to address the ACNC's concerns and then reapply.

Unless the registration decision has particular precedential value or is highly topical we are not convinced that a media release, as set out in the example in the Consultation Paper, is necessary for most decisions. Rather a periodic publication, potentially as part of ACNC annual reporting, would be a more efficient method of disclosure. This would allow industry participants to understand decisions in context rather than the challenging task of assessing trends or ACNC expectations from individual media releases.

We also consider there is an opportunity for the ACNC to provide the industry with guidance on registration expectations as an ACNC Commissioner Interpretation Statement.

The AICD supports disclosure of deidentified registration decisions once all avenues for review have been exhausted.

### Area 2: New and ongoing investigations

This section responds to **Area 2: New and ongoing investigations** and addresses each of the questions in the Consultation Paper.

Do you have any concerns (other than privacy and confidentiality) about the disclosure of the fact that an investigation into a registered charity has commenced or is ongoing or that no investigation is being undertaken?

We have significant concerns with the proposal to allow disclosure of ongoing ACNC investigations. As recognised by the Strengthening for Purpose: Australian Charities and Not-for-profits Commission

Legislation Review (**ACNC Review**), the NFP sector is unique in that the reputation of a registered entity is central to its ability to carry on its purpose.<sup>2</sup> Public standing or reputation is fundamental to a registered entity not only obtaining donations from the general public but also other sources of funding available from governments or private sources (e.g. charitable foundations) and in recruiting key staff and volunteers.

Feedback from the AICD's NFP Chairs' Forum and directors on charity boards has highlighted significant concerns that disclosure of ongoing investigations could prejudice a registered entity's access to natural justice and pose serious long term reputation risks. In the AICD's view the disclosure practices of regulators such as the Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) is not instructive or comparable with respect to the ACNC. The ACNC is in a unique position as a regulator in that disclosure of ongoing investigations would likely have significant negative impact on public confidence in a registered entity, its access to funds and volunteer participation. These are significant considerations in any disclosure decision making process and are not shared to the same extent by the ACCC and ASIC. Additionally, the disclosure of information by Australian regulators is generally not subject to judicial review. This would prevent a registered entity from seeking review where it considers disclosure by the ACNC is prejudicial to its access to natural justice.

We also note that investigations, particularly for complex matters, regularly have very protracted timeframes over months or years before there is a resolution and all avenues for review are exhausted. The extended timeframe from disclosure to resolution would exacerbate the significant reputational damage to the registered entity.

Would your concerns be mitigated if the ACNC Commissioner could only confirm if an investigation is or is not underway?

Our significant concerns with disclosure of ongoing investigations would remain even if it was limited to the ACNC Commissioner being able to provide a confirmation of an investigation.

As above, the mere disclosure that an investigation is occurring into a particular registered entity could have a severe detrimental impact on its access to natural justice and potentially permanently damage its reputation. Further, in many cases without any background or context to the investigation the reputational impact may be magnified as it would create a broad air of suspicion or mistrust of the registered entity.

It would also likely place the registered entity in a difficult position of having to address queries about the investigation from key stakeholders. It is unclear under the existing secrecy provisions of the ACNC Act whether a registered entity would be able to provide sufficient information to stakeholders to provide assurance so as not to jeopardise funding commitments.

Should a public interest test form the basis of the discretion to disclose information about new and/or ongoing investigations and why?

The AICD does not support the use of a public interest test as outlined in the consultation paper in respect of disclosing ongoing investigations. Our members consider that such a test, that has benefit to the public as a key aim, would be interpreted in a manner where the public interest, as assessed by the ACNC Commissioner, would always take precedence over the registered entity's access to natural

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<sup>2</sup> Treasury, Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, May 2018, page 74.

justice. However, as outlined below our view is that a modified test or threshold may be appropriate to allow disclosure in exceptional circumstances.

AICD members have expressed concern that over time the ACNC may be incentivised or motivated to disclose ongoing investigations to demonstrate its own capability as an effective regulator. Again, we view such an outcome as contrary to the objectives of the ACNC and extremely prejudicial to the relevant registered entity. The ACNC has several avenues to publicly demonstrate its effectiveness, including annual reporting and self-assessment against the Australian Government's Regulator Performance Framework.

To the extent the Government concludes that disclosure may be appropriate, the AICD is of the view that any threshold should be constructed such that it would only apply in very limited circumstances. In our view the following would be key components of thresholds or parameters for disclosure:

1. the registered entity consents to disclosure as is the currently enabled under section 150-45 of the ACNC Act; or
2. knowledge of the investigation is already widely available in the public domain, such as through media reporting, **and** the registered entity consents to disclosure; or
3. there is a pressing threat of harm to the public and disclosure of the investigation is the most effective mechanism for curtailing that harm.

We would expect the above thresholds would be met in very rare circumstances and that with threshold 3 the ACNC Commissioner would reach a view of pressing harm to the public with considerable caution and in conjunction with use of other enforcement tools. An example of when disclosure under 3 may be appropriate is where the ACNC is seeking an injunction under Division 95 of the ACNC Act and the disclosure supports informing the public of the activities the injunction is seeking to restrain.

We would encourage detailed consultation with the sector on any further proposals on disclosure of ongoing investigation and the AICD is happy contribute to any Treasury policy development process.

As currently discussed in the Consultation Paper the AICD opposes the disclosure of ongoing investigations, including with a public interest test.

### **Area 3: Finalised investigations and resulting compliance action**

This section responds to **Area 3: Finalised investigations and resulting compliance action**. It does not specifically respond to the questions in the Consultation Paper but provides high level comment on the issues that were canvassed.

Consistent with our submission to the ACNC Review we are supportive of the disclosure of finalised investigations or compliance decisions by the ACNC (subject to any reviews or appeals).<sup>3</sup> The publication of details of an investigation, including the outcome and ACNC rationale for the action, would have educational benefit for the NFP sector. The ACNC being able to detail material enforcement activities would have a deterrent effect and support the reputation of the vast majority of registered entities that are effectively pursuing their purposes and meeting their compliance obligations. Importantly it would also support public faith in the regulation and oversight of the sector and the role of the ACNC.

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<sup>3</sup> AICD submission, Review of Australian Charities and Not-for-profits Commission Legislation, 28 February 2018.

We do consider that parameters, a materiality threshold or public interest test around the disclosure of this information is necessary. Administrative or minor breaches of the legislation are unlikely to have a broader educational benefit and may unfairly or disproportionately impact the reputation of the registered entity. For example, in many cases it may be inappropriate for details of enforcement action for breaches of the record keeping or reporting requirements under Division 55 and Division 60 of the ACNC Act to be disclosed. In such cases the registered entity should be afforded opportunity to remediate identified issues, including any penalty, without damage to its reputation.

We consider that the following factors would be central to any parameters or public interest test on disclosure of completed compliance actions:

1. the investigation or compliance action concerned a substantive breach of the relevant legislation; or
2. the investigation was known to the public, for instance through media reporting, and a statement is necessary to resolve questions about the investigation and uncertainty about the registered entity's operations and reputation; or
3. there is a broader industry and/or public benefit to disclosure, in particular as it concerns key interpretative elements of the relevant legislation (e.g. the definition of 'charitable purpose' under section 12 of the *Charities Act 2013*).

We do not consider the above factors are necessarily cumulative for any test to be met; only one arm may need to be met to warrant disclosure. However, we recommend public consultation on the drafting of any test or guidelines developed by the ACNC to ensure the practical implications are fully understood and it does not result in unintended consequences.

### Next steps

We hope our response will be of assistance. If you would like to discuss any aspects further, please contact Simon Mitchell at [smitchell@aicd.com.au](mailto:smitchell@aicd.com.au).

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Louise', with a long horizontal stroke extending to the right.

**Louise Petschler GAICD**  
General Manager, Advocacy