Tel: +61 7 3237 5999
Fax: +61 7 3221 9227
www.bdo.com.au

Level 10, 12 Creek St
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
Australia

Via email: ACNCReview@treasury.gov.au
Attention: Mr Murray Crowe

Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

28 February 2018

REVIEW OF AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION (ACNC) LEGISLATION

Dear Murray,

BDO welcomes the opportunity to provide feedback in response to the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation ('Review') which will enable the Government to meet its statutory obligation that a review of the Australian Charities and Not-for-profits Commission Act 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (together, the ACNC Acts) must be undertaken after their first five years of operation.

This BDO submission addresses questions 1-5 and 8-9 in the Review where BDO are of the belief that:

- the NFP sector should be given a clear direction on administration of the NFP sector;
- the current regulatory framework is appropriate for the management of those entities that seek registration as a charity or Deductible Gift Recipient status;
- if the ACNC is to regulate all not for profits, there will be a need for all States to hand over the role of regulating incorporated associations to the ACNC;
- there is limited comparability of fundraising costs of for different charities and each charity has to identify how it will seek to generate income to allow the charity to pursue their objects but where any concerns arise the ACNC should raise questions with the particular charity in order to understand the strategies and numbers;
- The transparency of the use of funds by charities is the responsibility of the particular charities and the ACNC should be the voice and arm of society on the conduct of charities (and NFP's if that is ultimately implemented);
- consideration should be given to alignment of the financial information reporting requirements of the various state regulatory authorities with either the ACAN assuming all the regulatory authority or the States implementing standard legislation for regulation of charities in all the States; and
- the ACNC needs to maintain its education role to recognise the newly appointed responsible persons and the new charities.

These and other issues are expanded upon in the attached appendix.

Should you wish to discuss any of our comments, please feel free to contact me on +61 2 9240 9736, or via email: Lance.Cunningham@bdo.com.au.

Kind regards,

Lance Cunningham
BDO National Tax Director

APPENDIX

1. Are the objects of the ACNC Act still contemporary?

At the time that the ACNC Act was introduced the stated plan was that the ACNC would commence with the regulation of charities and at a later unspecified date then extend to include all not for profits.

The Productivity Commission in its review of the NFP Sector (released January 2010) estimated that there were approx. 60,000 charities and approximately 600,000 not for profits.

Initial administration of the charity sector by the ACNC identified over 7,000 of the supposed 60,000 charities, a significant number of charities, had closed or ceased to exist for one reason or another.

As part of this review of the ACNC, the question of administration of the NFP sector needs to be reconsidered –

Will the ACNC ultimately regulate all NFP's?

The NFP sector should be given a clear direction and either the ACNC should be empowered to be responsible for all NFP's or another body such as the Australian Taxation Office (ATO) should be confirmed as the responsible regulator.

Every entity including all NFP's have a responsibility to constantly consider their income tax status as being an NFP does not equate to income tax exemption.

In order to enjoy income tax exemption, an entity must be a NFP and satisfy the rules of Division 50 of the Income Tax legislation, specific to their objects and activities.

Some NFP's are currently required to lodge income tax returns as their activities do not meet the requirements of Division 50 for the income to be exempt but they are a not for profit. These entities prepare income tax returns applying the principle of mutuality. Therefore, these taxable entities will still have to have some regulation by the ATO.

2. Are there gaps in the current regulatory framework that prevent the objects of the Act being met?

The current regulatory framework focuses on charities. Following the recent review of Deductible Gift Recipient (DGR) registers NFP's that are registered to have DGR status are to be migrated to charity status.

The current regulatory framework is appropriate to the management of those entities that seek registration as a charity or DGR status.

3. Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?

The ACNC has a goal to remove reporting duplication between government agencies.
At the time that the ACNC Act was introduced the stated plan was that the ACNC would ultimately regulate all not for profits.
Some charities are Companies Limited by Guarantee controlled by the Corporations Act so the reporting requirements were able to updated to the ACNC as part of the legislation to establish the ACNC.

Most (in terms of numbers) charities are unincorporated groups. Many charities are state regulated incorporated associations, and so bound by both the State and the Commonwealth legislation.

In terms of NFP's that are not charities, such as sporting groups, substantial numbers operate as incorporated associations, regulated under individual state legislation.

If the ACNC is to regulate all not for profits, there will be a need for all States to hand over the role of regulating incorporated associations to the ACNC.

4. **What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?**

If media attention is able to be used as a guide to measure public trust and confidence' activities and behaviours of concern include:

a) Application of funds raised by a charity to purposes inconsistent with the objects;
b) Payments to associates of controllers of the charity that are excessive and / or inconsistent with an arm's length value;
c) High income generation costs and / or administration costs eroding amounts received as donations.

The Charity standards focus on category (b) above and the ACNC is publicly stating its intention to increase scrutiny of the demonstration of application of arm's length principles.

The donor administration / fundraising costs referred to in (c) is periodically reported by media where there is an attempt to measure and compare charities. The reality is that there is limited comparability. Each charity has to identify how it will seek to generate income to allow the charity to pursue their objects.

Where there is an attempt to tabulate fundraising costs, there is a desire to compare the table results and not to look behind the numbers, resulting in incorrect and inappropriate conclusions. The ACNC should continue to take the stance that fundraising cost tables are fundamentally flawed. By way of example below is a table of five charities each achieving the same amount of funds raised over a two-year period, and each by a different mechanism. Volunteer labour can distort these fundraising percentages.

Where any concerns arise the ACNC should raise questions with the particular charity in order to understand the strategies and numbers.

See the next page contains for the worked example of five charities who raise $40,000 over a two-year period using different methods. The schedule contains examples of the fundraising activity including a calculation of a notional percentage of costs incurred to funds raised.

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Fax: +61 7 3221 9227
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SCHEDULE OF EXAMPLES OF FUNDRAISING

Calculation of a notional percentage of costs incurred to funds raised

Assumption - five charities raise $40,000 over a two year period using different methods

			Year 1				Year 2				Years 1 and 2		
Charity	**Activity**	**Income**	**Expenses**	**Net**	**%***	**Income**	**Expenses**	**Net**	**%***	**Income**	**Expenses**	**Net**	**%***
One	Sales of stuffed toys	80,000	-60,000	20,000	75.00%	80,000	-60,000	20,000	75.00%	160,000	-120,000	40,000	75.00%
Two	Bequest program	5,000	-10,000	-5,000	200.00%	50,000	-5,000	45,000	10.00%	55,000	-15,000	40,000	27.27%
Three	Donor development	22,000	-9,000	13,000	40.91%	28,000	-1,000	27,000	3.57%	50,000	-10,000	40,000	20.00%
Four	Art union	0	0	0	0.00%	250,000	-210,000	40,000	84.00%	250,000	-210,000	40,000	84.00%
Five	Sausage sizzles, fetes	22,000	-2,000	20,000	9.09%	22,000	-2,000	20,000	9.09%	44,000	-4,000	40,000	9.09%

*% is the percentage of expenses to gross income; assume all amounts are GST exclusive

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5. **Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?**

This is primarily the responsibility of the charity to ensure that the charity is operating in accordance with its constituent documents. The role for the ACNC is to be able to investigate charities (and NFP's) based on concerns raised by members of the public of from its own observations.

The ACNC is to be the voice and arm of society on the conduct of charities (and NFP's if that is ultimately implemented)

8. Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?

<u>Financial information reporting</u>

The requirement regarding the lodgement of financials statements remains for those charities in states where the state government has not agreed to accept the documents lodged with ACNC as meeting the state based lodgement requirements.

This duplication will generally arise where the legal structure of the charity is an incorporated association, namely an entity established under state based legislation rather than the Corporations Law managed at Commonwealth level.

Many of the charities that are established under state based legislation are smaller in nature and consequently may have a lower reporting / audit requirement under the ACNC rules than the reporting / audit requirement imposed by the State legislation.

Consideration should be given to alignment of the requirements. This may result in audits of organisations that would otherwise not be required. The benefit of an audit is the external scrutiny of the organisation and its activities.

<u>Fundraising regulation</u>

At present fundraising is regulated by states with different rules applying in each state. The interpretation is that if a charity is willing to accept a donation from a person in a particular state that the charity is required to hold a licence to fundraise in that state.
Each state has variations in the requirements as these have generally been developed in isolation of other states. These requirements impose substantial administrative burdens on charities to satisfy the competing requirements.

These administrative burdens add additional overheads that increase the cost of fundraising and divert funds raised into administration away from the purpose of the charity.
Fundraising includes a wide range of activities from seeking donations to art unions and public events / activities. The particular beneficiary of the fundraising may or may not be involved in the conduct of the activity.

There are three options that can be considered:

1. No change

If no change is implemented the inefficiencies remain; a calculation could make of the cost of the overlapping administration costs as a percentage of funds raised to be disclosed when administration costs of fundraising is discussed - x% is attributable to government accepted /endorsed duplication and overlap.

2. Transfer of powers

The Commonwealth could encourage the States to transfer the power to regulate fundraising to the Commonwealth and the ACNC administers the regulation of fundraising.

The challenge is that at present the ACNC regulates only charities and those who undertake fundraising are charities and other NFP's. This format would be appropriate if the ACNC is confirmed to oversee all NFP's and is appropriately resourced.

3. Universal legislation, single state registration

In 1981 the Australian National Companies and Securities legislation was introduced which has matured into the Corporations Act regulating all companies. From 1961 to 1981, companies were regulated under state legislation where uniform legislation was introduced into each state so there existed a single set of rules for companies. Prior to 1961, each state had various rules, not dissimilar to the current laws relating to regulation of fundraising:

- The Commonwealth could encourage the States to adopt universal legislation so the rules are identical across Australia (Similar to the Companies Act 1961 adopted by all states as uniform legislation with registration in the state in incorporation)
- For each entity to be required to register in the State that is the location of their registered office
- For that registration to satisfy all states
- The ABN to be used as the identifier

If the ACNC assumes regulatory responsibility for all NFP's at a future date, it could assume responsibility for fundraising regulation with state based offices migrating to be under the control of the ACNC in a similar manner to the establishment of state offices of ASIC.

9. Has the ACNC legislation and efforts of the ACNC over the first five years struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct?

The ACNC has publicly stated that it has been initially operating in an educator role but prepared to act to appropriately regulate any entities that are clearly in breach of the legislation.

This balance has been an appropriate balance. In numeric terms the charity sector has a large number of small charities. The nature of the charity sector is a constant change of personnel leading the charities. A good example is community based kindergartens advancing education where the management committee may change annually and the entity continues to operate.

The ACNC needs to maintain its education role to recognise the newly appointed Responsible Persons and the new charities.