FIERCE EXTREMES: WILL TAX ENDORSEMENT STYMIE MORE NUANCED ENFORCEMENT BY THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION?

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Feel by turns the bitter change
Of fierce extremes, extremes by change more fierce

Abstract

The Australian Charities and Not-for-profits Commission Act 2012 (Cth) and associated legislation commenced on 3 December 2012, delivering Australia a federal regulator for not-for-profits, the Australian Charities and Not-for-profits Commission (‘ACNC’). The ACNC baby is expected to effect a ‘fundamental change’ from the current system where the Australian Taxation Office, as the ‘default Commonwealth regulator’, is ‘unable to take action commensurate to the circumstances being addressed’. However, the ACNC’s achievement of proportional enforcement action and of its status as the national not-for-profit regulator may be stunted by additional tax endorsement requirements for charities to access tax concessions, such as income tax exemption. In particular, Commissioner of Taxation v Bargwanna (2012) 244 CLR 655 and the proposed rewrite of endorsement special conditions in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) raise the possibility of ‘fierce extremes’ between milder, more nuanced, ACNC compliance action and revocation of income tax endorsement.

I INTRODUCTION

The Australian Charities and Not-for-profits Commission Act 2012 (Cth) (‘ACNC Act’) and associated legislation commenced on 3 December 2012, delivering Australia a federal regulator for not-for-profits (‘NFP’s), the Australian Charities and Not-for-profits Commission (‘ACNC’). The issue is whether the ACNC baby will develop into a healthy adult which effects a ‘fundamental change’ from the current system where the Australian Taxation Office (‘ATO’), as the ‘default Commonwealth regulator’, is ‘unable to take action commensurate to the circumstances being addressed’. The prime concern is that the ACNC’s achievement of proportional enforcement action and of its status as the national NFP regulator will be stunted by additional tax endorsement requirements for charities to access tax concessions, such as income tax exemption. This is especially so in light of the High Court’s decision in Commissioner of Taxation v Bargwanna∗ and the proposed rewrite of endorsement

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2 Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) and Australian Charities and Not-for-profits Commission (Consequential Amendments) Bill 2012 (Cth) (‘ACNC Revised Explanatory Memorandum’) 120 [9.25].

3 (2012) 244 CLR 655 (‘Bargwanna’).
special conditions in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth).4

The Bargwanna decision indicates that the Commissioner of Taxation (‘Tax Commissioner’) may be able to revoke endorsement for breaches of a charity’s governing rules, even where charity controllers have acted honestly and reasonably, but inconsistently, with the purposes of the charity, or involving the derivation of personal benefits from charitable funds. This raises the possibility of ‘fierce extremes’ between milder, more nuanced, compliance action by the ACNC and revocation of income tax endorsement by the Tax Commissioner.

The ACNC’s role, including its gatekeeper function of determining an entity’s charitable status and satisfaction of the other registration requirements, is outlined in Part II. Critically, Part IIB emphasises the importance of registration to a charity wishing to access Commonwealth Government concessions and benefits, including income tax exemption. Finally, Part IIC examines the ACNC Commissioner’s broad range of enforcement powers along with the ACNC Act measures which support the tailored use of those powers in a proportional fashion. In particular, the ACNC Act and related explanatory material evidence a clear desire for such an appropriate regulatory response to be achieved in a harmonised way with other regulators where feasible.

In considering the overlap between the ACNC Commissioner’s enforcement function and that of the Tax Commissioner, this paper focuses on income tax exempt endorsement rules for charities. Part IIIA sketches the current income tax endorsement conditions, as well as discussing the considerably expanded requirements proposed under the Special Conditions Bill. The limited responses available for breach of the tax endorsement conditions are considered in Part IIIIB. Part IIIC then suggests that the impact of the Bargwanna decision is likely to be that failure to administer a charity strictly in accordance with its governing rules will engender a breach of the Special Conditions Bill endorsement conditions in a relatively broad range of circumstances.

Part IV explains how the tax endorsement conditions overlay the ACNC registration requirements and, hence, why the ACNC Commissioner and the Tax Commissioner continue to serve separate roles in relation to the regulation of NFPs. The scope to which those roles result in overlapping regulation of the same matters is investigated and some potential sample enforcement outcomes compared. This comparison demonstrates a real risk that the Tax Commissioner’s revocation power might stymie the aim of achieving proportional supervision of charities, particularly as there is a degree of uncertainty about the extent to which the Tax Commissioner is permitted to take account of ACNC enforcement action. Further, the lack of public detail about whether and how the Tax Commissioner intends to coordinate the Tax Commissioner’s regulatory response with that of the ACNC Commissioner, does little to assist the reduction in regulatory duplication faced by NFPs.

Accordingly, several preliminary reform options are outlined for further investigation in the Conclusion.

4 Referred to as the ‘Special Conditions Bill’.
II GRADUATED ENFORCEMENT BY THE ACNC COMMISSIONER

On 3 December 2012, Australia’s nascent independent statutory regulator for NFPs launched its website and sent its first email. Initially, the ACNC governs charities, but in the longer term, potentially all NFPs. As well as establishing the ACNC, the ACNC Act creates a ‘regulatory framework’ for registered NFPs, which is intended to improve transparency and accountability, bolster governance and achieve ‘streamlined’ regulation across government agencies and levels of government. The role of the ACNC and the ACNC Commissioner is to administer this regulatory framework, especially by registering eligible NFPs and ensuring that they meet their obligations.

A key government aim is to ensure that the application of the new framework provides an appropriate level of regulation (by reference to ‘size’ and ‘risk’) and that this is achieved in a harmonised fashion across regulators, where feasible. This approach also applies to the ACNC Commissioner’s compliance powers, with the ACNC Revised Explanatory Memorandum emphasising that the broad scope of powers should enable ‘proportionate, balanced and effective’ action. The reason is that, ultimately, the reforms are intended to promote ‘a robust, vibrant, independent and innovative Australian NFP sector’.

A Role of the ACNC

The chief aims of the ACNC Act are to support ‘public trust and confidence’ in not-for-profits; ‘support and sustain’ the sector; and to champion a decrease in ‘unnecessary regulatory obligations’. The ACNC Commissioner is to carry out several functions in pursuit of those aims:

- acting as gatekeeper to NFP status by registering NFP entities, initially limited to charities;
- acting as educator to aid registered charities to comply with the ACNC Act;

5 The term ‘not-for-profit’ can cover a broad range of entities, see, eg, Productivity Commission, ‘Contribution of the Not-for-Profit Sector’ (Research Report, 11 February 2010) 3–8. For the purposes of this paper, the term covers ‘entities that seek to achieve a community, altruistic or philanthropic purpose’ such that an entity ‘is not operating for the profit or gain of its individual members’ and ‘does not provide any private benefit’ to related parties or associates except by way of ‘reasonable remuneration for services provided or reimbursement of related costs’: ACNC Revised Explanatory Memorandum 7 [1.5], 32 [3.33]-[3.34].
7 ACNC Act ss 15-5, 25-5(5); ACNC Revised Explanatory Memorandum 7 [1.2]-[1.3], 13 [1.48].
8 ACNC Revised Explanatory Memorandum 3-4.
9 Ibid 8 [1.12]-[1.13].
10 Ibid 8 [1.14], 11 [1.11].
• a monitoring and enforcement function to ensure compliance by registered charities where education is insufficient;
• maintaining a public register with a range of information on registered charities; and
• cooperating with other regulators and government agencies to reduce regulatory duplication.

This final function of the ACNC has been described as achieving a ‘one-stop shop’ for charities ‘seeking access to tax concessions’.\(^\text{14}\)

**B Registration**

As noted above, the ACNC Commissioner is responsible for ‘registering’ NFPs. Registration is the codeword required to enter the new regime. While it entails a number of obligations, it unlocks access to a range of other government benefits, including tax concessions, and programs, so that even though voluntary,\(^\text{15}\) many NFPs will have no practical choice but to register.

In broad terms, the ACNC Commissioner is obliged to register an entity if it:

• has an Australian Business Number;
• is a not-for-profit entity;
• complies with specified governance and external conduct standards (which are yet to be promulgated), with some exceptions for religious charities,\(^\text{16}\)
• does not undertake or support terrorist or criminal activities; and
• is a charity.\(^\text{17}\)

The registration process also allows the ACNC Commissioner to record any relevant ‘subtype’ of charity that describes the NFP, for instance, that it is a public benevolent institution.\(^\text{18}\) This potentially enables NFPs to access tax or other concessions which are specific to that subtype.\(^\text{19}\)

The registration process therefore charges the ACNC Commissioner with determining whether an NFP is a charity or not, a task which is initially to be conducted by applying the common law concept of charity as expanded by the *Extension of*

\(^{14}\) ACNC Revised Explanatory Memorandum 255 [15.3].
\(^{15}\) *ACNC Act* ss 15-5(3)-(4), 20-5(2)-(3); ACNC Revised Explanatory Memorandum 17-8 [1.82]-[1.83].
\(^{17}\) *ACNC Act* ss 25-5(1), (3), (5); ACNC Revised Explanatory Memorandum 31 [3.24]. It appears intended that the range of NFPs which can be registered will, in time, be expanded beyond charities: ACNC Revised Explanatory Memorandum 31 [3.23].
\(^{18}\) *ACNC Act* ss 25-5(2), (5).
\(^{19}\) ACNC Revised Explanatory Memorandum 34 [3.46].
Once registered, a charity has to comply with the record keeping, reporting and notification requirements of the ACNC Act and also the governance standards and external conduct standards created under it. Rather than setting out standards in the legislation, the ACNC Act provides for governance and external conduct standards to be made by regulation. At the date of writing, the Government had released a consultation paper on governance standards and announced that both sets of standards would be in place by 1 July 2013. The governance standards enshrine minimum outcomes in respect of the ‘practices and procedures’ adopted by an entity to govern its operations so as to enable it to carry out its purposes. The standards are also intended to engender public confidence that, amongst other things, registered charities will ‘minimise the risk of mismanagement and misappropriation’ and will ‘pursue their purposes’. External conduct standards are aimed at things done outside Australia by registered entities (such as activities or the provision of funds) as well as things which are ‘closely related to’ or which ‘will have a significant impact on’ such external matters.

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20 Ibid 35 [3.50]. The common law concept of charity requires, first, that the entity’s purposes be charitable in the technical sense (that is, the ‘relief of poverty’, the ‘advancement of education’, the ‘advancement of religion’, or ‘other purposes beneficial to the community’). Second, the entity (unless it is for the relief of poverty) must be for the public benefit. This means that the entity must bestow an actual benefit, and must do so in relation to the public or a section of the public rather than a private class of individuals. See, eg, Central Bayside General Practice Association Ltd v Commissioner of State Revenue (2006) 228 CLR 168, 178-9 n 28 (Gleeson CJ, Heydon and Crennan JJ); Ian Murray, ‘Charity Means Business: Commissioner of Taxation v Word Investments Ltd’ (2009) 31(2) Sydney Law Review 309, 311-12. For a comprehensive literature review of the meaning of charity, see Not-for-Profit Project Tax Group, Defining Charity: A Literature Review (20 February 2011) University of Melbourne <http://www.law.unimelb.edu.au/tax/research/current-research-projects/defining-taxing-and-regulating-not-for-profits-in-the-21st-century/publications>. Note that a statutory definition of charity is expected to be introduced by 1 July 2013: ACNC, Factsheet: Ongoing Obligations, above n 16.

21 ACNC Revised Explanatory Memorandum 35 [3.52].

22 Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth) (‘Consequential and Transitional Act’) sch 1 items 2(2), 3(2), 4(2).

23 For instance, notification is required if a significant contravention of the entity’s obligations renders it ineligible for continued registration: ACNC Act ss 65-5(1)-(2). Ineligibility for registration will not mean that the ACNC Commissioner will automatically terminate registration, since another regulatory action may be more appropriate: ACNC Revised Explanatory Memorandum 89 [7.19].

24 ACNC Act ch 3.

25 Ibid ss 45-10(1), 50-10(1).


27 ACNC Revised Explanatory Memorandum 57 [5.5], 63 [5.43]. See also The Treasury (Cth), Development of Governance Standards, above n 26, 5; Supplementary Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) and Australian Charities and Not-for-profits Commission (Consequential Amendments) Bill 2012 (Cth) 12 [1.20].

28 ACNC Act s 45-5(1).

29 Ibid ss 50-5(2), 50-10(3).
C Enforcement

The ACNC Act provides the ACNC Commissioner with a spectrum of responses where a registered NFP fails to meet its obligations, or where it is more likely than not that it will fail to do so in the future. These include:

- revocation of registration (also available where, amongst other reasons, the entity is no longer entitled to be registered as a charity);
- the ability to issue a warning about compliance action to a registered entity;
- issuing a direction to do or refrain from doing an act;
- accepting an ‘enforceable undertaking’ from a registered entity to do or refrain from doing an act and to enforce that undertaking. In this case, there is no requirement that a contravention have occurred or be more likely than not to occur, although the undertaking is intended to address current or future non-compliance or potential non-compliance;
- seeking an injunction; and
- suspending, removing and appointing acting ‘responsible entities’.

However, in performing this compliance function, the ACNC Commissioner is intended to consider principles of ‘regulatory necessity, risk and proportionality’ so that the Commissioner’s ‘actions are suitable and relative to individual circumstances’. While the ACNC has not yet released a detailed description of its compliance approach, it has indicated that it will be based on the design principles in the Implementation Report of the taskforce created to prepare for the ACNC’s establishment. The Implementation Report states that the ACNC should employ ‘regulatory principles such as proportionality, transparency, fairness, timeliness and consistency’ as well as ‘the use of graduated powers with opportunity for self-

30 Alternatively, where the entity is ‘proposing’ to do so, in the case of an injunction: Ibid ss 95-15(1)-(2), 95-20(1).
31 Other than the power to revoke an entity’s registration, the other compliance powers can generally only be exercised in relation to a ‘federally regulated entity’. This term covers constitutional corporations; trusts if the trustee is a constitutional corporation; and entities which are sufficiently linked to the Northern Territory or the Australian Capital Territory: ACNC Act ss 205-15, 205-20.
32 Ibid s 35-10(1).
33 Ibid ss 80-5(1)-(2).
34 Ibid ss 85-5(1), 85-10(1).
36 Ibid ss 95-15(1)-(2), 95-20(1).
37 Ibid ss 100-5(1), 100-10(1), 100-15(1), 100-30. In summary terms, a responsible entity is alone or jointly ‘responsible for the decision-making, day-to-day management and compliance of a registered entity’ and would include directors of a company or the trustee of a trust (and the directors of the trustee, if a corporate trustee): ACNC Revised Explanatory Memorandum 221 [13.68]-[13.72]; ACNC Act s 205-30.
38 ACNC Revised Explanatory Memorandum 21 [1.105]. See also at 21 [1.108], 117 [9.2]-[9.5].
The concept of proportionality clearly envisages the use of different compliance tools in different circumstances, depending on ‘the severity of the non-compliance’ and ‘the size and the nature’ of an entity’s activities.

The following ‘regulatory pyramid’, proposed for consideration in the Implementation Report, handily summarises and ranks the ACNC’s compliance responses to accord with this principle:

Specific guidelines mandating the above goals have been built into each of the chief regulatory powers. For instance, before deciding to revoke an entity’s registration, the ACNC Commissioner must generally give the entity an opportunity to respond to the proposed revocation and must consider the following factors:

- the ‘nature, significance and persistence of any contravention’ of an obligation;
- whether the ACNC Commissioner or the registered NFP could do or have done anything to resolve the failure, or to prevent such a failure occurring again;

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41 Ibid 7.
42 Ibid 5-6.
43 ACNC Act ss 35-10(2), 35-15.
• the benefits of making certain that ‘contributions’ are applied to the entity’s purpose and in accordance with its NFP status;

• the objects of any pieces of federal legislation for which status as a registered entity is relevant;

• the degree to which the registered NFP’s actions may ‘jeopardise … public trust and confidence in the not-for-profit sector’;

• the ‘welfare’ of those who directly benefit from the registered NFP’s activities; and

• any other relevant matter.

The same list of factors must also be considered for each of the other compliance powers listed above, other than those in relation to enforceable undertakings. 45

The ACNC Revised Explanatory Memorandum states that these factors require the ACNC Commissioner to consider the use of other regulatory responses as alternatives to revocation. 46 For instance, education measures, a warning notice or an enforceable undertaking. A registered entity’s ‘compliance track record’ is also relevant. 47 Indeed, the ACNC Revised Explanatory Memorandum suggests that revocation should be resorted to only for ‘prolonged non-compliance with a governance or external conduct standard’. 48

Overall, the ACNC Revised Explanatory Memorandum describes this approach to compliance as: 49

a fundamental change from the sector’s current regulatory framework where the default Commonwealth regulator, the ATO, only has the power to remove an entity’s access to tax concessions and is unable to take action commensurate to the circumstances being addressed.

III ENFORCEMENT OF TAX ENDORSEMENT CONDITIONS BY THE TAX COMMISSIONER

This Part examines the endorsement conditions charities must meet to maintain income tax exempt status, as well as the compliance tools available to the Tax Commissioner where those conditions are breached. As will be expanded further in Part IV, this analysis demonstrates a degree of regulatory duplication with the ACNC Commissioner, especially if the Special Conditions Bill reforms are implemented; but a narrower breadth of enforcement options for the Tax Commissioner. The

44 In broad terms, the provision of money, property or other benefits, including government concessions: ACNC Act s 205-40.
45 Ibid ss 80-5(3), 85-5(2), 100-10(9), 100-15(6). The factors are also only indirectly relevant for injunctions: s 95-35.
46 ACNC Revised Explanatory Memorandum 43 [3.99]-[3.100], 48 [3.127]. This approach seems permitted, primarily, by the second factor which looks at what the Commissioner could do to resolve the failure or prevent future failures: at 44 [3.107], 44 [3.110].
47 Ibid 120 [9.29].
48 Ibid 60 [5.24].
49 Ibid 120 [9.25].
The Bargwanna decision is discussed to show that the Special Conditions Bill endorsement conditions may be breached in a relatively broad range of circumstances.

A Endorsement

For charities to be eligible for income tax exemption, they must fall within the categories of charitable entity listed in s 50-5 of the *Income Tax Assessment Act 1997* (Cth) (‘*ITAA97*’).\(^{50}\) Until 3 December 2012, the categories included a ‘charitable institution’ and a ‘fund established in Australia for public charitable purposes by will or instrument of trust’ (‘charitable fund’).\(^{51}\) From 3 December 2012, the *Consequential and Transitional Act* wreaks some significant reforms.\(^{52}\) One of the reforms is that the distinction between charitable institutions and charitable funds has been removed in most cases,\(^{53}\) such that only one class of charities remains: a ‘registered charity’.\(^{54}\) Whether a charity is a ‘registered charity’ for the purposes of the *ITAA97* is based on whether the entity has been registered as a charity under the *ACNC Act*.\(^{55}\)

The registered charity category is then subject to several additional special conditions that must be satisfied. These have been revised so that there are now two that broadly apply to all charities.\(^{56}\) First, the conditions continue to require that the entity be endorsed by the Tax Commissioner,\(^{57}\) which in turn means the charity must fall within the identified category,\(^{58}\) have applied for endorsement in the approved way,\(^{59}\) have an ABN,\(^{60}\) and have met the other special conditions.\(^{61}\) Second, all charities must now meet one of the following conditions derived from s 50-50 of the *ITAA97*, which in general terms applies a geographic nexus test:\(^{62}\)

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\(^{50}\) *ITAA97* s 50-1.
\(^{51}\) Ibid s 50-5 items 1.1, 1.5B. As to charitable funds, see also items 1.5 and 1.5A as at 2 December 2012.
\(^{52}\) Note that the following ruling has not yet been updated: ATO, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011.
\(^{53}\) Separate categorisation of ‘religious institutions’ has also been removed.
\(^{54}\) See especially *Consequential and Transitional Act 2012* (Cth) sch 2 items 20, 30, 31, 35. This appears to be based on the unified special conditions expected to be introduced upon the passage of the Special Conditions Bill: ACNC Revised Explanatory Memorandum 260 [15.44]-[15.45].
\(^{55}\) *Consequential and Transitional Act 2012* (Cth) sch 2 items 20, 30.
\(^{56}\) Ibid sch 2 items 30, 33, 37, sch 4 items 4-7. However, charitable funds established before 1 July 1997 continue to be accorded concessional exclusions from the special conditions: ibid sch 2 item 40.
\(^{57}\) *ITAA97* s 50-52(1).
\(^{58}\) Ibid s 50-110(2).
\(^{59}\) Ibid s 50-105.
\(^{60}\) Ibid s 50-110(3).
\(^{61}\) Ibid s 50-110(5)(a). A ‘reasonable grounds’ test applies to entities which have not yet carried on activities as a charitable institution or for charitable purposes at the time of application for endorsement: s 50-110(5)(b) (including as amended by *Consequential and Transitional Act 2012* (Cth) sch 2 item 38).
\(^{62}\) *Consequential and Transitional Act 2012* (Cth) sch 2 items 30, 37. It is unclear why the requirement that the entity be an ‘institution’ has not been removed from two of the three conditions.
the entity ‘has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia’ (the ‘in Australia’ test);

- it is an institution that is a deductible gift recipient referred to in item 1 of the table in s 30-15(2) of the ITAA97 (deductible gift recipients generally have to pass a separate in Australia test, unless individually named and permitted or under certain externally focussed deductible gift recipient categories); or

- it is prescribed by name in regulations and is a foreign institution which is exempt from income tax in its home jurisdiction or is an institution with a ‘physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia’. This is referred to as the ‘prescribed by law’ test.

This is the same test as that which previously applied for charitable institutions. While it could be interpreted as implicitly requiring that a charity pursue its objectives, the test is predominantly focussed on a geographic nexus with Australia rather than with the use of funds for non-charitable purposes. Further, the manner in which funds are used is relevant to whether an entity continues to come within the concept of a ‘charitable institution’, as that term has been interpreted. Currently then, it seems that use of funds for charitable purposes is not a matter that the Tax Commissioner must monitor (except in a geographic sense), other than to await notification of deregistration from the ACNC Commissioner.

However, the federal government is currently proposing a number of further changes to the special conditions for endorsement which are set out in the Special Conditions Bill. The Special Conditions Bill contains a requirement that every charity would have to ‘comply with all the substantive requirements in its governing rules’ and ‘apply its income and assets solely for the purpose for which the entity is

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66 Ibid.

67 The constraint which formerly applied to charitable funds, that a fund be ‘applied for the purposes for which it was established’, has been removed: CONSEQUENTIAL AND TRANSITIONAL ACT 2012 (Cth) sch 3 item 6.


70 These measures form part of a package that was initially aimed at updating the ‘in Australia’ tests following Word Investments (2008) 236 CLR 204: Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 10 [1.34].
established’. The Explanatory Memorandum acknowledges that an entity’s activities can be relevant to a determination of its purpose. Further, even where activities do not demonstrate a non-charitable purpose, they may still suggest that endorsement should not be retained where there has been failure to observe ‘rules of core importance to the operation of the entity’ such as ‘those related to an entity’s object and purpose and those relating to an entity’s not-for-profit status’. This would not include ‘minor procedural irregularities’. The changes are proposed to apply from the first income year commencing after the day after Royal Assent. This could potentially be the 2013-14 year, if the Special Conditions Bill is passed before 30 June 2012.

In addition, the Special Conditions Bill would oblige a charity seeking income tax exempt status to be a ‘not-for-profit entity’. A ‘not-for-profit entity’ is defined as an entity which is not carried on for the profit or gain of owners or members and as being prohibited from distributing (and which does not distribute) profits or assets to owners or members. Finally, the Special Conditions Bill would also restate the current s 50-50 ITAA97 geographic nexus condition, primarily to tighten its rules, especially in relation to conduit funding of offshore activities, which may satisfy the current test. If not endorsed as a deductible gift recipient or prescribed in regulations, a charity would generally have to satisfy a rewritten in Australia test, which would require the entity to ‘operate principally in Australia’ and ‘pursue its purposes principally in Australia’.

B Enforcement

The Tax Commissioner has carriage of endorsing charities as income tax exempt. Any failure to meet the special conditions means, for an entity that is not yet endorsed, that it cannot be so endorsed; and, for an entity that is endorsed, that it must notify the Tax Commissioner. The Commissioner also has the power to require an endorsed entity to provide information that would enable the Commissioner to check the entity’s entitlement to endorsement.

However, what can the Tax Commissioner do if an entity ceases to meet the endorsement conditions? There are two matters relevant to this question. First, while the Consequential and Transitional Act effects a number of changes to the Tax

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71 Special Conditions Bill sch 1 item 38.
72 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 23 [1.96].
73 Ibid 23-24 [1.97]-[1.100].
74 Ibid 24 [1.99].
75 Special Conditions Bill sch 1 item 166.
76 Ibid sch 1 item 38.
77 Ibid sch 1 item 44.
78 Ibid sch 1 item 38; Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 12, 14 [1.55], 14 [1.59]-[1.60], 19-22 [1.74]-[1.89].
79 Special Conditions Bill sch 1 item 38.
80 ITAA97 ss 50-105; Taxation Administration Act 1953 (Cth) (‘TAA’) sch 1 div 426.
81 ITAA97 ss 50-110(1), 50-110(5)(a).
82 TAA sch 1 s 426-45(1).
83 Ibid sch 1 s 426-40(1).
Commissioner’s endorsement process under the TAA, it does not introduce a series of enforcement measures which would enable a proportionate response. Accordingly, unlike the ACNC Commissioner, the Tax Commissioner’s only primary regulatory responses are, generally, to ignore the loss of entitlement, revoke endorsement, or seek prosecution of a charity for failing to notify the Tax Commissioner of loss of endorsement in some circumstances.

Second, it is unclear whether the Commissioner has any choice about revoking endorsement when the conditions are not satisfied, or is permitted to take account of as broad a range of factors as the ACNC Commissioner. The revocation power says that the Commissioner ‘may’ revoke endorsement. However, the use of the word ‘may’ does not necessarily mean that the Commissioner has a discretion about revocation, rather than an obligation. Ultimately, it is a matter of construction.

Due to the meaning of ‘may’, the starting point is that the provision is discretionary. However, the purpose of the endorsement provisions is also highly relevant, given some uncertainty over the word, as one can test whether a discretion or obligation would be inconsistent with that purpose. While the purpose is a little difficult to discern, it appears the endorsement requirement was introduced to ‘ensure that the taxation concessions provided to charities are not abused’ and to ‘protect the integrity of the taxation system in respect of deductible gift recipients and income tax exempt charities’. The very existence of an endorsement requirement in a self-assessment system also supports such a purpose. Further, in terms of context, the endorsement provisions also provide for the fact of endorsement to be made available to the public by way of the Australian Business Register which has the associated purpose of ‘allow[ing] greater scrutiny of the use of taxation concessions by charities … and improv[ing] public confidence in the provision of taxation support to the charitable sector’. While not entirely clear, it is possible to construe the revocation

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84 The changes relate predominantly to the removal of the distinction between institutions and funds and to the inclusion of information about ACNC registration in the Australian Business Register.
85 If a backdated revocation of endorsement means that tax has been underpaid, then the Commissioner should also be able to issue an assessment to recover this amount and may be able to impose penalties and interest.
86 TAA sch 1 s 426-55(1).
87 Failure to notify is likely to constitute a tax offence: Ibid s 8C(1).
88 Ibid sch 1 s 426-55(1).
90 Pearce and Geddes, above n 89, 349 [11.5], 354-5 [11.13]; Acts Interpretation Act 1901 (Cth) s 33(2A) (Pearce and Geddes note at 354-5 that s 33(2A), which appears entrenched a discretionary interpretation of the word ‘may’, is subject to a contrary intention and so has been relatively narrowly interpreted).
91 Ibid 347-8 [11.3]. See also Julius v Lord Bishop of Oxford (1880) 5 App Cas 214, 222–3 (Earl Cairns LC).
93 Explanatory Memorandum, A New Tax System (Tax Administration) Bill 1999 (Cth) 106 [6.7].
94 See, eg, Pearce and Geddes, above n 89, 353-4 [11.12].
95 TAA sch 1 sub-div 426-C.
96 Explanatory Memorandum, Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth) 77 [10.4].
provision as discretionary, even in light of these purposes, if the width of the discretion is narrowed by the integrity and public confidence concerns. For instance, this might permit some flexibility in situations where charity controllers have made an honest mistake or where the failure to meet endorsement conditions is very minor.

In any event, seeking to apply s 426-55(1) of the TAA so as to take account of a range of mitigating factors which are not expressed in the legislation raises the risk that the Tax Commissioner is acting outside power or taking irrelevant considerations into account, or that the decision could otherwise be subject to challenge on administrative law grounds. 97

C Impact of Bargwanna Decision

Bargwanna suggests that there may be a relatively broad range of circumstances where loss of entitlement to endorsement would be engendered by failure to meet the ‘compliance with governing rules’ and ‘application of income and assets’ conditions contained in the Special Conditions Bill. Bargwanna involved several breaches of trust relating to the administration of a charitable fund, with the issue being whether the breaches meant that the charitable fund had not been ‘applied for the purposes for which it was established’. This requirement has been removed as part of the ACNC reforms, but the reasoning in the case remains relevant to the Special Conditions Bill proposals.

The key breaches of trust spanned a number of income years and constituted:

- Mixing relatively significant amounts98 of trust funds with non-trust funds, coupled with a failure to obtain interest on those trust funds.99 An amount in compensation was apparently added to the trust fund in a later income year.100

- Transferring an amount of $210,000, representing just under 50 per cent of the trust funds at the relevant time, into a personal mortgage offset account of the trustees so as to reduce the interest paid by the trustees on their personal home loan.101 The principal amount was subsequently largely refunded to the trust, along with an amount in respect of interest foregone.102

The High Court found that the breaches resulted in the trust being ineligible for endorsement in the relevant income years and the reasoning suggests that, unless a de

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98 Minor amounts in the income years ending in 2002 to 2005. Thereafter, 10 per cent, 20 per cent and 25 per cent, respectively, of the trust’s total funds.
100 FCT v Bargwanna (2009) 72 ATR 963, 973 [33] (Edmonds J).
minimis misapplication, a charitable fund would not continue to qualify for endorsement under the old test where:

- a breach of trust has occurred which results in trust funds being used for a purpose other than the charitable purposes of the charity; or
- there has been a mixing of charitable funds with other funds; or
- the trustee has not administered the trust in accordance with the trust deed or the law such that it cannot be said that the administration of the trust is ‘referable’ to achieving its charitable purposes; for instance, where ‘benefits are derived personally by the trustees or a third party’.

The effect of the revised special conditions contained in the Special Conditions Bill is intended to be consistent with the High Court’s interpretation of the ‘applied for the purposes for which it was established’ condition in Bargwanna. That is, failure to meet the ‘compliance with governing rules’ or ‘application of income and assets’ conditions would be likely to strike at income tax endorsement eligibility in a significant range of situations. Failure to act consistently with not-for-profit status, which would be an on-going condition under the Special Conditions Bill, is also covered by the analysis in Bargwanna (see the final dot point above) and is cited as a trigger for loss of endorsement in the Explanatory Memorandum; at least where the failure involves breach of the entity’s governing rules.

IV ENFORCEMENT CROSSOVER

This Part identifies that the income tax endorsement conditions apply in addition to the ACNC registration requirements and that each set of conditions is separately administered by the Tax Commissioner and the ACNC Commissioner, respectively. Further, it compares the scope of the obligations monitored by each of the commissioners, and considers whether there is a difference in outcomes where regulatory duplication exists and whether this might be justified.

A Tax Endorsement Conditions Overlay ACNC Registration Requirements

It is the Tax Commissioner, not the ACNC Commissioner, who determines and monitors the income tax exempt endorsement of entities. However, the ACNC

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103 Ibid 669 [41]-[42] (French CJ, Gummow, Hayne and Crennan JJ), 673 [62] (Cf Heydon J). The term was not expanded upon. However, it seems clear that it does not apply where a ‘significant part of the assets’ of the trust have been misapplied, or where the trust fund has been ‘substantially applied’ or ‘on the whole applied’: 669 [39], 669 [42], 669-70 [44]. (French CJ, Gummow, Hayne and Crennan JJ).
105 Ibid 669 [40]-[42], 670 [45] (French CJ, Gummow, Hayne and Crennan JJ).
107 Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 24 [1.102].
108 Ibid 24 [1.100].
Commissioner determines and monitors a necessary condition for income tax exempt charities: registered charity status. Unsurprisingly, therefore, there is to be some coordination in the two processes, with the ACNC providing a joint application form to charities, which it will process for registration purposes and then pass on to the ATO to consider for tax endorsement.\footnote{110}

Further, the ACNC Revised Explanatory Memorandum suggests that the ACNC Commissioner will enter into ‘memoranda of understanding’ with other regulators to work collaboratively.\footnote{111} It also states that ‘administrative decisions of the Commissioner of Taxation and the ACNC will in practice be interlinked and jointly considered’.\footnote{112} Cooperation of this nature will be assisted by the information disclosure provisions introduced with the creation of the ACNC. ACNC officers are permitted to disclose information about registered entities to the ATO\footnote{113} if the information would ‘enable or assist the [ATO] to perform or exercise any of the functions or powers of the [ATO]’, the disclosure is for that purpose and is also ‘reasonably necessary to promote the objects of [the ACNC Act]’.\footnote{114} Likewise, the Tax Commissioner or another taxation officer may now disclose information to the ACNC Commissioner where this is ‘for the purpose of administering the [ACNC Act]’ or where it relates to the failure of a charity to comply with a law and is made for ‘the purpose of the administration of a law governing trusts and charities’.\footnote{115}

Accordingly, it is to be expected that the ACNC Commissioner and the Tax Commissioner will keep each other informed of their respective regulatory actions and of instances where charities have breached obligations.\footnote{116} Nevertheless, the two regulators have separate and on-going roles to fill in relation to charities seeking income tax exemption and the amendments introduced as part of the ACNC legislative package certainly do not provide for the referral of matters from one regulator to the other such that the first regulator can decline to act. Further, as discussed in Part IIIIB above, the Tax Commissioner may not have any discretion over whether to revoke a charity’s endorsement if it ceases to meet the requirements. Even if the Tax Commissioner does have a discretion, it is unlikely to permit the Tax Commissioner to take account of the range of matters considered by the ACNC Commissioner, or to accord too much weight to the ACNC Commissioner’s proposed regulatory response.

\section*{B Scope Comparison – Circumstances for Enforcement}

\footnote{110} ACNC, \textit{ACNC and Other Regulators}, above n 109.\footnote{111} ACNC Revised Explanatory Memorandum 19 [1.96]. It appears that the Implementation Taskforce may already have entered into an administrative understanding with the ATO for the provision of ‘back office services’ for the ACNC on its establishment: Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 3 September 2012, 5 (Susan Pascoe, Interim Commissioner, Australian Charities and Not-for-profits Commission Implementation Taskforce).\footnote{112} ACNC Revised Explanatory Memorandum 262 [15.56].\footnote{113} Disclosure is permitted to an ‘Australian government agency’ which includes ‘an authority of the Commonwealth’ and so would apply to the ATO: \textit{ACNC Act} s 300-5 (definition of ‘Australian government agency’). See, eg, ACNC Revised Explanatory Memorandum 182 [11.30].\footnote{114} \textit{ACNC Act} s 150-40.\footnote{115} \textit{Consequential and Transitional Act} sch 3 items 15, 16.\footnote{116} Provision has also been made for the joint consideration of administrative review of, or court appeal from, objection decisions of the ACNC Commissioner or Tax Commissioner: \textit{ACNC Act} ss 165-55, 170-30; \textit{Ibid} sch 3 items 3-14.
The currently attenuated special conditions for endorsement as an income tax exempt charity\textsuperscript{117} mean that the only likely existing overlap in the obligations supervised by the Tax Commissioner and the ACNC Commissioner is between the s 50-50 geographic nexus condition and the yet unmade ACNC external conduct standards. However, to the extent it can be predicted in the absence of the standards, it appears that the foci of the two requirements are quite disparate. The standards are centred on whether funds are used for ‘legitimate purposes’ and reach ‘legitimate beneficiaries’ rather than supporting terrorist or criminal activities.\textsuperscript{118} In contrast, the ‘in Australia’, ‘deductible gift recipient’ or ‘prescribed by law’ tests seek to determine whether a charity has a sufficient geographic link with Australia or whether alternative reasons and conditions exist for income tax exemption in the absence of such a link. Accordingly, the degree of overlap may be small.

However, if the revised conditions proposed by the Special Conditions Bill are introduced, there will be a material duplication of the matters considered by the two commissioners. The following table summarises the overlap.

\textit{Table 1: Regulatory Overlap from Reforms in Special Conditions Bill}

<table>
<thead>
<tr>
<th>ACNC Requirement…</th>
<th>Overlaps with these Proposed Tax Endorsement Conditions</th>
<th>Comment</th>
</tr>
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<tbody>
<tr>
<td>Must maintain its status as a not-for-profit entity (deregistration power applies); or notify the ACNC Commissioner of a significant contravention of ACNC obligations which has caused the entity to stop being not-for-profit (failure to notify enlivens the range of enforcement powers). See also ACNC governance standards below, to the extent they relate to maintenance of not-for-profit status (enlivens the range of enforcement powers).</td>
<td>Must be and maintain its status as a not-for-profit entity as defined under the Special Conditions Bill. Must comply with substantive requirements in governing rules.</td>
<td>Although the term ‘not-for-profit entity’ is not defined in the \textit{ACNC Act}, but will be defined under the Special Conditions Bill, it is likely to have largely similar content.\textsuperscript{119} Substantive requirements in governing rules would include not-for-profit provisions.\textsuperscript{120} \textit{Bargwanna} provides an example of an overlap situation where charity controllers have not administered the charity in accordance with its governing rules or the law, by allowing the controllers or a related party to derive personal benefits.</td>
</tr>
<tr>
<td>Must maintain its status as a charity (deregistration power applies); or notify the ACNC Commissioner of a significant</td>
<td>Must comply with substantive requirements in governing rules. Must apply its income and assets solely for the purpose</td>
<td>If a charitable institution engaged in conduct such as that in \textit{Bargwanna} of applying approximately 50 per cent of the charity’s assets in an income year to a purpose other than the institution’s charitable purpose, this would likely</td>
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\textsuperscript{117} See above Part IIIA.
\textsuperscript{118} \textit{ACNC Act} s 50-5(1).
\textsuperscript{119} See, eg, above n 5; Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 25 [1.106].
\textsuperscript{120} See above nn 73, 108 and accompanying text.
contravention of ACNC obligations which has caused the entity to stop being a charity (failure to notify enlivens the range of enforcement powers).

See also ACNC governance standards below, to the extent they relate to acting in accordance with charity status (enlivens the range of enforcement powers).

| Must comply with ACNC governance standards (enlivens the range of enforcement powers). | Must comply with substantive requirements in governing rules. | While the ACNC governance standards are yet to be determined, there is likely to be extensive duplication, although the breadth of the draft ACNC governance standards (eg accountability to members, compliance with Australian laws) indicates that the ACNC governance standards are likely to be wider. The governance standards are focussed on the systems that an entity has in place to govern its operations so as to reduce maladministration and to enable it to carry out its purposes. Draft governance standard 1 would require a registered charity to comply with its charitable purposes and its not-for-profit character on an on-going basis. Similarly, ‘substantive requirements’ in governing rules appear to be interpreted broadly for tax endorsement purposes and look to ‘rules of core importance to the operation of [an] entity’ such as ‘those related to an entity’s object and purpose’ and its ‘not-for-profit status’.

Must comply with one of the ‘in Australia’, ‘deductible gift recipient’ or ‘prescribed by law’ tests. The focus of these tests is

Although the ACNC external conduct standards have not been finalised, it appears likely that there will be some overlap between requirements relating to activities or the provision of funds outside Australia.

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121 As to charity status, see above n 69. See also *Brookton Co-operative Society Ltd v FCT* (1981) 147 CLR 441, 451 (Mason J): the ‘purpose for which a company is established may change in the course of time’.

122 See, eg, Murray, above n 20, 309, 321; Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 23 [1.96]-[1.97].

123 The Treasury (Cth), Development of Governance Standards, above n 26, 13, 15.

124 For instance, ‘absence of quorum at a meeting’, at least on a one-off basis, seems to be characterised as not giving rise to a breach of the proposed tax endorsement condition: Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 24 [1.99].

125 The Treasury (Cth), Development of Governance Standards, above n 26, 11.

126 The Explanatory Memorandum suggests that they do not include ‘minor procedural irregularities’: Explanatory Memorandum, Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cth) 24 [1.99].

127 See above n 73.
A rider to the intersecting circumstances set out above is that the ACNC Commissioner may use the ACNC enforcement provisions before a registered entity has breached its obligations. As noted in Part IIIC, the test for the majority of enforcement actions is whether a reasonable person (in the position of the ACNC Commissioner) would believe that ‘it is more likely than not that the registered entity will contravene [its obligations]’. This could provide the ACNC Commissioner with exclusive space to undertake regulatory action and, for instance, would allow a milder, preventative, enforcement response.

However, there is some ambiguity about the extent of this additional scope. Unfortunately, it is not assisted by the example provided in the ACNC Revised Explanatory Memorandum which refers to the test being satisfied where an NFP enters into a contract to transfer assets in breach of its charitable purposes, if the ACNC Commissioner acts before the contract is completed. If the governance standards are implemented in a form similar to the proposed draft governance standards, it is likely that entry into the contract would itself amount to a breach of the governance standards (that the entity ‘comply with … its character as a not-for-profit entity’) since it would likely breach the required not-for-profit provisions in the governing rules of the entity. In any event, entry into such a contract is also likely to be a breach of the proposed ‘compliance with substantive requirements in governing rules’ tax endorsement condition, so that the Tax Commissioner could also act.

C Enforcement Outcomes

As identified in Parts IVA and IVB, the ACNC Commissioner and Tax Commissioner may be separately required to respond to the same set of compliance circumstances for an endorsed charity, particularly if the Special Conditions Bill reforms are introduced. Given the ACNC Commissioner’s greater range of enforcement powers and increased ability to consider a variety of matters, including the possibility of less intrusive regulatory action, in selecting the appropriate power, it seems likely that the commissioners will frequently employ different enforcement options. As explored in Parts IIIB and IIC, it may be expected that the ACNC Commissioner will

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<table>
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<th>these standards is on whether funds are used for ‘legitimate purposes’ and reach ‘legitimate beneficiaries’ rather than supporting terrorist or criminal activities.</th>
<th>on determining whether a charity has a sufficient geographic link with Australia or whether alternative reasons and conditions exist for income tax exemption in the absence of such a link.</th>
<th>Australia and a test which focuses on whether an entity operates and pursues its purposes principally in Australia.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia and a test which focuses on whether a charity has a sufficient geographic link with Australia or whether alternative reasons and conditions exist for income tax exemption in the absence of such a link.</td>
<td>However, the foci of the two requirements are quite disparate, so the degree of overlap may be small.</td>
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</tbody>
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128 ACNC Act s 50-5(1).
129 Ibid ss 35-10(1)(c), 80-5(1), 85-5(1), 100-5(1), 100-10(1), 100-15(1). The test for an injunction requires consideration of whether a person is ‘proposing to engage’ in contravening conduct or ‘proposing to refuse or fail… to do a thing’ where that refusal or failure would be a contravention: Ibid ss 95-15(1)-(2), 95-20. Further, there is no such test that must be satisfied before the Commissioner can accept an enforceable undertaking: Ibid ss 90-10(1)-(2).
130 ACNC Revised Explanatory Memorandum 41 [3.93]. See a similar example at 122 [9.42].
131 The Treasury (Cth), Development of Governance Standards, above n 26, 11.
132 See below n 134 and accompanying text.
133 In fact, the ACNC Commissioner is required to do so.
adopt enforcement action which is better tailored to the risk involved and the severity of the breach.

For instance, the following example from the ACNC Revised Explanatory Memorandum is a situation where the ACNC Commissioner might be expected not to revoke an entity’s registration: 134

**Example 3.16**

Aloe Wishes is a federally regulated entity that is registered with the ACNC. Aloe Wishes enters into a related party transaction, the terms of which contravene the Bill. Aloe Wishes has yet to complete the transaction and, prior to this, has never contravened the Bill. Taking into account the list of factors described above, the ACNC Commissioner decides that issuing a direction to the entity not to perform the related party transaction is the most appropriate enforcement action in a situation where the entity appears not to wish to take voluntary action.

What response might the Tax Commissioner make? First, these circumstances would probably amount to a breach of a charity’s core governance rules. That is, those rules relating to purpose and to not-for-profit status. Arguably, the breach occurs at the time the related party transaction contract is entered into (not settlement) such that the application in Bargwanna of funds to the personal benefit of controllers, rather than for the trust’s charitable purposes, is analogous. On this basis, the Tax Commissioner would have grounds to revoke the charity’s endorsement. To the extent the Tax Commissioner is able to consider alternatives, which Part IIIB shows is unclear, the only alternatives are to ignore the breach or to prosecute for a tax offence of failing to notify the Tax Commissioner of loss of entitlement to endorsement.

The first option does not appear to advance the tax endorsement provision objects of protecting the integrity of the tax system and public confidence in the grant of tax benefits to charities. The second option should not generally be employed where a charity has made an honest mistake while attempting to comply with endorsement conditions. 135 It may be appropriate if Aloe Wishes knows the related party transaction is prohibited, but not otherwise. The scenario of an honest mistake would then leave the Tax Commissioner with revocation as the only remedy.

Further, the Court’s approach in Bargwanna leaves open the question whether honesty or corrective action on the part of charity controllers are relevant factors for the Tax Commissioner to consider for tax endorsement purposes. Heydon J expressly left this issue at large and the plurality judgment did not specifically address corrective action, though their Honours did note that having acted ‘honestly and reasonably’ under the relevant trustee legislation would be insufficient in relation to breaches of the type considered in the case. 136 Bargwanna provides a useful case study of this situation. On one view of the evidence, the charity controllers acted honestly, 137 although carelessly, 138 so causing the charity to breach its governing rules

134 ACNC Revised Explanatory Memorandum 47 [3.122].
136 Bargwanna (2012) 244 CLR 655, 669 [41]-[42] (French CJ, Gummow, Hayne and Crennan JJ), 673 [62] (Heydon J). The plurality judgment did not comment on whether the trustees had actually acted honestly and reasonably for the purposes of exculpation under trustee legislation.
137 The Tax Commissioner seems to have accepted that the charity controllers acted honestly, or at least that they did not ‘deliberately’ misapply the relevant funds: Bargwanna (2012) 244 CLR 655, 673-4
by misapplying funds for non-charitable purposes which resulted in a personal benefit to the controllers. The controllers also applied funds other than for charitable purposes by mixing the charity’s funds with the money of others and failing to obtain interest. Indirectly, via a related party, the charity controllers attempted to rectify the breaches to the extent possible by repaying misapplied amounts, plus compensation. In addition, in Bargwanna, over the relevant years, the charity had distributed somewhere between 25 to 40 per cent of the funds it received or generated to other charities.

Bargwanna demonstrates that revocation is available to the Tax Commissioner and is likely to be applied. However, the ACNC Commissioner may well not deregister the charity. The ACNC Act encourages ‘self-correction’ by registered NFPs. Further, example 9.6 from the ACNC Revised Explanatory Memorandum suggests that where there is no suggestion of dishonesty, self-correction, following informal notification from the ACNC Commissioner that an entity is using its funds for a purpose not permitted by its rules, albeit charitable, may mean no formal enforcement action is necessary. Admittedly, example 9.6 relates to an isolated incident and Bargwanna concerns breaches over a number of years and in respect of a significant portion of the charity’s funds, which is a relevant factor for the ACNC Commissioner. Nevertheless, example 3.8 indicates that even in cases of fraud, the ACNC Commissioner may still attempt to use lesser enforcement measures before moving to deregistration.

Of course, it is legitimate to ask: why shouldn’t there be a difference in approach between the two regulators? The purpose of the ACNC and income tax enforcement provisions is relevant to this question. As enunciated in Part IIIB, the endorsement requirements appear to have been introduced to prevent abuse of tax concessions and to ‘protect the integrity of the taxation system in respect of … income tax exempt charities’, as well as to shore up public confidence in the granting of tax benefits to charities. By reason of the ACNC Act objects discussed in Part IIA, the overall purposes to be achieved by use of the ACNC Commissioner’s enforcement powers are: furthering ‘public trust and confidence’ in NFPs, ‘sustain[ing]’ the sector, and championing a decrease in ‘unnecessary regulatory obligations’. In particular, the

[63] (Heydon J); Bargwanna v FCT (2010) 191 FCR 184, 209[68], 211 [75] (Dowsett, Kenny and Middleton JJ). See also the Administrative Appeal Tribunal’s acceptance of good faith reasons for the breaches of trust: Re TACT and FCT (2008) 71 ATR 827, 844-56 [56]-[105] (Senior Member Taylor).
[139] See above nn 100, 102 and accompanying text.
[140] It appears that between 2002 and 2007 the charitable trust received, or generated as income, $707,198 (Bargwanna (2012) 244 CLR 655, 663 [17] (French CJ, Gummow, Hayne and Crennan JJ)) and distributed somewhere between $176,821 and $293,915 to charities (HELP International, several churches and retired ministers of religion) (Re TACT and FCT (2008) 71 ATR 827, 836-7 [32]-[34], 844 [54]-[55] (Senior Member Taylor)).
[141] ACNC Revised Explanatory Memorandum 128 [9.76]; ACNC Act s 35-10(2)(b). See also ACNC Revised Explanatory Memorandum 126 [9.60].
[142] ACNC Revised Explanatory Memorandum 128 [9.76].
[143] ACNC Act s 35-10(2)(a).
[144] ACNC Revised Explanatory Memorandum 40-1 [3.87]. Example 3.13 does not seem pertinent as the personal benefits were obtained without deliberate misapplication of funds in Bargwanna: at 46-7 [3.120].
[145] ACNC Act s 15-5(1); ACNC, ACNC’s Role, above n 12.
compliance function seems best suited to advancing public trust and confidence.\footnote{ACNC Revised Explanatory Memorandum 117 [9.1]-[9.5].} While the ACNC Commissioner is generally required, when exercising enforcement authority, to consider the objects of the income tax legislation, since it refers to registration under the \textit{ACNC Act},\footnote{See above Part IIC.} this is only one of several relevant matters.

The need for revenue protection for tax purposes and the broader focus of the ACNC enforcement objects suggest that different responses may be appropriate in some circumstances. Indeed, stricter measures on the part of the Tax Commissioner may be warranted by the fact that the endorsement provisions are intended to apply on top of the ACNC registration requirements. However, before extrapolating too far, it must be acknowledged that for many charities, the chief reason for applying for ACNC registration is to access tax concessions.\footnote{The three most prominent and specific of six reasons to register suggested by the ACNC all relate to tax concessions: ACNC, \textit{Why Register} (2012) <http://www.acnc.gov.au/ACNC/Register_my_charity/Why_register/ACNC/Edu/Why_reg.aspx?hkey =f1345f59-0774-41b7-82ff-833fe79ed207>. See also, ACNC Revised Explanatory Memorandum 29 [3.2], 30 [3.10].} Accordingly, loss of income tax exemption, which could occur through revocation of endorsement by the Tax Commissioner or from deregistration by the ACNC Commissioner, may be the ultimate sanction for many charities. If the Tax Commissioner wields this sanction in circumstances where the ACNC Commissioner considers a milder regulatory response is desirable, the benefits of proportionate compliance activities will not be achieved. Further, uncertainty about what enforcement measures the Tax Commissioner is permitted to take and, to the extent permitted, might choose to take, also seems likely to undermine a system intended to deliver proportionate regulation.

Moreover, it is clear that the ACNC Commissioner’s role is to determine whether an entity is, and continues to act in accordance with its status as, a charity and that this determination and monitoring function should replace duplicative determinations on the same matters by other federal regulators.\footnote{See, eg, ACNC Revised Explanatory Memorandum 257-8 [15.17]-[15.21].} That is surely the reason why the income tax endorsement requirements now refer to a registered charity under the \textit{ACNC Act}. Accordingly, drastically different regulatory responses to the same core issue, or even the perceived potential of different responses, should be avoided. If the desire for revenue protection means that the Tax Commissioner’s regulatory role should overlap with that of the ACNC Commissioner, then a coordinated regulatory response seems preferable and appears contemplated to some degree by the information sharing provisions discussed in Part IVA above. However, it does not seem best practice that the principles underlying any such coordinated response have not, to the author’s knowledge, been made public. More fundamentally, given doubt about the extent of the Tax Commissioner’s discretion and the uncertainty that even an unfettered discretion could cause, it would be better if the factors considered by the Tax Commissioner when deciding whether to revoke endorsement were enshrined in legislation.

\section*{V \hspace{1em} CONCLUSION}
Although the ACNC regime is still in its infancy, this paper submits that the regulatory overlap with the Tax Commissioner over income tax endorsed charities should be clarified and reformed. If the Special Conditions Bill changes are implemented, the ACNC Commissioner and Tax Commissioner will be separately required to respond to the same set of compliance circumstances for endorsed charities in a broad range of situations, but will likely do so with a ‘fierce extreme’ of compliance measures. This will detract from proportionate regulation of charities and is likely to hinder the ACNC in achieving its aim of reducing regulatory duplication by acting as the chief statutory regulator for NFPs. Based on these concerns, the following reform proposals may warrant further investigation.

First, the regulatory overlap could be addressed by leaving the tax endorsement special conditions largely in their current form (that is, applying a geographic nexus test), with the Special Conditions Bill amended to implement only those special condition changes relevant to this nexus test. As demonstrated by Part IVA, duplication would then primarily be limited to the ACNC external conduct standards and the income tax endorsement geographic nexus test. The different aims of these requirements should then justify separate regulators and separate responses. This approach bears some resemblance to the removal of a number of Corporations Act 2001 (Cth) governance requirements for NFPs which are registered with the ACNC, so as to ‘eliminate the need for [ASIC] to continue to regulate [them]’. 151

An approach like this has the benefit that it avoids cutting across the principle that the ACNC Commissioner is the independent statutory regulator of the NFP sector. This was a principle strongly supported by most participants in the consultation process leading up to the formation of the ACNC,152 in part due to a ‘perceived conflict of interest’ between the ATO’s ‘revenue collection focus’ and NFP regulation.153 However, the problem is that it may not sufficiently achieve the revenue integrity object of the income tax endorsement provisions, since the ACNC Commissioner need only consider this object as one of many factors relevant to the exercise of the ACNC Commissioner’s discretion.

Accordingly, a second and preferable alternative would be to allow the Tax Commissioner to retain a role in relation to NFP regulation, for instance, by including the type of income tax endorsement special conditions proposed in the Special Conditions Bill. However, the Tax Commissioner’s discretion whether or not to revoke endorsement could be confirmed and the Tax Commissioner could be obliged to consider any regulatory action or proposed regulatory action of the ACNC Commissioner in exercising the discretion. Arguably, this would bolster a whole of government proportionate approach to enforcement, while still permitting the Tax Commissioner to emphasise revenue protection.

151 Consequential and Transitional Act sch 3 pt 3; ACNC Revised Explanatory Memorandum 261 [15.49].
152 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012; the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (2012) 32 [2.90]-[2.91].
153 The Treasury (Cth), ‘Scoping Study for a National Not-for-profit Regulator’ (Final Report, April 2011) 66.
Further, to address concerns about duplication of regulators and the ACNC’s role as the chief and independent statutory regulator for NFPs, the Tax Commissioner could be compelled to cooperate with the ACNC Commissioner and to publically release the principles upon which such cooperation would occur. Ideally, the principles would be included with the endorsement administration provisions in the TAA, in order to prescribe the appropriate ambit for each commissioner and to ensure that the Tax Commissioner’s revocation discretion is not exercised inconsistently with the principles.