

## THE ACNC, THE SENATE, THE COMMISSION OF AUDIT AND THE NOT-FOR-PROFIT SECTOR

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### I INTRODUCTION

Law reform initiatives may take decades to come to fruition.<sup>1</sup> According to Kingdon, a convergence of problems, policies and political streams is needed to open a window of opportunity to initiate major changes to existing laws.<sup>2</sup> Policymaking may, in fact, be characterised by long periods of stability followed by brief periods of major policy shifts that may result in key reforms to existing legal systems.<sup>3</sup> As such, it is not surprising that the not-for-profit sector's reforms have taken decades<sup>4</sup> and countless inquiries<sup>5</sup> to come into effect. These reforms have resulted in the introduction of a new regulatory framework for the sector

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The authors would like to thank the referees of *University of New South Wales Law Journal* for their useful feedback.

1 See generally John W Kingdon, *Agendas, Alternatives, and Public Policies* (HarperCollins, 2<sup>nd</sup> ed, 1995) 116.

2 Ibid 165–8.

3 Frank R Baumgartner and Bryan D Jones, 'Agenda Dynamics and Policy Subsystems' (1991) 53 *Journal of Politics* 1044, 1044.

4 The inquiries and reviews date back at least as far as the 1995 report of the Industry Commission on the not-for-profit sector: Industry Commission, 'Charitable Organisations in Australia' (Report No 45, 16 June 1995).

5 See, eg, *ibid*; Commonwealth, Inquiry into the Definition of Charities and Related Organisations, *Report* (2001) ('*Definition of Charities Report*'); Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) ('*Disclosure Regimes for Charities Report*'); Victoria State Services Authority, *Review of the Not-for-Profit Regulation* (Final Report, September 2007); Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) ('*Contribution of the Not-for-Profit Sector Report*'); Australia's Future Tax System Review Panel, *Report to the Treasurer* (Report, December 2009) ('*Australia's Future Tax System Report*'); Senate Economics Legislation Committee, Parliament of Australia, *Tax Laws Amendment (Public Benefit Test) Bill 2010* (2010).

through the establishment, in 2012, of the Australian Charities and Not-for-Profits Commission ('ACNC').<sup>6</sup>

However, the window of opportunity that allowed for the amendment of the regulation of the not-for-profit sector seems to be closing as the election of a new federal government in September 2013 heralded a change in direction of the government's approach to the not-for-profit sector. This change in relationship is best illustrated by reference to a flashpoint: the attempt to unwind the national regulator of the charity sector, the ACNC, and the concomitant creation of the National Centre for Excellence for Civil Society ('Centre for Excellence').<sup>7</sup> Accordingly, the purpose of this article is to critically evaluate the current Federal Government's approach to the sector. In doing so, the article considers the context of the two latest inquiries: the National Commission of Audit ('NCoA') and the Senate Economics Legislation Committee Inquiry into the ACNC Repeal Bill ('Senate Repeal Inquiry'). Both inquiries demonstrate a significant change of direction in the way the not-for-profit sector is viewed by the government. The Government's reform agenda appears to be moving away from any attempt to establish a relational governance model and, instead, heralds a return to a 'new public management theory' of governance.<sup>8</sup>

The proposals to repeal the ACNC and to create the Centre for Excellence may be characterised as key government initiatives for the not-for-profit sector. They are not, however, isolated measures. The examination of selected NCoA proposals for the sector, as well as sector-based announcements, such as the recent decision to shelve the previous Government's proposal to tax unrelated business income of not-for-profit entities,<sup>9</sup> shows a pattern of engagement that sheds light on the proposed reforms. Further, this change in direction indicates a failure by the Government to adopt the theoretical underpinnings that have dominated discussions concerning the not-for-profit sector, its role and future direction. As Murray notes, the Government may be taking the 'not-for-profit sector "back to the future" by rolling back reforms' that have been implemented by the previous Government.<sup>10</sup> In light of the shift in policy accompanying a change of government, this article updates and builds on the work of O'Connell,

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6 *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ('ACNC Act'). The introduction of this regulatory system will be discussed in this article. Other reforms have also been introduced, such as the *Charities Act 2013* (Cth), but they are beyond the scope of this article.

7 The Centre for Excellence has, at the time of writing, yet to be formally brought into existence.

8 See Susan D Phillips and Steven Rathgeb Smith, 'Between Governance and Regulation: Evolving Government – Third Sector Relationships' in Susan D Phillips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector: International Perspectives* (Routledge, 2011) 1, 2–3; Mark Lyons and Bronwen Dalton, 'Australia: A Continuing Love Affair with the New Public Management' in Susan D Phillips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector: International Perspectives* (Routledge, 2011) 238.

9 Arthur Sinodinos, 'Integrity Restored to Australia's Taxation System' (Media Release, 14 December 2013) <<http://axs.ministers.treasury.gov.au/media-release/008-2013/>>.

10 Ian Murray, 'Not-for-Profit Reform: Back to the Future' (2014) 20(1) *Third Sector Review* 109, 110.

Martin and Chia on drivers of reform,<sup>11</sup> applying Kingdon's theoretical framework to the new Government's agenda.

Part II of this article is an overview of the not-for-profit sector and the reforms by the Gillard Government that helped set the consensus understanding of the tripartite problems of the not-for-profit sector and of the preferred solution. Part III discusses the attempt to repeal the ACNC. Part IV examines the Senate Repeal Inquiry and its emphasis on solving only one of the three problems highlighted by O'Connell, Martin and Chia. It also reviews the Inquiry's endeavour to reduce and even dismiss contesting views. Part III and Part IV will further apply Kingdon's model to explain the challenge the Government is facing in its attempt to repeal the ACNC. Part V considers how the NCoA's recommendations demonstrate an attempt to return to the new public management approach to the sector and to legitimise the proposed solution. It also highlights that the ACNC may actually complement the Government's approach to the sector. Following from this, Part VI reassesses the abolition of the ACNC and discusses different considerations that may be taken into account by the Government to create a policy consensus regarding any change in the not-for-profit sector.

## II THE GILLARD REFORMS AND EMERGENT CONSENSUS

The Australian not-for profit sector is sizeable: in 2012/13, it employed over one million people and contributed nearly \$55 billion to the economy.<sup>12</sup> As such, this sector makes a major contribution to the economy, society and politics in Australia.<sup>13</sup> Despite this, successive governments made 'no effort to simplify the legal and regulatory environment of nonprofit organizations'.<sup>14</sup> The talk of reform led to multiple reviews but very few implementations of review recommendations.<sup>15</sup> After two decades of inquiries and discussions to amend the regulation of the not-for-profit sector, the Gillard Government started the process of reform with proposals in the May 2011 federal budget. The proposals included funding for the establishment of a new independent statutory agency, the ACNC;<sup>16</sup> a proposal to define 'charity' in legislation; and a proposal to tax

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11 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.

12 Australian Bureau of Statistics, *Australian National Accounts: Non-profit Institutions Satellite Account, 2012–13* (Publication No 5256.0, 30 June 2014) 7 <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0260992FB20E701ECA257D0400129476/\\$File/52560\\_2012-13.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0260992FB20E701ECA257D0400129476/$File/52560_2012-13.pdf)> ('*Non-profit Institutions Satellite Account Report*').

13 See, eg, Mark Lyons, 'Australia's Non-profit Sector' in W McLennan (ed), *1999 Year Book Australia* (Australian Bureau of Statistics, 1999) 536; *Contribution of the Not-for-Profit Sector Report*, above n 5, ch 4.

14 Lyons and Dalton, above n 8, 250.

15 *Contribution of the Not-for-Profit Sector Report*, above n 5, 367.

16 Australian Government, *Budget Measures 2011–12* (Budget Paper No 2, 10 May 2011) 322–3 <<http://www.budget.gov.au/2011-12/content/bp2/download/bp2.pdf>>.

unrelated business income that is retained by charities and not-for-profits.<sup>17</sup> This was followed up by a proposal to clarify and modify the restriction of tax concessions to not-for-profit entities that were, with some exceptions, ‘operat[ing] principally in Australia and for the broad benefit of the Australian community’.<sup>18</sup> The latter did not come to pass, lapsing on 5 August 2013. However, the ACNC was created in 2012,<sup>19</sup> and the *Charities Act 2013* (Cth) was passed in June 2013 and came into force on 1 January 2014.

At least partly driving this flurry of government activity was the High Court’s groundbreaking decision: *Federal Commissioner of Taxation v Word Investments Ltd*.<sup>20</sup> In its assessment of whether Word Investments Ltd was entitled to be endorsed as an income tax exempt charitable institution, the High Court determined that, despite the fact that the company’s only activities related to raising funds through involvement in commercial activities, it was entitled to a tax exemption as a charitable institution. As a consequence, it was understood that a broad test should be applied to the determination of eligibility for the tax exemption. This means that a charitable institution is able to carry on business activities if the profits are redirected towards furthering its charitable purposes.<sup>21</sup> In 2010, another High Court decision, *Aid/Watch Inc v Federal Commissioner of Taxation*,<sup>22</sup> highlighted the need to review and make changes to the existing laws. The Court held that the political purposes doctrine (or *Bowman* doctrine)<sup>23</sup> did not apply and that political advocacy in relation to charitable purposes did not disqualify an entity from the relevant tax concessions granted to charities.<sup>24</sup> As observed by others, notably Pinto, Gilchrist and Morgan, it was the cumulative effect of all the inquiries since 1995, the High Court’s decisions, together with

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17 Ibid 37.

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 2012, 9727–8 (David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation).

19 *ACNC Act* s 5-10(1) item 2 column 2 para (b).

20 (2008) 236 CLR 204.

21 It is also important to note that the High Court interpreted ‘in Australia’ as requiring the entity to incur expenditure and pursue its objectives principally in Australia: *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 239–40 [73]–[74] (Gummow, Hayne, Heydon and Crennan JJ).

22 (2010) 241 CLR 539.

23 The *Bowman* doctrine is derived from the remarks of Lord Parker of Waddington in the House of Lords in *Bowman v Secular Society Ltd* [1917] AC 406, 442: ‘a trust for the attainment of political objects has always been held invalid ... because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift’.

This led to the *Bowman* doctrine whereby a trust with a political purpose advocating (or opposing) change in government policy would fail the public benefit test required for a charitable trust. Although not wholeheartedly adopted in Australia by the courts, it has been adopted in former taxation rulings: see Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2005/21, 21 December 2005, 27–34 [102]–[127].

24 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 557 [49] (Heydon J). A third High Court decision on charities in 2012, *Federal Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655, was narrower in application and garnered mostly the attention of legal advisers: see, eg, Bernadette Carey, ‘Charitable Mistrust’ (2012) 50(7) *Law Society Journal* 72. This case had limited effect on reforms and made it clear that the terms of the deed of the trust to create a charitable fund must have a sole purpose of being charitable and that the funds must also be applied only for a charitable purpose.

the root-and-branch *Future of Australia's Tax System* review (the 'Henry Review', which included four recommendations relevant to the not-for-profit sector)<sup>25</sup> – that led the previous Government to begin to implement changes.<sup>26</sup> According to Kingdon, one can say that a window of opportunity to change the existing system was created through an alignment of problems, policies and political streams.<sup>27</sup>

### A Kingdon Model

Kingdon has developed a multiple-streams framework to explain the policy process. In doing so, he rejected the assumption that policy development processes are always rational and logical. In fact, he notes that setting government agendas may contain 'considerable doses of messiness, accident, fortuitous coupling and dumb luck'.<sup>28</sup> Kingdon advocates that the policy process is composed of three independent streams:

- a problem stream consisting of indicators, crises and/or existing conditions that may highlight perceived problems. The recognition of the problem/s may bring the subject to a prominent place in the government's agenda. There is also a 'perceptual, interpretive' element to the problems as they are influenced by the values and beliefs one brings to the table;<sup>29</sup>
- a policy stream, which is characterised by Kingdon as a 'policy primeval soup'.<sup>30</sup> A community of specialists ('policy communities') will be putting forward different ideas/solutions to the problem. These solutions are generated, debated, redrafted and accepted for consideration as genuine alternatives to the existing system. Having viable alternatives available for adoption by government increases the chances for its placement on the government's agenda; and
- a political stream which has its own dynamics and rules. It is comprised of a range of factors such as national mood, election promises, changes in government and pressure group campaigns.<sup>31</sup>

It is the combination of these streams that allows for the opening of a policy window that may lead to reforms. While Kingdon's work has been subject to criticism,<sup>32</sup> it provides a good illustration of the way in which the reforms in the

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25 *Australia's Future Tax System Report*, above n 5.

26 Dale Pinto, David Gilchrist and Annette Morgan, 'A Few Reflections on the Current State of Play for Not-for-Profit Taxation Arrangements' (2013) 48 *Taxation in Australia* 79.

27 Kingdon, above n 1, 165–8.

28 *Ibid* 206.

29 *Ibid* 110.

30 *Ibid* 116.

31 *Ibid* 87, 145–64.

32 See, eg, Paul Sabatier (ed), *Theories of the Policy Process* (1999, 1<sup>st</sup> ed, Westview Press); Jonathan Bendor, Terry M Moe and Kenneth W Shott, 'Recycling the Garbage Can: An Assessment of the Research Program' (2001) 95 *American Political Science Review* 169.

not-for-profit sector have been shaped<sup>33</sup> and it also explains some of the difficulties the current Government may be having in rolling back the reforms.

## **B Application of the Model to the Introduction of the ACNC**

O’Connell, Martin and Chia applied Kingdon’s multiple-streams framework to provide a useful map for exploring Australia’s not-for-profit reform process under the Gillard Government.<sup>34</sup>

First, O’Connell, Martin and Chia identified three (competing) perceptions of the ‘problems in need of reform’.<sup>35</sup> The first problem is the ‘regulatory complexity, incoherence and undue burden imposed upon the sector through a patchwork of laws and regulation’.<sup>36</sup> The second problem is the perception that the sector needs to enhance its ‘transparency and accountability to the public and its stakeholders, and improve standards of governance generally’.<sup>37</sup> The third problem is ‘partly the outgrowth of charities from their traditional “boundaries”’,<sup>38</sup> perhaps best expressed in the drive to curtail the unrelated business activities of not-for-profit institutions.<sup>39</sup>

Secondly, as a result of the inquiries that have taken place over the last two decades, policy communities have been formed and have generated a number of ideas and solutions that may deal with the perceived problems highlighted above. Some of these solutions, such as the need to establish a central regulator for the not-for-profit sector, have attracted a policy consensus in the sector.<sup>40</sup> This consensus came after wide consultations with the sector and the wider community. It was noted that the consultations were ‘the most exhaustive period of policy development, inquiry and consultation ever undertaken in relation to a policy affecting the not for profit sector’.<sup>41</sup>

Thirdly, the election of the Labor Government in 2007 led to the revival of the reform process from a political perspective. While the not-for-profit sector had resisted proposals put forward by the Howard Government, the sector was more open in the beginning to the Labor Government’s attempts at reforming the system. The sector’s mood was supportive of the changes. However, changes in the Labor Government’s leadership and the fact that it had a problem sustaining voters’ confidence affected the enactment of the proposed reform. It resulted in a fast-paced reform process which raised certain concerns in the sector as to

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33 O’Connell, Martin and Chia, above n 11, 296–7.

34 Ibid 296.

35 Ibid.

36 Ibid 296–7.

37 Ibid 297.

38 Ibid 298.

39 See, eg, *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 255 (Kirby J).

40 O’Connell, Martin and Chia, above n 11, 300.

41 Robert W Fitzgerald, Submission No 52 to Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into the Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014*, 1 May 2014, 5.

whether ‘too much’ was being done ‘too soon’. This led to a delay in the introduction of key reforms.<sup>42</sup>

Despite this, the fact that there was an alignment between problem, policy and politics resulted in putting the not-for-profit sector reform at the top of the Government’s agenda and has led to major changes in the regulation of the sector. The ACNC was born as a result of ‘nearly two decades of advocacy, formal inquiries and formal consultative processes’.<sup>43</sup> However, this window of opportunity has closed as the current Government has a different agenda that it is attempting to implement. This means that the rest of the recommendations made by the Productivity Commission – recommendations that may enhance relational governance – are unlikely to be implemented.<sup>44</sup> The question now is whether a new window of opportunity has been opened to allow the Government to roll back the reforms that were implemented by its predecessor.

### III AGENDA TO REPEAL THE ACNC

The ACNC is the national regulatory body, established by legislation in 2012 to regulate the charity sector. However, the incumbent Coalition Government prior to its election in September 2013 did not support such an introduction and as such the Coalition asserted on several occasions its intention to dismantle the new regulatory regime.<sup>45</sup>

The pre-election commitment was carried into government and was highlighted at the swearing in of the new Government. The Prime Minister at that time disbanded the Office of the Not-for-Profit Sector.<sup>46</sup> This office had been established in October 2010 in the Department of the Prime Minister and Cabinet to drive and coordinate the policy agenda for the not-for-profit sector.<sup>47</sup>

The government agenda to dismantle the regulatory regime is underpinned by four philosophies which were highlighted by Kevin Andrews prior to the election: ‘A coalition government will live within its means, back our nation’s strengths, reverse the nanny state, and restore a culture of personal responsibility’.<sup>48</sup> As such, the focus is on reducing regulation and dismantling

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42 O’Connell, Martin and Chia, above n 11, 301–2.

43 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 23 May 2014, 65 (Susan Pascoe, Commissioner, Australian Charities and Not-for-Profits Commission).

44 More needs to be done to ensure the full reform of the sector. See, eg, 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, 360.

45 See, eg, Kevin Andrews, ‘Empowering Civil Society’ (Speech delivered at the Menzies Research Centre, Melbourne, 15 June 2012) <<http://charitiesreform.com.au/empowering-civil-society/>>; Commonwealth, *Parliamentary Debates*, Senate, 30 October 2012, 8384–5 (Mitch Fifield); Commonwealth, *Parliamentary Debates*, Senate, 31 October 2012, 8570–4 (Ian Macdonald).

46 See Council of Social Service of New South Wales, ‘Office for the Not-for-Profit Sector Disbanded’, *Not-for-Profit Sector Reform* (18 September 2013) <<http://www.ncoss.org.au/content/view/6487/111/>>.

47 O’Connell, Martin and Chia, above n 11, 300.

48 Andrews, ‘Empowering Civil Society’, above n 45.

the ambitious reform agenda of the previous Government.<sup>49</sup> This move is also highlighted by – and consistent with – the Government’s deregulation agenda.<sup>50</sup>

## A Is There an Opening for a New Policy Window?

With the election of the Liberal Government in 2013, the landscape of the not-for-profit sector was reviewed through a different lens as the Coalition’s four philosophies were applied to the sector. This has impacted on the alignment of Kingdon’s problem, policy and political streams.

### 1 Problem Stream

The perceived problems that led to the previous reform have been altered to a certain extent. The Government no longer views the three problems noted by O’Connell, Martin and Chia as the drivers for reform. Its emphasis is on two problems only, which once again highlights the subjective nature of the indicators that may illustrate the nature of the problems at hand.<sup>51</sup> The Government is choosing to emphasise only *one* of the three problems discussed previously: the first problem of regulatory burden. The importance of this problem in general has also been flagged by the Government’s creation of the Office for Deregulation to facilitate the reduction of red tape on individuals, businesses and communities.<sup>52</sup>

While the answer to the problem of regulatory burden was, under the previous Government, the establishment of the ACNC, the current Government views the ACNC as the problem. It is argued that this central regulator adds an unnecessary regulatory burden to the charity sector. Minister Andrews has noted in the past that the principal reason for dismantling the ACNC was ‘to remove the regulatory impost on the sector as soon as possible, to ensure that organisations are not reporting unnecessarily’.<sup>53</sup> He further added:

The commission was established with the intention of it being a single reporting point for charities. However, this has not eventuated – the majority of charities continue to provide information to multiple jurisdictions in the course of conducting their business as charities.<sup>54</sup>

The Government perceived that the creation of the ACNC led to unincorporated organisations being subject to a ‘new regulatory regime, whereas they previously fell largely outside of the sector’s regulatory framework’.<sup>55</sup> Further, incorporated entities were then subjected to duplicate reporting

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49 Murray, above n 10, 112.

50 See, eg, Arthur Sinodinos, ‘Plenary Address to the Association of Financial Advisers’ (Speech delivered at the Association of Financial Advisers’ National Conference, Gold Coast, 13 October 2013) <<http://axs.ministers.treasury.gov.au/speech/001-2013/>>.

51 Kingdon, above n 1, 110.

52 Department of the Prime Minister and Cabinet, Australian Government, *Office of Deregulation* <<http://www.dpmc.gov.au/office-deregulation>>.

53 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2387 (Kevin Andrews, Minister for Social Services).

54 Ibid 2386.

55 Ibid 2387.



requirements arising from pre-existing state, territory and Commonwealth governments' rules and regulation.<sup>56</sup>

In summary, the underlying agenda is that regulation has a negative impact on productivity,<sup>57</sup> is a 'burden [to] ... businesses and individuals' and, as such, is a problem that needs to be remedied.<sup>58</sup>

The second problem is highlighted by the first philosophy of the Government: living 'within its means'. As noted by Kingdon, the budget is a problem of its own as it is a focal point that may define a government's activities.<sup>59</sup> Budgetary considerations affect government policies and expenditures.<sup>60</sup> With the current Government's commitment to a return to budget surplus,<sup>61</sup> budget cuts are being implemented with a number of agencies and government departments facing the axe.<sup>62</sup> The ACNC is directly affected as its \$14 million annual budget<sup>63</sup> may be viewed as an unnecessary expense, especially as it has been argued that its role may be satisfactorily conducted by the Australian Taxation Office ('ATO').<sup>64</sup> In this regard, Minister Andrews has noted:

Given that the regulators in place before the commission was established can provide similar regulatory oversight at a lesser cost – both in terms of administrative costs to government and in terms of costs imposed on regulated entities – the introduction of a specialist regulator to monitor and enforce a codification of generally applicable laws has not proven to be the best use of Commonwealth funding.<sup>65</sup>

Accordingly, abolishing the ACNC may lessen government expenditure. As such, different alternatives have been put forward to remedy the identified problems.

## 2 Policy and Political Streams

In response to the identified two problems, the alternatives supported by the Government are the abolition of the ACNC, the establishment of the Centre for Excellence and the roll back of regulatory oversight to the ATO and the

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56 Ibid.

57 Ibid.

58 Explanatory Memorandum, Amending Acts 1901 to 1969 Repeal Bill 2014 (Cth) 2.

59 Kingdon, above n 1, 105.

60 Ibid.

61 See, eg, J B Hockey and Mathias Cormann, *Mid-year Economic and Fiscal Outlook* (Statement, December 2013) 1 <<http://www.budget.gov.au/2013-14/content/myefo/html/index.htm>>.

62 National Commission of Audit, *Towards Responsible Government: Appendix to the Report of the National Commission of Audit: Volume 3* (Report Appendix, March 2014) 129–79 <[http://www.ncoa.gov.au/report/docs/appendix\\_volume%203.pdf](http://www.ncoa.gov.au/report/docs/appendix_volume%203.pdf)> ('*Towards Responsible Government Report – Appendix 3*').

63 Australian Charities and Not-for-Profits Commission, *International Charity Regulators' Meeting* (Report, 8–9 April 2014) <<http://www.acnc.gov.au/ACNC/Pblctns/Rpts/IntReg/ACNC/Publications/Reports/InternationalReg.aspx?noleft=1>>.

64 *Towards Responsible Government Report – Appendix 3*, above n 62, 172.

65 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2387 (Kevin Andrews, Minister for Social Services).

Australian Securities and Investments Commission ('ASIC').<sup>66</sup> The proposed solution is consistent with the current Government's political vision and election promises.

However, the Government's stumbling block so far is that this alternative is inconsistent with the 'policy consensus solution'<sup>67</sup> that emerged out of the Gillard and earlier Governments' reform history. The consensus solution of the ACNC was endorsed by several of the major reports<sup>68</sup> and once the agency was created it was mostly well received by the sector.<sup>69</sup> Additionally, the governance standards imposed by the *Australian Charities and Not-for-Profits Commission Amendment Regulation (No 1) 2013 (Cth)* ('*ACNC Regulation*') are a direct result of the introduction of the *ACNC Act*. The purpose of the governance standards according to the simplified outline contained in the *ACNC Regulation* is to provide a 'minimum level of assurance that they meet community expectations in relation to how a registered entity should be managed'.<sup>70</sup> They also operate to 'enliven the enforcement powers in Part 4-2 of the [*ACNC Act*]'.<sup>71</sup> The repeal of the *ACNC Act* would also lead to repeal of the governance standards, standards that would and should increase trust and confidence of the public in the sector. Yet the effects that the repeal of the Act would have on these standards have not really been considered.<sup>72</sup>

All this raises the issue of whether the policy stream aligns with the political stream: is there a policy consensus for the current proposal? From a review of the Government's attempt to abolish the ACNC, the answer is no, as the Government has found it challenging to roll back the reforms initiated by the previous Government.

For example, the majority of the not-for-profit sector supports the ACNC.<sup>73</sup> Further, the Government's attempt in December 2013 to amend the Social Services and Other Legislation Amendment Bill 2013 (Cth) to delay the introduction of the *Charities Act 2013 (Cth)* from 1 January 2014 to September 2014<sup>74</sup> was not passed before the Senate rose for the year and the Act commenced on 1 January as originally legislated. Additionally, the legislation to repeal the ACNC has not been enacted. The proposed reform was presented on 19 March

66 Kevin Andrews, 'Establishing the National Centre for Excellence for Civil Society' (Media Release, 12 June 2014) <<http://www.formerministers.dss.gov.au/15247/establishing-the-national-centre-for-excellence-for-civil-society/>>.

67 O'Connell, Martin and Chia, above n 11, 300.

68 *Definition of Charities Report*, above n 5, 275; *Disclosure Regimes for Charities Report*, above n 5, 48 [5.39]; *Contribution of the Not-for-Profit Sector Report*, above n 5, xliii–xliv; *Australia's Future Tax System Report*, above n 5, 211.

69 O'Connell, Martin and Chia, above n 11, 302.

70 *ACNC Regulation* reg 45.1.

71 *ACNC Regulation* reg 45.1.

72 Suggestions that the Centre for Excellence may be dealing with this are hard to assess as the role of the Centre is still not clear. As noted in this article, it is a work in progress.

73 See O'Connell, Martin and Chia, above n 11, 302; Pro Bono Australia, *ACNC – Surviving One Year On* (3 December 2013) <<http://www.probonoaustralia.com.au/news/2013/12/acnc-surviving-one-year/>>; Murray, above n 10, 116.

74 Social Services and Other Legislation Amendment Bill 2013 (Cth) sch 1A.

2014 to the House of Representatives in the form of the Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (Cth) ('Repeal Bill'). The Repeal Bill was referred to the Senate Economics Legislation Committee ('Senate Repeal Inquiry') on 27 March 2014.

## B The Need for a Consensus-Based Alternative

The lack of alignment of the policy and political streams has hindered the abolishment of the ACNC.<sup>75</sup> The challenge for the Government remains in getting the policy consensus for the change which has to occur irrespective of political events.<sup>76</sup> Currently, politics is driving policy and the two streams are interdependent.<sup>77</sup> The solution chosen by the Government is more a policy alternative to the current legal position and is only supported by a small policy community. The alternative has to be tested, debated and then a firm solution may emerge.<sup>78</sup> This is hard to achieve currently as the alternative position set out by the Government, especially the establishment of the Centre for Excellence, is still a work in progress. There was no firm model that had been put forward for the Centre prior to the introduction of the reforms. For example, the first reading of the Repeal Bill did not name the replacement agency, instead referring to a 'successor Agency' to be named by the Minister by legislative instrument.<sup>79</sup> It should be noted that from the outset the Repeal Bill was not to 'take effect until the enactment of a later bill, which will provide the details of the arrangements replacing the commission'.<sup>80</sup> The Centre for Excellence is still the subject of reviews and different models are currently being put forward by the Centre for Social Impact.<sup>81</sup> At the time of writing of this article, the proposed replacement is not yet finalised and is still in a draft model phase, with four proposed models.<sup>82</sup> Although it is uncertain what activities the Centre for Excellence model will

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75 See Kingdon, above n 1, 143; Timna Jacks, 'Scott Morrison Puts Bill To Abolish Charity Regulator on Backburner', *The Sydney Morning Herald* (online), 7 February 2015 <<http://www.smh.com.au/national/scott-morrison-puts-bill-to-abolish-charity-regulator-on-backburner-20150206-1378o9.html>>.

76 Kingdon, above n 1, 117.

77 Richard Jenkins, 'The Meaning of Policy/Policy as Meaning' in Susan M Hodgson and Zoë Irving (eds), *Policy Reconsidered: Meanings, Politics and Practices* (Policy Press, 2007) 21, 26–7. The fact that the policy and political streams may be interdependent is one of the criticisms of Kingdon's multiple-streams framework: see, eg, Gary Mucciaroni, 'The Garbage Can Model and the Study of the Policy Making: A Critique' (1992) 24 *Polity* 459.

78 Kingdon, above n 1, 139–40.

79 Repeal Bill cl 3.

80 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2387 (Kevin Andrews, Minister for Social Services).

81 Andrews, 'Establishing the National Centre for Excellence', above n 66.

82 Centre for Social Impact, *Draft Models – Interim Report* (Interim Draft Models Report, 2 July 2014) <<http://www.civilsocietycentre.org.au/wp-content/uploads/2014/07/NCE-Draft-Models-Interim-Report.pdf>> ('*Interim Report*'); Centre for Social Impact, *Draft Models for Consultation* (Mid-project Report, 21 July 2014) <<http://www.civilsocietycentre.org.au/wp-content/uploads/2014/07/NCE-Draft-Models-Report.pdf>>.

engage in,<sup>83</sup> it appears to be clear that regulatory oversight is not part of any model, likely leading to regulatory gaps.<sup>84</sup>

Further, the roll back of regulatory oversight to the ATO ignores the fact that past inquiries and reports have criticised the previous system. The Productivity Commission described the previous regulatory framework for the not-for-profit sector as complex, lacking coherence and sufficient transparency, and costly to not-for-profits.<sup>85</sup> However, the alternative adopted by the Government, which supports a partial return of the old regime, does not attempt to deal with these concerns. The danger of such an approach is that this failure, together with other government actions such as the introduction of the Centre for Excellence, will be met with resistance and confusion by affected stakeholders.

Additionally, in providing the alternative, emphasis should not only be on the regulatory burden. It should also be directed toward tackling issues of transparency and accountability in the sector. For example, there is no attempt to address the apparent inconsistency of how the proposed removal of the ACNC's regulatory regime will allow for the regulation and monitoring of unincorporated entities that had previously fallen 'outside of the sector's regulatory framework'.<sup>86</sup> The conclusion that can be drawn from the Minister's explanations is that transparency and accountability must be considered secondary to the need to reduce the regulatory burden on the sector (renamed the civil sector), and the desirability of the sector to be able to self-manage.<sup>87</sup>

Accordingly, the Government's proposal is currently lacking the consensus of the wider community. Instead, it has accentuated the fragmentation of the not-for-profit sector leading to uncertainty<sup>88</sup> and policy fragmentation.<sup>89</sup> This in turn may result in instability of the system.<sup>90</sup> To remedy this fragmentation, the Bill was referred to the Senate Repeal Inquiry for consideration. The question is then whether the Inquiry was able to achieve a policy consensus regarding the Government's alternative.

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83 Education, advocacy and innovation leadership, to a greater or lesser extent, feature in the modeling: see *Interim Report*, above n 82, 31–9.

84 Murray, above n 10, 117.

85 *Contribution of the Not-for-Profit Sector Report*, above n 5, xxiii.

86 A review of Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2386 (Kevin Andrews, Minister for Social Services) highlights that this matter is not taken into account in the decision of the Government to abolish the ACNC.

87 *Ibid.*

88 See, eg, Australian Charities and Not-for-Profits Commission, *Annual Report 2013–14* (2 October 2014) 5.

89 See Kingdon, above n 1, 118–21.

90 See *ibid* 120.

## IV SENATE REPEAL INQUIRY

The Senate Repeal Inquiry consisted of three Coalition members,<sup>91</sup> two Labor members<sup>92</sup> and one independent.<sup>93</sup> Additionally, two senators, one from the Labor Party,<sup>94</sup> and one from the Greens<sup>95</sup> participated in the Inquiry. When assessing whether the ACNC should be abolished the Committee considered the following:<sup>96</sup>

- Has the introduction of the *ACNC Act* increased red tape?
- Is there national harmonisation of regulation of not-for-profits?
- Are the powers that the ACNC has under its legislation appropriate?
- What details should be included in the No 2 Bill?
- Should there be restoration of some of the ATO's pre-ACNC responsibilities in relation to charities?

Consequently, the problem of regulatory burden including duplication of reporting requirements imposed on not-for-profit entities was reviewed by the Inquiry. In its own words, '[o]ne of the major issues discussed during the inquiry was the effect of the *ACNC Act* on the burden of red tape on charities. Attention focused particularly, but not exclusively, on charities' reporting obligations'.<sup>97</sup>

### A Findings of the Senate Repeal Inquiry

The report issued by the Senate Repeal Inquiry was delivered on political party lines. The Labor senators<sup>98</sup> and the Australian Greens<sup>99</sup> each lodged dissenting reports. Accordingly, the Inquiry (excluding the dissenting reports) supported the perspective of the Government regarding the argument that the creation of the ACNC by itself has added to the regulatory burden on charities and not-for-profit entities. The Inquiry highlighted that there had been an increase in the regulation of charitable will trusts. For example, the Financial Services Council observed:

The ACNC regime imposes reporting obligations on the trustees of charitable will trusts that did not exist formerly. The cost of complying with these obligations is a

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91 Senator David Bushby (Chair), Senator Alan Eggleston and Senator John Williams: Senate Economics Legislation Committee, Parliament of Australia, *Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014 (2014)* iii ('*Senate Repeal Inquiry Report*').

92 Senator Mark Bishop (Deputy Chair) and Senator Louise Pratt: *ibid.*

93 Senator Nick Xenophon: *ibid.*

94 Senator Sam Dastyari: *ibid.*

95 Senator Rachel Siewert: *ibid.*

96 *Ibid* 8.

97 *Ibid.*

98 *Ibid* 31–8.

99 *Ibid* 39–41.

new compliance cost, created by the ACNC, which diverts funds away from charitable purposes.<sup>100</sup>

Additionally, many entities that have significant reporting requirements under other legislation – such as universities, hospitals and medical research institutes – were subjected to even more regulation as a result of the *ACNC Act*.<sup>101</sup> The cost of preparing the ‘annual information statement’ was also viewed as another unreasonable requirement imposed on the sector.<sup>102</sup> In all this, the Senate Inquiry’s discussion of regulatory burden sought to downplay the findings of previous reports and inquiries that held

compliance costs are minimised when [not-for-profit entities] have to face a single clear set of requirements – whether in regard to registration, tax endorsement or fundraising – with common reporting standards and requirements, and where one report satisfies most, if not all, obligations.<sup>103</sup>

Further, despite the fact the charity passport<sup>104</sup> had been developed but not yet implemented, the Committee view was that the government had ‘limited legislative powers in this area’ to achieve a single reporting function and the Act should be repealed.<sup>105</sup>

Once again, the Inquiry’s discussion attempted to reframe one of the problems that led to the initial reform: accountability and transparency of the sector. The reframing was first linked to the fact that the increase in red tape had not added to or improved the transparency or accountability of the sector.<sup>106</sup> Further, the issue of transparency and accountability was minimised through the reiteration by the Committee of the appropriateness and adequacy of the ATO and ASIC as regulators.<sup>107</sup> The examples chosen in the report to demonstrate adequacy of oversight refer to areas with existing oversight such as charities that are public companies limited by guarantee, or areas subject to other sources of rigorous oversight such as medical research institutes or charitable hospitals and aged-care facilities.<sup>108</sup>

As a consequence, the Senate Repeal Inquiry found that the *ACNC Act* had ‘significantly and unnecessarily increased red tape for many charities’.<sup>109</sup> This was especially the case as it is unlikely for the regulator to achieve consistent regulation at a national level. The Inquiry then noted that the role of harmonisation should instead be left to the Centre for Excellence.<sup>110</sup>

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100 Financial Services Council, Submission No 201 to Senate Economics Legislation Committee, Parliament of Australia, *Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014*, 2 May 2014, 1, cited in *Senate Repeal Inquiry Report*, above n 91, 9.

101 *Senate Repeal Inquiry Report*, above n 91, 9–11.

102 *Ibid* 11–12.

103 *Contribution of the Not-for-Profit Sector Report*, above n 5, 115.

104 The charity passport is a measure designed to implement a ‘report once, use often’ system.

105 *Senate Repeal Inquiry Report*, above n 91, 18.

106 *Ibid* 16.

107 *Ibid* 14–16.

108 *Ibid*.

109 *Ibid* 18.

110 *Ibid* 19–20.

Additionally, the ACNC's powers regarding suspension and removal of trustees and directors of corporate trustees have been viewed as inappropriate.<sup>111</sup> All these findings contributed to the decision of the Inquiry to support the abolition of the regulator. The Inquiry upheld the roll back of regulatory oversight to the ATO and ASIC. In doing so, it explicitly rejected the notion of an inherent conflict of interest between the ATO and the administration of charities law.<sup>112</sup>

### **B Building Consensus?**

While the Senate Repeal Inquiry's report made the abovementioned recommendations, it did not really take a consultative approach to the review. The report did not systematically test the government proposal and it did not consider alternatives to such a proposal to allow for a compromise to be reached. Consequently, the fragmentation of the policy community remains.

This reality can first be illustrated through an analysis of the 155 submissions made to the Inquiry. Over 80 per cent of the submissions opposed the Repeal Bill.<sup>113</sup> Consequently, the Senate Repeal Inquiry's findings do not represent an accurate depiction of the submissions or of the consultations made with the sector, many concerns of which were brushed aside. When assessing, for example, whether the charities were facing significant reporting obligations, the focus was on certain types of charities, such as charitable trusts, universities and medical research institutes. The ACNC's responses regarding this over-regulation of the sector may have been downplayed. A more balanced approach would have been for the Inquiry to acknowledge that:

- the ACNC is not all about excessive red tape; and
- the ACNC has not eliminated red tape.

The truth lies between these two perspectives: regulation needs to be 'fit for purpose'<sup>114</sup> and this is not always the case under the current regime. As such, a review of how this can be achieved would enhance the system more than just abolition of the regulator. The recognition by the Inquiry that the ACNC has been working toward reducing red tape should have been taken more seriously. It is important to acknowledge that harmonisation is hard to achieve in the not-for-profit sector as there are a number of negotiations with federal and state/territory agencies and governments that need to take place. In fact, the Commonwealth, states, territories and local governments regulate different parts of the not-for-profit sector and each has a different approach to regulating not-for-profit

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111 Ibid 25.

112 Ibid 29.

113 Emma Tomkinson, *Charities Voice Overwhelming Opposition to ACNC Repeal Bill* (13 May 2014) Pro Bono Australia <<http://www.probonoaustralia.com.au/news/2014/05/charities-voice-overwhelming-opposition-acnc-repeal-bill>>.

114 McGregor-Lowndes, above n 44, 385.

organisations.<sup>115</sup> For example, at a federal level, agencies such as ASIC<sup>116</sup> and the Office of the Registrar of Indigenous Corporations ('ORIC')<sup>117</sup> may be involved in the regulation of not-for-profit organisations if these organisations have been registered with them. Similarly, at the state and territory level, not-for-profit organisations may be registered under different regimes such as incorporated associations<sup>118</sup> or cooperatives.<sup>119</sup>

A harmonisation of such a system cannot be completed in just one or two years. The reality is that 'without progress in this matter, any short-term reductions in red tape from repealing the *ACNC Act* would be more than offset by the missed opportunity to reduce red tape by aligning regulation across jurisdictions'.<sup>120</sup> Despite all this, the conclusion of the Senate Inquiry was that the ACNC was 'creating a burden with no apparent benefit either to those they serve or the wider community'.<sup>121</sup> Further, the *Senate Repeal Inquiry Report* did not give much weight to suggestions that highlight that the removal of the ACNC is not simply about the removal of regulation but is about 'entrenching a regulatory environment that has been found failing since 1995'.<sup>122</sup>

Additionally, the proposed alternative to reinstate the ATO as the central regulator of the sector<sup>123</sup> was not followed by a rigorous discussion regarding the flaws of the previous system. This is despite the fact that submissions to the Inquiry have noted that:

- there may be a conflict between the role of the ATO to determine charitable status and its responsibility to maximise taxation revenue;

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115 For an overview of the different rules that may apply, see Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) pt 4. For a historical overview, see Mark Lyons, 'The History of Non-profit Organisations in Australia as a Test of Some Recent Non-profit Theory' (1993) 4 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 301.

116 If the not-for-profit organisation is registered with ASIC as a company, it will be regulated by ASIC. Eg, not-for-profit organisations may be registered as companies limited by guarantee. Further, trustee companies are monitored by ASIC and as such if they are running a charitable trust they have to abide by the rules in the *Corporations Act 2001* (Cth) and they will also have to abide by relevant state or territory laws regarding charities such as the *Charities Act 1978* (Vic).

117 ORIC regulates Aboriginal and Torres Strait Islander corporations. The majority of the corporations registered with ORIC are not-for-profit organisations. This has been determined through a review of all the Aboriginal and Torres Strait Islander corporation rule books which are available through ORIC's online register: Office of the Registrar of Indigenous Corporations, 'Public Register of Indigenous Corporations' <<http://register.oric.gov.au/PrintCorporationSearch.aspx?corporationName=&icn=>>.

118 See *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act 2009* (NSW); *Associations Act 2003* (NT); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Act 1981* (Vic); *Associations Incorporation Act 1987* (WA).

119 See *Cooperatives Act 2002* (ACT); *Co-operatives Act 1992* (NSW); *Co-operatives Act 1997* (NT); *Cooperatives Act 1997* (Qld); *Co-operatives Act 1997* (SA); *Cooperatives Act 1999* (Tas); *Co-operatives Act 1996* (Vic); *Co-operatives Act 2009* (WA).

120 *Senate Repeal Inquiry Report*, above n 91, 19.

121 *Ibid* 18.

122 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 23 May 2014, 58 (Robert Fitzgerald), cited in *ibid* 13.

123 See *Senate Repeal Inquiry Report*, above n 91, 27; Andrews, 'Establishing the National Centre for Excellence', above n 66.



- there were difficulties in the past regarding the interaction of the not-for-profit sector with the ATO; and
- there were long delays in the ATO's dissemination of information.<sup>124</sup>

These observations are not new as they were highlighted and flagged by previous inquiries<sup>125</sup> and academics. For example, as long ago as 2001, in the *Definition of Charities Report*, questions of administration were raised by both the ATO itself and in a number of submissions from charities and related entities. It was noted in the report that there were arguments that the decisions on charitable and related statuses should be separate from decisions about taxation liability.<sup>126</sup> Academics including Dal Pont have identified the inherent conflict between the ATO's role to collect revenue and, on the other hand, to fairly and impartially make an assessment of the status of a trust or institution that has the capacity to reduce the revenue collected.<sup>127</sup> Instead of responding to all these concerns, the Senate Repeal Inquiry noted that the evidence regarding the issues raised by the submissions was anecdotal.<sup>128</sup> It further held that views on the existence of such conflict are 'simplistic'.<sup>129</sup>

Dismissing past inquiries'<sup>130</sup> findings and the ATO's recommendation that 'administration [of the sector] would be better served by a single, independent common point of decision making',<sup>131</sup> the report observed that there was 'no reason why the Australian Taxation Office could not administer any charities law assigned to it in an objective and fair way'.<sup>132</sup>

This solution does not adequately address concerns that oversight of the sector is already fragmented. The perspective of the Inquiry that the Centre for Excellence should be the one undertaking the harmonisation is not of itself convincing due to the fact that there is no concrete model for the Centre.<sup>133</sup> This makes an assessment of such a proposal harder to undertake.

The policy community remains fragmented with one community supporting the regulator and another supporting the Government's proposed changes. The *Senate Repeal Inquiry Report* did not result in any compromise. It was even the subject of two dissenting reports by the senators who were involved in the Inquiry but opposed the findings of the Inquiry. As noted previously, there was a dissenting report by the Labor senators<sup>134</sup> and a dissenting report by Australian

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124 *Senate Repeal Inquiry Report*, above n 91, 26–8.

125 See, eg, *Definition of Charities Report*, above n 5, 10–11.

126 *Ibid.*

127 See, eg, G E Dal Pont, 'Conceptualising "Charity" Parameters – The Prism of Public Benefit' (2013) 7 *Journal of Equity* 1, 8–9.

128 *Senate Repeal Inquiry Report*, above n 91, 27.

129 *Ibid.* 29.

130 See, eg, *Definition of Charities Report*, above n 5, 287, 289–90.

131 Australian Taxation Office, Submission to the Inquiry into the Definition of Charities and Related Organisations, January 2001, 2 [9], quoted in *Senate Repeal Inquiry Report*, above n 91, 27.

132 *Senate Repeal Inquiry Report*, above n 91, 29.

133 *Ibid.* 20.

134 *Ibid.* 31–8.

Greens.<sup>135</sup> There seems to be a loss of common outlook and orientation of the not-for-profit sector leading to a weakness in the implementation of the government alternative. In fact, it is important to remember that it takes years of effort for proposals to reach the point where they can be seriously considered as viable options, and further years of effort for those options to be implemented.<sup>136</sup>

In short, all this highlights that the push to remove the ACNC is part of the broader attempt of the Government to realign the framework within which the not-for-profit sector is understood to operate. The attempt to realign the framework of the sector can also be highlighted in the way the not-for-profit sector together with the ACNC is considered by the NCoA. Part V examines the relevant aspects of the NCoA to show the attempts at realignment by adopting a new public management theory of governance.

## V THE NATIONAL COMMISSION OF AUDIT

The following is a background look at the NCoA, considering the origins of its decision-making and an examination of its recommendations as they relate to the not-for-profit sector. Not long after its election, the current Government announced the creation of the NCoA with a specific remit to ‘review the scope, efficiency and functions of the Commonwealth government’.<sup>137</sup> The purpose of the NCoA according to its own terms of reference is to identify areas of Commonwealth government activity which require changes in order for the Commonwealth to ‘live within its means and begin to pay down debt’.<sup>138</sup> The NCoA appears to be operating as something of an economic blueprint for the current Government, with several of its proposals appearing at least in a modified form in the federal budget, including the co-payment for medical services and Family Tax Benefit changes.<sup>139</sup> The NCoA recommendations will be drawn upon to inform the White Paper on the Reform of the Federation, to be delivered by the end of 2015.<sup>140</sup> Consequently, these recommendations will continue to be influential in framing the government’s approaches to different sectors of the economy, including the not-for-profit sector.

The NCoA had a general remit to review Commonwealth government activity with the view to:

- ensure taxpayers are receiving value-for-money from each dollar spent;
- eliminate wasteful spending;

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135 Ibid 39–41.

136 Kingdon, above n 1, 143.

137 National Commission of Audit, *Terms of Reference* (22 October 2013) 1 <[http://www.ncoa.gov.au/docs/NCA\\_TERMS\\_OF\\_REFERENCE.pdf](http://www.ncoa.gov.au/docs/NCA_TERMS_OF_REFERENCE.pdf)>.

138 Ibid.

139 Australian Government, *Budget Measures 2014–15* (Budget Paper No 2, 13 May 2014) 140, 197–200 <<http://budget.gov.au/2014-15/content/bp2/html/index.htm>>.

140 See Tony Abbott, ‘White Paper on Reform of the Federation’ (Media Release, 28 June 2014) <<https://www.pm.gov.au/media/2014-06-28/white-paper-reform-federation>>.

- identify areas of unnecessary duplication between the activities of the Commonwealth and other levels of government;
- identify areas or programs where Commonwealth involvement is inappropriate, no longer needed, or blurs lines of accountability; and
- improve the overall efficiency and effectiveness with which government services and policy advice are delivered.<sup>141</sup>

In light of this emphasis on issues such as duplication, efficiency and effectiveness, regulation of the not-for-profit sector would fall within the NCoA's ambit as the sector has long been identified as an area that is subject to multiple levels of government involvement.<sup>142</sup> Therefore, the ACNC, as a Commonwealth regulator, may be impacted by the NCoA's findings.

### **A NCoA and a Renewed Entrenchment in the New Public Management Theory**

The new public management theory describes a number of changes in the way government manages the public sector, changes that have even been referred to as akin to a 'cultural revolution'.<sup>143</sup> The new public management theory refers to a method of reorganising public sector departments to bring them in line with the management, reporting and accountability in the business sector.<sup>144</sup> This theory reflects a high trust and belief in the functioning of markets and businesses. In this, markets are viewed as the most 'efficient and effective mechanisms for the distribution of resources'.<sup>145</sup> As Yeatman noted, this approach has produced 'a competitively oriented approach to cost or, more accurately, price, which in turn has produced a more sophisticated and responsible orientation to resource deployment in the public sector'.<sup>146</sup> There has also been a shift of emphasis from 'stress on process' to 'stress on outputs'.<sup>147</sup> This theory has played a dominant role in Australia<sup>148</sup> and has impacted on the not-for-profit sector,<sup>149</sup> as not-for-profit entities have been viewed as mere competitors in government tenders.<sup>150</sup>

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141 National Commission of Audit, *Terms of Reference*, above n 137.

142 The *Australia's Future Tax System Report* noted 40 separate pieces of legislation and 19 government agencies dealing with tax concession across federal and state levels: *Australia's Future Tax System Report*, above n 5, 207.

143 See Anna Yeatman, *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State* (Allen & Unwin, 1990) 13–21; John Alford, 'Toward a New Public Management Model: Beyond "Managerialism" and Its Critics' (1993) 52 *Australian Journal of Public Administration* 135.

144 See, eg, Yeatman, *Bureaucrats, Technocrats, Femocrats*, above n 143.

145 Lyons and Dalton, above n 8, 239.

146 Anna Yeatman, 'The Reform of Public Management: An Overview' (1994) 53 *Australian Journal of Public Administration* 287, 287.

147 Christopher Hood, 'The "New Public Management" in the 1980s: Variation on a Theme' (1995) 20 *Accounting, Organizations and Society* 93, 95.

148 Yeatman, *Bureaucrats, Technocrats, Femocrats*, above n 143.

149 See, eg, Lyons and Dalton, above n 8, 243–8; *Contribution of the Not-for-Profit Sector Report*, above n 5, 24–5; O'Connell, Martin and Chia, above n 11, 290.

150 O'Connell, Martin and Chia, above n 11, 299.

Such an approach to the sector has attracted a mixed response. In certain instances, the not-for-profit sector has benefited from privatisation and outsourcing. For example, the competition of the not-for-profit sector with private firms regarding the outsourcing of government employment services resulted in an expansion of certain not-for-profit entities because they were considered to be the most appropriate entities to deliver such services.<sup>151</sup> However, the reality remains that under the new public management theory, not-for-profit entities still have to compete with one another and with the private sector to obtain the status of preferred supplier.<sup>152</sup> The Productivity Commission noted that economically significant not-for-profit entities earned 33 per cent of their revenue from government grants.<sup>153</sup> More recently, the Australian Bureau of Statistics' *Non-profit Institutions Satellite Account Report* highlights that in 2012/13, most of the income received by market and non-market 'non-profit institutions'<sup>154</sup> was from the government, \$27.6 billion and \$13.4 billion respectively.<sup>155</sup> Therefore, any changes to government funding will be likely to have a direct impact on most of the not-for-profit sector.

According to the Productivity Commission, this has created a relationship of inequality and dependence between the government and this sector. Additionally, the Government was viewed as imposing 'top down' solutions and mandating 'over the top' reporting requirements on the sector.<sup>156</sup> For example, Jobs Australia (one of the entities that have benefited from the new public management theory adoption) has noted:

Jobs Australia contends that the new public management approach to relationships between government and the non-profit sector, which seeks to minimise public sector risk and to maximise public sector control is not conducive to effective 'partnership' approaches and is in urgent need of reform.<sup>157</sup>

With the election of the Labor Government in 2007, a shift from the new public management model to a more 'relational governance' model seemed to have started.<sup>158</sup> For instance, language of 'social inclusion' was adopted in the Government's agenda. Senator Ursula Stephens was appointed to the position of the Parliamentary Secretary for Social Inclusion and the Third Sector.<sup>159</sup> A Social Inclusion Board as well as social inclusion units in the Department of Prime Minister and Cabinet and other key departments were established. Additionally, a national compact was entered into and it promised to provide a framework which

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151 Lyons and Dalton, above n 8, 245.

152 Ibid.

153 *Contribution of the Not-for-Profit Sector Report*, above n 5, 72.

154 'Non-profit institutions' are defined as organisations that have the following characteristics: 'they are organisations, they are not-for-profit, they are institutionally separate from government, they are self-governing, and are non-compulsory: *Non-profit Institutions Satellite Account Report*, above n 12, 34.

155 Ibid 8.

156 *Contribution of the Not-for-Profit Sector Report*, above n 5, 309.

157 Jobs Australia, Submission No 104 to Productivity Commission, *Contribution of the Not-for-Profit Sector Inquiry*, May 2009, 3, quoted in *Contribution of the Not-for-Profit Sector Report*, above n 5, 309.

158 O'Connell, Martin and Chia, above n 11, 290.

159 Lyons and Dalton, above n 8, 254.

would allow the Government to work in partnership with the not-for-profit sector.<sup>160</sup> However, it is important to note that this relational approach to governance by the Rudd–Gillard Governments was not successfully implemented as the use of the language of ‘social inclusion’ has not been matched with the Government’s action. For example, Simon Schrapel, the then President of the Australian Council of Social Services, described the sector’s experience with the Government after the adoption of the national compact in the following way:

what has been noticeable in the manner in which this is being managed is that in many ways the Government really doesn’t get it when it comes to working with the [not-for-profit] sector ... what we have witnessed is a traditional top down approach used by governments for decades to enact change. It hasn’t facilitated a sense of shared ownership or responsibility.<sup>161</sup>

After the election of the Abbott Government, any pretext of working within a relational governance model has been put aside with a return to the new public management theory. In fact, this theory currently forms part of the political stream that is driving the solutions and alternatives put forward by the policy stream. This is apparent when reading the NCoA’s report. The aims and language of the NCoA – which considers that competition, efficiency, restrained resource allocation and performance measurements are key to the way the reforms are shaped<sup>162</sup> – resonate strongly with the ideas that underpin new public management theory. This is also cemented by the NCoA’s hostility toward public debt.<sup>163</sup>

In increasing efficiency of the public sector, some of the criteria the NCoA applied related to:

- ‘consolidation of agencies and boards’;
- ‘rationalising the service delivery footprint to ensure better, more productive and efficient services for stakeholders’;
- ‘flattening organisational structures and streamlining lines of responsibility and accountability’; and
- ‘consolidating government support functions into a single agency’.<sup>164</sup>

This measurement of efficiency linked to ‘consolidation’ and ‘rationalisation’ then justifies the NCoA recommendation that ‘the Australian Charities and Not-for-Profits Commission and its advisory board could be abolished, as these functions could be undertaken by the Australian Taxation Office’.<sup>165</sup> However, no analysis has been put forward as to how the ATO can adopt the role of the

160 Australian Government, *National Compact: Working Together* (2011)

<[http://www.mdsi.org.au/pub/National\\_Compact.pdf](http://www.mdsi.org.au/pub/National_Compact.pdf)>.

161 See Pro Bono Australia, ‘National Compact Two Years On’ (22 March 2012)

<<http://www.probonoaustralia.com.au/news/2012/03/national-compact-two-years>>.

162 National Commission of Audit, *Towards Responsible Government: Phase One* (Report, February 2014) iii–iv (‘*Towards Responsible Government: Phase One Report*’).

163 Ibid iii.

164 National Commission of Audit, *Terms of Reference*, above n 137, 2.

165 National Commission of Audit, *Towards Responsible Government: Phase Two* (Report, March 2014) 92 <[http://www.ncoa.gov.au/report/docs/phase\\_two\\_report.pdf](http://www.ncoa.gov.au/report/docs/phase_two_report.pdf)>.

ACNC.<sup>166</sup> From the perspective of the NCoA, there are two key problems justifying the removal of the ACNC relating to ‘principles of good government’ which are heavily influenced by the new public management theory:

- reduction of complexity: abolition of the ACNC may result in the simplification of the not-for-profit sector’s regulation; and
- budget constraint: moving the role of the ACNC to the ATO as recommended by the NCoA would lead to collapsing of agencies and as such would free government resources.<sup>167</sup>

However, even when applying the new public management model, the ACNC can still survive if more focus is put on transparency and accountability, two indicators of good governance.<sup>168</sup>

### **B ACNC, the NCoA and the New Public Management**

The NCoA made several recommendations that have a direct impact on the not-for-profit sector. However, it should be noted that this Part purports to examine the more general references to the not-for-profit sector contained in the report.<sup>169</sup> Additionally, this Part does not directly consider the likely flow-on effects of other measures such as those targeting welfare payments, except to observe that the flow-on effects are part of the realignment of the relationship between the not-for-profit sector and the government. The focus of this Part is on illustrating that the ACNC can still fit within the NCoA’s efficiency criteria as the recommendations made by the NCoA raise issues of transparency and accountability of the not-for-profit sector.

For example, in line with the new public management theory, recommendation 16 regarding the National Disability Insurance Scheme includes a measure to ensure contestability of services by ‘implementing contracting arrangements with the informal (not-for-profit) sector or other disability services bodies, including those operating in existing State schemes’.<sup>170</sup> It also notes that ‘systems in different States vary significantly in their capacity, their structure (particularly in regard to the level of involvement and maturity of not-for-profit providers)’.<sup>171</sup> Therefore, the NCoA’s view is that the introduction of competitive tendering processes for the delivery of disability services would assure pricing and service equities. However, the risk behind such an approach is that the tendering process will raise questions of governance and accountability in the minds of the public that may not be assuaged by the ATO, as the ATO is not equipped with the necessary tools to achieve this monitoring. Such a power may

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166 The only explanation appears in the appendix to the NCoA’s report which notes that the ACNC ‘performs functions which could be done by the Australian Taxation Office’: *Towards Responsible Government Report – Appendix 3*, above n 62, 172.

167 *Towards Responsible Government: Phase One Report*, above n 162, iii–iv; *ibid.*

168 *Towards Responsible Government: Phase One Report*, above n 162, iii.

169 An in-depth discussion of the NCoA’s recommendations is beyond the scope of this article.

170 *Towards Responsible Government: Phase One Report*, above n 162, 94.

171 *Ibid* 92.

be centralised with the ACNC as the regulator may streamline reporting requirements to avoid any duplication in the system.<sup>172</sup> In doing so, it may apply explicit, formal and measurable standards of performance that allow for a comparison of outcomes with the desired goals. Such a system would then improve the confidence of the public in the sector without raising the cost of running the entities due to the harmonisation of the reporting system. One report instead of multiple reports may then be lodged by the entity.

The same may be said regarding recommendations 42 and 49, which are driven by the new public management theory. Recommendation 42,<sup>173</sup> regarding the transfer of responsibility for community development programmes to the states and territories, is likely to fragment the regulatory system of the not-for-profit sector even more in terms of transparency and accountability. Similarly, recommendation 49<sup>174</sup> proposes to conduct a number of alterations to the grants programmes,<sup>175</sup> including ‘reducing red tape for grant recipients by applying contemporary risk-based approaches to grant management’.<sup>176</sup> While this recommendation is consistent with new public management theory of competition promoting better allocation of scarce resources in the not-for-profit sector combined with specification of outcomes, it still raises issues of accountability. Discussions of reduction of red tape in this recommendation do not necessarily deal with double reporting that the entities receiving the grant may have to comply with: reporting based on one set of criteria to one government department and reporting based on a different set of criteria to a different state or federal agency. Such duplication may not be remedied by the ATO, however it may be dealt with by the ACNC. This regulator would be in a position to streamline both reporting requirements if given the power to do so.<sup>177</sup> This would reduce significantly the not-for-profit sector’s costs regarding reporting and would help harmonise the not-for-profit sector.

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172 This would require the ACNC to have the power to adapt the reporting requirements. This will allow the entity to provide information regarding the project and its viability. While the purpose of the reporting to the ACNC and to the funding agency may be different, an adaptation of the report may be beneficial as it will highlight the position and funding which will add to the transparency of the system. It will also add to the harmonisation in the not-for-profit sector.

173 *Towards Responsible Government: Phase One Report*, above n 162, 190.

174 *Ibid* 203.

175 The not-for-profit sector is a key beneficiary of the Commonwealth grants programs. This can be highlighted by reviewing of these sources: Department of Finance, Australian Government, *Commonwealth Grants Rules and Guidelines* (at July 2014) <<http://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelines-July2014.pdf>>; Australia Business Financing Centre, *Recipients* <<http://www.australiangovernmentgrants.org/reports.php>>; Pro Bono Australia, *State of the Not for Profit Sector Survey* (September 2014) <[http://www.probonoaustralia.com.au/sites/www.probonoaustralia.com.au/files/pdf\\_survey\\_2014.pdf](http://www.probonoaustralia.com.au/sites/www.probonoaustralia.com.au/files/pdf_survey_2014.pdf)>.

176 *Towards Responsible Government: Phase One Report*, above n 162, 203.

177 Communication and negotiation with state and federal agencies need to occur to achieve this.

## VI WHERE TO NOW?

A focus of the current Government is on cutting red tape and dealing with budget constraints. Influenced by the new public management theory, these two problems are driving the government reform agenda for the not-for-profit sector. However, such an approach pays minimal attention to accountability, harmonisation and reaching consensus with the sector.

### A Accountability

As noted previously, accountability was one of the problems that led to the establishment of the ACNC. Ensuring accountability relates to two of the aims of the ACNC, which are:

- to ‘maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector’; and
- to ‘support and sustain a robust, vibrant, independent and innovative’ sector.<sup>178</sup>

The regulatory purpose of the ACNC as enshrined in its legislation was to provide some assurance over the use of taxpayer and donor monies, as well as to collect information that could contribute to more informed policy decisions. For example, a survey commissioned by the ACNC indicated that the public’s awareness of the ACNC increased trust in charities significantly<sup>179</sup> as members of the public were aware that an independent agency was monitoring and regulating the sector. However, such monitoring does not imply lack of confidence in the sector. In performing its functions, the ACNC is supposed to ‘assist registered entities in complying with and understanding [the *ACNC Act*], by providing them with guidance and education’.<sup>180</sup> It is only when this fails that the ACNC would rely on its enforcement tools.<sup>181</sup>

The proposed alternative to the ACNC does not seem to take all this into account. Questions remain regarding whether the ATO can regulate the charity sector effectively as highlighted by previous inquiries. While the ATO may address mismanagement of funds and serious governance breaches by de-endorsing the tax concession status of an offending charity,<sup>182</sup> it does not have the necessary tools to deal with minor breaches of the law because, in such instances,

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178 *ACNC Act* ss 15-5(1)(a)–(b).

179 Chantlink, *Australian Charities and Not-for-Profits Commission (ACNC) 2013 Research: Public Trust and Confidence in Australian Charities* (Research Report, 8 July 2013) 4 <[http://acnc.gov.au/ACNC/Pblctns/Rpts/ACNC/Publications/Reports/Trust\\_con.aspx](http://acnc.gov.au/ACNC/Pblctns/Rpts/ACNC/Publications/Reports/Trust_con.aspx)>.

180 *ACNC Act* ss 15-5(2)(b)(iii), 110-10(1).

181 The ACNC applies an enforcement pyramid in its regulation of the sector. It is only when persuasion fails that deterrent strategies will be applied: see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

182 *Federal Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655. While this case is about the refusal to issue an exemption, it highlights the reality that the ATO has the power to issue an exemption and subsequently it has the power to withdraw such an exemption if the circumstances of the charity have changed.



relying on de-endorsement would not lead to a measured regulatory response. Similarly, the Centre for Excellence will have a mandate to support rather than regulate the not-for-profit sector. The Centre ‘would act as an advocate for the sector, be a leader in innovative [sic] and provide education, training and development opportunities to the sector’.<sup>183</sup>

The Government’s proposed approach is concerning as it solely relies on self-regulation to promote good governance practices in an organisation. On its own, the use of self-regulation can easily result in laxity and failure to deter those in the not-for-profit sector who have no interest in voluntary compliance.<sup>184</sup> This will be problematic as good governance is essential to ensure that confidence in the sector remains – without this confidence, people may not be willing to donate their income, assets and estates to charities. The ACNC has already noted that 48 per cent of the concerns raised about charities relate to governance,<sup>185</sup> a matter that the ATO would not and could not deal with. Self-regulation and best practice will not necessarily enhance the standard and deal with the problem.

Further, self-regulation by itself may discourage improved regulatory performance in the sector if law breakers go unpunished. The ‘good apples’ may feel that they are at a competitive disadvantage if they invest money in compliance when others are seen as ignoring the establishment of good standards of compliance.<sup>186</sup> Consequently, reliance on a Centre for Excellence by itself to deal with the not-for-profit sector may lead to a lax and lower standard of governance. This will negatively affect consumer confidence in the sector.

## B Harmonisation

In addition to accountability, another key problem which has been identified by both sets of reforms – reforms leading to the establishment of the ACNC and reforms pushing for the abolition of the regulator – is the reduction of red tape. However, the approaches of each of the reforms regarding this point are different. Under the current system, the ACNC has ‘to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector’.<sup>187</sup>

In order to achieve this, the Reporting and Red Tape Reduction Directorate has been established to ensure that the ACNC’s resources are targeted to prioritise this aim. The Directorate is working with the states and territories to harmonise the regulatory requirements for charities registered at the state and

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183 See Freyla Ferguson, *ACNC Replacement Unveiled* (10 December 2013) Pro Bono Australia <<http://www.probonoaustralia.com.au/news/2013/12/acnc-replacement-unveiled>>, paraphrasing a statement by the spokesperson for the Minister for Social Services, Kevin Andrews.

184 See Neil Gunningham, ‘Negotiated Non-compliance: A Case Study of Regulatory Failure’ (1987) 9 *Law & Policy* 69.

185 Australian Charities and Not-for-Profits Commission, *Annual Report 2013–14*, above n 88, 45.

186 Sidney A Shapiro and Randy S Rabinowitz, ‘Punishment versus Cooperation in Regulatory Enforcement: A Case Study of OSHA’ (1997) 49 *Administrative Law Review* 713.

187 *ACNC Act* s 15-5(1)(c).

territory level.<sup>188</sup> The ACNC has also entered into memoranda of understanding with ASIC,<sup>189</sup> ORIC<sup>190</sup> and the ATO<sup>191</sup> to ensure effective collaboration in this area. These initiatives have started to make a difference in cutting red tape in the sector. For example, for the 2014 reporting period, companies limited by guarantees which are registered with ASIC and report to ASIC only reported to the ACNC.<sup>192</sup> Further, as a result of cutting red tape, “small charities” – those with less than \$250 000 revenue per year (78 per cent of all registered charities) – do not have to submit a financial report.<sup>193</sup> They only need to complete an online annual statement with 20 questions aimed at ensuring the charity is complying with its charitable purposes.<sup>194</sup>

More recently, South Australia and the Australian Capital Territory have agreed to align their regulatory regimes with the one applied by the ACNC. In fact, the Australian Capital Territory Government saw the ACNC as providing a ‘once-in-a-generation opportunity to make some very significant inroads into the impact of red tape on community sector organisations’.<sup>195</sup> However, this initiative has not been implemented as a result of the uncertainty regarding the future of the ACNC.<sup>196</sup> Despite this progress, which occurred in a short period of time, the Senate Repeal Inquiry was dismissive in its assessment of the achievements of the ACNC regarding the harmonisation of the system by noting ‘it is relatively early days for the ACNC. It is not clear how much more national harmonisation, if any, the ACNC would achieve with time’.<sup>197</sup>

While it is true that the initiatives adopted so far are not enough, they start the process of the harmonisation of the system and the reduction of red tape. Such a reduction will not and cannot happen overnight but may take decades to be achieved. A perfect example of this is the harmonisation of company law which

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188 Australian Charities and Not-for-Profits Commission, *Red Tape Reduction* <[http://www.acnc.gov.au/ACNC/About\\_ACNC/Redtape\\_redu/ACNC/Report/Red\\_tape.aspx?hkey=02c36842-0881-4e67-98ad-0533e728658a](http://www.acnc.gov.au/ACNC/About_ACNC/Redtape_redu/ACNC/Report/Red_tape.aspx?hkey=02c36842-0881-4e67-98ad-0533e728658a)>.

189 Australian Charities and Not-for-Profits Commission, ‘ASIC and the ACNC Sign a MOU’ (Media Release, No 029, 18 June 2013) <[http://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_029.aspx](http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_029.aspx)>.

190 Australian Charities and Not-for-Profits Commission, ‘Registrar and the ACNC Work Together To Support Aboriginal and Torres Strait Islander Charities’ (Media Release, No 032, 21 June 2013) <[http://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_032.aspx](http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_032.aspx)>.

191 Australian Charities and Not-for-Profits Commission and Australian Taxation Office, *Head MOU between the ACNC and the ATO* (Memorandum of Understanding, 12 December 2012) <<http://www.acnc.gov.au/ACNC/Pblctns/Pol/MOU/ACNC/Publications/MOU.aspx?hkey=6dc20099-799a-4d17-b3bd-0921d6f10c50>>.

192 Australian Charities and Not-for-Profits Commission, *Companies Limited by Guarantee* <[http://www.acnc.gov.au/ACNC/Manage/ASIC\\_and\\_other\\_regulators/CLG/ACNC/Edu/CLG.aspx](http://www.acnc.gov.au/ACNC/Manage/ASIC_and_other_regulators/CLG/ACNC/Edu/CLG.aspx)>.

193 Ann O’Connell, ‘Watching over the Helpers: Why Regulation of Charities Matters’ on *The Conversation* (27 December 2013) <<https://theconversation.com/watching-over-the-helpers-why-regulation-of-charities-matters-19971>>; see *ACNC Act* ss 60-10, 205-25.

194 *ACNC Act* s 60-5.

195 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 23 May 2014, 9 (Robert Gotts, Director, ACT Community Sector Reform Project).

196 *Senate Repeal Inquiry Report*, above n 91, 18.

197 *Ibid* 19.

has taken five decades and countless reforms to be realised.<sup>198</sup> The same may occur with the not-for-profit sector. The question now is whether the Centre for Excellence can achieve this and, for the reasons outlined previously in the article, this is hard to assess at this stage.

### C Search for a Consensus

As noted previously, reaching a policy consensus is essential to smoothing the path of reform as it will align Kingdon's three streams in the context of the not-for-profit sector. The discussion so far has highlighted that this consensus is currently lacking despite the findings of the Senate Repeal Inquiry and the NCoA's reports. Differing perspectives remain about the best option to follow. As Kingdon stated, such a diversity of perspectives may lead to uncertainty and instability. To deal with such a fragmentation of the policy community, persuasion becomes essential. Sheer pressure does not aid in achieving consensus.<sup>199</sup> Consensus may be achieved through wide-ranging consultation with the sector and the wider community consultations like the ones undertaken before the establishment of the ACNC.

Currently, such consultations are absent. The opposition to the Repeal Bill remains, with a number of entities challenging the assertion that they were consulted by the Government regarding the change. For example, the Governance Institute of Australia responded to claims by the Department of Social Services that it had consulted with it regarding the Bill by noting that such claims were 'misleading'.<sup>200</sup> Similarly, Justice Connect wrote: 'We were surprised and concerned to see the name of our organisation, Justice Connect, on a list of organisations [the Department of Social Services] had consulted about the ACNC'.<sup>201</sup>

Lastly, in completing its consultation and reaching a solution, the Government should pay attention to all the concerns of the sector and the community at large. Serious consideration needs to be given to the manner in which the current alternatives put forward by the Government deal with the concerns of the sector and the wider community. Accordingly, the authors conclude that the Government cannot hope to achieve its policy objective of abolishing the ACNC unless it adjusts its policy settings. This reality is becoming more apparent today as the Government no longer treats the repeal of the ACNC as a priority.<sup>202</sup>

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198 R P Austin and I M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, 16<sup>th</sup> ed, 2015), 48–52, 59–61.

199 Kingdon, above n 1, 125.

200 See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2014, 14 153 (Andrew Leigh).

201 *Ibid.*

202 Daniel Hurst, 'Abbott Government Retreats from Push To Abolish Charity Watchdog', *The Guardian* (online), 8 April 2015 <<http://www.theguardian.com/australia-news/2015/apr/08/abbott-government-retreats-from-push-to-abolish-charity-watchdog>>.

## VII CONCLUSION

The proposal to reduce the regulatory burden by removing an agency which is built on a policy consensus is problematic without proper consultation and a well-defined alternative that takes into account all perceived problems. The alternative chosen by the Government is even more concerning when the Government, driven by the new public management theory, is simultaneously seeking to change the role, the participants and the funding of the sector. Additionally, the Government is currently reviewing and reassessing the tax arrangements and concessions provided to the not-for-profit sector.<sup>203</sup> Given these changes are directly impacting the sector at the same time as the proposal to remove the ACNC, it is likely that the sector will continue to suffer turmoil for the next few years.

The abolition of the ACNC, the creation of a Centre for Excellence and the return to regulation by the ATO and ASIC will have to be justified. Explanation and proper analysis of how the new system would reduce red tape and lead to a harmonisation of the sector has to be conducted. A clear vision for the Centre for Excellence has to be in place. A case study to investigate how the ATO is able to ensure accountability of the sector has to be completed.

Applying Kingdon's multiple-streams framework, a more consultative approach by the government is recommended to align all streams. This would be accompanied by a government open to compromises which may lead to redrafting of the current proposals. Further, the three problems highlighted by O'Connell, Martin and Chia have to be seriously considered as they remain of relevance to the sector and the wider community even if they do not fit within the Government's priorities. A consensus built over the last two decades should not simply be rejected just because it does not fully fit within the Government's policy. In fact, as highlighted in this article, the ACNC can actually provide an accountability mechanism to ensure that the application of the new public management theory does not add to the duplication and red tape that already exists within the system. As such, the abolition of the regulator may not be needed as it actually can fit within the Government agenda.

Consequently, the Government may need to review its position regarding the sector and determine whether it wants to uphold its current stance or not. In fact, as highlighted in the Tax Discussion Paper – *Re:think: Better Tax System, Better Australia* – the administration of the sector is still an ongoing concern of the Government.<sup>204</sup>

If it does want to pursue a change of the status quo, the Government has to fine tune its proposal, conduct consultation with the sector and the community and be willing to compromise. In view of the strong support the ACNC has from the sector, the Government will have an uphill battle to succeed in this quest. The

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203 Australian Government, *Re:think: Better Tax System, Better Australia* (Discussion Paper, March 2015) 121–7 <[http://bettertax.gov.au/files/2015/03/TWP\\_combined-online.pdf](http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf)>.

204 Ibid.

current composition of the Senate makes it imperative that any proposals for change be accompanied by demonstrable sector support, as many senators are hostile to the current repeal proposal.<sup>205</sup> A compromise may result in retaining the ACNC and introducing a Centre for Excellence that plays a key role in enhancing good governance in the charity and not-for-profit sector.

If the Government decides to change its position and support the status quo, the current regulatory framework may help the Government implement its new public management theory, improve accountability and harmonise the system. In the end, a clear position by the Government is needed. Currently the Government notes that while the removal of the ACNC is still on the table, it is not a priority on its agenda.<sup>206</sup> Such a position causes instability and uncertainty in the sector and prevents the ACNC from conducting its role and achieving its aims. The situation is unacceptable and has to be remedied as soon as possible as it weakens the regulatory system and sends the wrong message to the not-for-profit sector in Australia and overseas.

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205 Jacks, above n 75.

206 Ibid.