

ANFPAN CONFERENCE 2012

Charities Commission Overview

This is the era of accountability for the NFP Sector

This paper forms an introduction to the plethora of changes and proposed changes that are currently in progress. For those of us who work to a significant degree with charities and churches life will never be the same. The changes will have enormous significance on the advice we will be called upon to provide. Much has happened that impacts on the NFP Sector since Labor came to power federally. We will review what has been happening and outline the current complex agenda to help us all better understand what is developing around us.

COAG Reform

“The objective of the Not-for-profit (NFP) Reform Working Group is for all Australian jurisdictions to work together to develop an effective approach to the regulation of the NFP sector which will **reduce the regulatory burden on the sector where possible**. The Government aim is to better control the substantial concessions and grants made available to the Sector.”

Apart from the significant aims for the ACNC, additional “reforms” aim at –

- Revision of taxation concessions,
- A national fund raising scheme,
- A national Business Names system,
- Payroll Tax harmonisation between the States and Territories.

Some of these changes are already well under way.

The government estimates that the identifiable cost to the Commonwealth alone in 2010/11 is \$3.3 billion. Also there are substantial unquantifiable concessions, mainly taxation concessions that may amount to a similar value. They argue that such substantial concessions need to be more responsibly controlled. While this is a valid argument there is a danger that too much intrusion will stifle the contribution of the Sector and have a detrimental impact on the life of the community.

Government web-sites provide some helpful statistics which may explain at least a part of the Governments reasons for major change, including –

- The NFP Sector is comprised of around 600,000 entities,
- 400,000 have access to federal tax concessions,
- 56,000 are endorsed charities,
- The charities include around 5,000 Companies limited by guarantee and another 6,000 are charitable trusts,
- Around 21,000 endorsed DGR’s,
- The NFP Sector overall employs over 850,000 people, about 8% of total employment,
- It contributes \$43 billion to Australia’s GDP – over 5% of total GDP

- Over 4.6 million Australians volunteer regularly with NFP's with an estimated wage equivalent value of \$14.6 billion.
- Direct Government funding to the Sector in 2006-7 was estimated at \$25.5 billion.
- Public donations to the Sector in 2006-7 was estimated at \$7.2 billion.

Remember – this is what Government has some record of – and there is a lot happening in the Sector that they don't have much information on with the small unincorporated entities – and the church donations that don't get into statistics. The impact of the Sector is substantial, and it is hard to measure. Governments have “control freak” characteristics, so when they speak of “reducing the regulatory burden”; “reducing red-tape” and similar comments one can be forgiven for some scepticism.

Currently income tax exemption for not for profit entities is spread through several different sections of Division 50 of ITAA 1997 and includes sporting clubs, community groups and service clubs. A significant number of small unincorporated entities do not have an ABN and are effectively hidden from Government scrutiny. As a consequence they achieve income tax exemption by default. It seems Government are not comfortable about that and aim to bring them into the overall system. These groups will eventually be brought together for oversight purposes when the Charities Commission (ACNC) gets into its full programme, although the separation between charities and the other NFP's will continue as charities get a lot more concessions.

Currently there are 178 Commonwealth, State or Territory laws in existence that determine the charitable status of an NFP entity. The Common Law definition of a charity that has developed from the Statute of Elizabeth is not applied consistently in these acts of a parliament. For example, the WA Charitable Collections Act does not include religious or educational purpose in its definition of “charitable purpose”.

The Government wants to see value for money in an area which is providing substantial but largely intangible benefits to the community.

Government Inquiries

Since 1995 there have been a number of inquiries into the Sector, being –

- Industry Commission Enquiry into Charitable Organisations - 1995
- Report on the definition of Charities - 2001
- Senate Economics Committee into Disclosure Regimes for Charities & NFP organisations - 2008
- Productivity Commission Report on the Contribution of NFP Sector – 2009
- Senate Economics Legislation Committee Inquiry into the Public Benefit Test – 2010
- Henry Review of Taxation System - 2009
- COAG Inquiry into Sector, and also
- The National Compact: Working Together” - 2010

All of these inquiries encouraged the establishment of a NFP Sector regulator. Of these the two most relevant in this paper are –

1. The **2009 Productivity Commission Report** which emphasised -
 - Building knowledge systems,

- Smarter regulation,
- Stimulation of social innovation,
- Improving effectiveness of government funding,
- Improving governance,
- Effective Sector development, and other improvements

2. The National Compact which has the aim of –

- Developing a framework for meaningful and innovative ways of working together,
- Work together on reforms that strengthen the Sector,

These included eight priority action areas - but you will see later that not all government agencies seem to have heard about this agreement.

The current Government, in coming to office, also made significant election commitments for the reform of the NFP Sector. These commitments included –

- Establishing the new Office of NFP Sector and the new NFP Sector Reform Council,
- Develop the scoping study for a national one-stop regulator,
- Provide greater harmony and simplification between Federal & State & Territory Governments,
- Reduce red-tape for government funded NFP entities.

They have certainly been very active in these areas, but some of the results, once the bureaucrats became involved, seem to be different to their stated objectives.

Another area of significance is the result of **recent ATO Test Cases into the meaning of “Charity”**

- Word Investments – ATO lost
- SIMAID – ATO won
- Victorian Women Lawyers Association – ATO lost
- Aid/Watch – ATO lost
- Also CBH was confirmed as a NFP so again ATO lost.

As a result of these Court losses, particularly Word Investments, the ATO view of the commercial activities of charities was seriously disrupted. Tax Rulings TR 2005/21 & 22 were never seen by the Sector to provide a balanced explanation of established tax law. ATO now realise that they needed serious revision and this resulted in TR 2011/4 in October 2011. ATO and Treasury seem paranoid about the legal problems arising from Word in particular – a view that Murray Baird, who took Word to the High Court, finds hard to understand.

There are **two issues** developing side by side –

1. **The need for a NFP Regulator**, strongly supported by Government inquiries, and
2. **Better legislative control on charities** as a consequence of the court losses.

These two issues were clearly not in harmony

The Government decided to establish a NFP Regulator in late 2009. The initial moves were to establish the -

- Office of Non-Profit Sector within Dep't of Prime Minister & Cabinet, and
- Non Profit Sector Reform Council, in December 2010 for a three year term.

The role of the **Office for the Not-For-Profit Sector** is to explore the way forward for reform. It has been given the following areas of responsibility –

- Whole of Government coordination of NFP reform,
- Support the NFP Sector Reform Council,
- Progress the National Compact,
- Promote volunteering,
- Promote philanthropy and social investment, and

The role of the **Not-For-Profit Sector Reform Council**, an advisory body representing the Sector, is to advise the Office on relevant issues relating to the establishment of the new regulatory body. It has established several working groups for the following areas –

1. National regulator,
2. Reducing red tape,
3. Harmonisation of legislation, and
4. National Compact.

The Council now has 14 Members, with the inclusion of Robert Fitzgerald, who will become the Chairman of the Advisory Board to the ACNC. While the members have a good representation from the NFP Sector there is **no visible representation from sporting, educational or religious interests**, all of which are major areas within the Sector.

There is now a new body, the **ACNC Implementation Task Force** established within Treasury Philanthropy Unit – but this is not the group that is currently issuing the various Discussion papers on the ACNC and has issued the Draft ACNC Bill. The Task Force is rapidly becoming the initial team that will be the core of the new ACNC.

The establishment of **the Australian Charity and Not For Profit Commission** was approved in the 2011 Budget announcements – to be operative from 1 July 2012 – this date has now been moved to 01.10.2012. The ACNC initially is to take over some of the responsibilities of ATO and ASIC as well as influence Government policy within other areas. Gradually it will take on greater responsibilities with the aim to make it the focus on most NFP matters including those areas where the States and Territories currently have control. This latter task will take longer, involving much consultation but is clearly consistent with the COAG reform agenda. Just how that will develop due to the sensitive area of State rights is still far from clear.

Overall the aims are commendable and are welcomed by many within the Sector. The Report **“Scoping Study for a National Not-For-Profit Regulator”** released in April 2011 provides recommendations on the way forward to enable the Sector to develop into a stronger and also a more accountable Sector.

It isn't all good news, with two streams of Government activities acting in contrary ways. One group are apparently not aware of the National Compact!

Major change such as this will not occur without its significant additional load on those of us who work in the Sector. The "No gain without pain" slogan certainly applies to us.

The bad news first –

1. Charities endorsement rules may change. A **Public Benefit test** is proposed and is included within the draft "In Australia" paper. Such a test already applies in England and New Zealand, but is as yet largely untested in their courts. However the significant issues that emerge from this test mean substantial additional work is needed by charities that fall under two of the four heads of charity under the Statute of Elizabeth and Pemsel's Case to prove they are charitable. **Educational and religious institutions will be at risk here.** We will hear more on this on Monday afternoon.
2. Ancillary Funds are now re-named as **Public Ancillary Funds (PAF)** and the requirements changed to be more in line with the Private Ancillary Funds. Major changes have occurred effective from 1 January 2012. As a consequence most trust deeds will need to be upgraded, and a number of additional obligations will apply. They will include a need to re-value assets annually, establish an investment policy, lodge an income tax return and compulsory audit. More details will be available on Monday morning.
3. The **"Better Targeting of Not-For-Profit Concessions"** project is intending to reduce the impact of the Word Investments case regarding the commercial activities of charities. The intent is to limit income tax exemption to only be available where the commercial profits achieved are directed to advancing the altruistic purposes. It is difficult to imagine instances where this doesn't happen, but government is convinced that they are losing some revenue. It seems unlikely that most charities will not have a problem other than having to comply with more rigorous tests to ensure funds have been applied appropriately. There is however a concern with the possibility of ATO staff being ill-equipped to review a charity under these provisions.
4. The **"In Australia" tax law changes** currently being planned, which seem also to relate to the Better Targeting agenda? The original proposals would have had a devastating impact on most charities. They intended to introduce many additional procedural checks, and could have caused many charities to lose their TCC endorsement. An example was a proposal that a charity would lose endorsement if it was found to be in breach of even just one of its obligations under its constitution. If they gave too short a notice for a members meeting or committee meeting that would have been enough – and there was no provision for reinstatement once endorsement was lost. Following an enormous outcry from the Sector this draft paper was withdrawn and the re-issued paper represents a major back-down by government. It still contains concerns and we await the final results with bated breath.

These complex and seemingly conflicting developments provide the background to the current Office of the Not-For-Profit Sector and the ACNC itself. One stream of Government

seemed to want to destroy the Sector before the ACNC is even established – which would certainly make its role simple to manage – and the other stream aims to come alongside to assist, and only where necessary, utilise its regulatory role.

The planned reforms through the ACNC focus on smarter regulation, reduced red tape and an increase in social investment and volunteering. The fact that a part of Treasury has an aim of heavy regulation has complicated the development of the reforms and is a significant concern. The political arm of government however appears to have heard the very clear voice of the sector and has been slowing the pace down and we are now seeing evidence that the most objectionable components are being removed.

It is important to create an informed understanding of the seemingly conflicting views held, and the objectives that need reconciliation. One thing that is very clear though is that **our roles as the people who have to handle the red-tape will become more onerous for some time.**

One area where we were expecting some early relief was with fundraising. The COAG reform agenda gave some priority to national fundraising licences for the Sector. With co-operation from State and Territory Governments it was anticipated that this would be implemented and operating soon. (With my home State of WA this may take a little longer.) The introduction of the national Standard Chart of Accounts was seen to be the necessary first step, and this was implemented effective from 01.07.2011 for Commonwealth Government instrumentalities. The new licencing arrangements, once in place, will mean you will only need one licence to cover all fund raising within Australia. For the large number of charities that have needed a licence in all States and Territories this will be very welcome relief. It will take away the need to be aware of the different regulatory requirements across Australia, and reduces reporting obligations. Regretfully there seems to now be a delay in the implementation of this programme. It seems to be linked to the differences that exist in the definition of charity between the various Acts.

The Government considers that the single most significant issue for the Sector is the need for a “robust and streamlined regulatory framework while at the same time reducing unnecessary duplication in ... reporting arrangements”. The ACNC will have this as one of its main early objectives. A related objective is to “strengthen the NFP Sector’s transparency, governance and accountability”. More red-tape to reduce red-tape is what that seems to be saying. However the benefit to government is significant as there should eventually be a substantial reduction in salary costs to Government if their aim is achieved. The benefit to the larger NFP entity should be in itself significant, but minor as against the larger Government potential saving. The impact on the small charities and NFP’s will however be very different and it is likely to introduce more expense, and more need for support from us.

The Australian Charities and Not For Profit Commission

The overall Government objectives for the ACNC are –

1. A one-stop shop for registration, for determination of eligibility for tax concessions, for accessing Commonwealth Government services and concessions and reporting on Government contracts.
2. Incorporated associations that are charities would only report to ACNC who would pass on data to relevant agencies at State and Commonwealth level. This will take some time to negotiate with State Governments but is a commendable aim.
3. Only report once for grant acquittals, to ACNC. This is likely to reduce the additional audit costs for acquittals currently estimated at an average of \$1,000 per acquittal report.
4. Reporting obligations would be on a tiered basis based on size, risks and access to public monies.
5. Provision of education services and governance support linked with a user-friendly information portal (if there is such a thing!) The Portal would be linked to the ABR. The Portal will also display some information on the activities of entities, including financial information, and contact persons. While not clear re format as yet the display of financial information will present greater reporting obligations on many entities in the Sector.
6. Have responsibility for regulatory control of NFP entities currently regulated by ASIC, but with ASIC retaining responsibility for incorporation.

The ACNC will be largely modelled on the English Commission. David Locke, the Executive Director of the Charities Commission of England & Wales has been on secondment to the Implementation Task Force as an advisor. The Chair of the Task Force is Susan Pascoe, formerly the Commissioner of Victoria's State Services Authority. Government have not as yet named the ACNC Commissioner. However a very recent announcement has named David Locke and Murray Baird (from Moores Legal) as the two Assistant Commissioners.

The initial structure of the ACNC, as announced by Government, is to have three areas of primary activity, being –

- The determination of TCC and DGR status,
- Education, and
- Public Information Portal.

A possible example of a new DGR with a web-site –

- Incorporates with ASIC as a Company Limited by Guarantee,,
- Applies to either ATO or ACNC for ABN (even now this isn't clear).
- Applies to ACNC for TCC & DGR endorsement,
- Applies to ACNC for fund raising licence – covers all Australia,
- Seeks grant funding from Dep't Families (Cth),
- Files annual report, including financial statements, with ACNC. This includes office bearer details etc.,
- Dep't Families acquittal incorporated in ACNC report, who forward to Dep't,
- No reporting to ASIC, this is handled through the ACNC report already submitted.
- On-line reporting for many or most entities through the Standard Business Reporting (SBR) facility on line – yet many software packages in use by the Sector are not as yet SBR compatible.

The recently available Discussion Paper for the ACNC Bill provided more information on the details, but was not a well-researched or well drafted document.

1. It demonstrates that the Government planners did not understand Australian Accounting or Auditing Standards and don't know how to describe financial reports.
2. It tells us that "education" will be limited to searching the web-site for the ACNC and perhaps getting some literature through the mail. No direct face to face interaction is planned – as the ACNC do not have the funds for such a purpose.
3. It presumes that the new definition of Charity is already in place – yet this will not go to Parliament until 2013.
4. It imposes an obligation for all charities to demonstrate they function for the Public Benefit. The current test for a charity provides a presumption of public benefit for the relief of poverty and the promotion of education and religion so this is a concern.

Many of us who are active in the Charitable Sector are responding as best we are able to the Discussion Papers, and seek to influence the results in the hope that the original worthy aims may be achieved. The picture becomes a little clearer with each passing week. It is to be hoped that Government hear the concerns of the Sector and soften the significant red-tape obligations that are emerging.

STOP PRESS:

On 18 May 2012 the Assistant Treasurer advised that the draft ACNC legislation is to be referred to the House of Representatives Standing Committee on Economics over the winter break. The government will presumably consider that committee's recommendations before bringing a final draft of the legislation to the Parliament later. With the ACNC due to commence its role on 01.10.2012 it is a very tight time frame indeed!

They have also announced a revised time frame for other key issues, including –

- Governance standards – deferred until 01.07.2013.
- Financial reporting requirements – deferred until 01.07.2014.
- "In Australia" tests – TBA.
- Harmonisation of fund-raising laws – TBA.

and reaffirmed its commitment to "effective engagement and consultation with the NFP Sector". We can only wonder what that statement means, and hope.

Noel Harding FCPA (Taxation), FCIS

20 May 2012

The views expressed in this paper are the opinions of the author only. Charities and professionals should seek updated advice.