

TREASURY'S NOT-FOR-PROFIT REFORM FACTSHEET

THE ACNC EXPOSURE DRAFT CONSTITUTIONAL ISSUES

9 December 2011

AT A GLANCE

The Assistant Treasurer, the Hon Bill Shorten MP, today released exposure draft legislation for the establishment of the Australian Charities and Not-for-profits Commission (ACNC). The exposure draft and explanatory materials can be found at www.treasury.gov.au.

Submissions on the exposure draft materials are due on 20 January 2012. Queries and submissions should be sent to NFPReform@treasury.gov.au.

KEY FACTS

The Government announced in the 2011-12 Budget that it would establish the ACNC by 1 July 2012. The ACNC would be responsible for determining the legal status of entities seeking charitable, public benevolent institution and not-for-profit (NFP) benefits on behalf of all Commonwealth agencies, and would be a 'one-stop shop' regulator for the sector at the Commonwealth level.

The *Final Report of the Scoping Study for a National NFP Regulator* (the Final Report) recommended that a single regulator should be established for the purpose of promoting public trust and confidence in the sector through improved governance, accountability and transparency. However, as the Commonwealth probably does not have the constitutional power to regulate the NFP sector on a comprehensive basis, the Final Report recommended that it should improve Commonwealth regulation for the sector in the interim, ensuring that the Government regulatory overlap at a Commonwealth level is removed.

Further, the Final Report recommended that the Commonwealth should pursue the long-term objective of a single national regulator and regulation for the NFP sector, through the Council of Australian Governments (COAG). Currently, Commonwealth, State and Territory governments regulate different parts of the NFP sector for both different and overlapping purposes.

NEGOTIATIONS WITH THE STATES

The Government announced in the 2011-12 Budget that it would undertake negotiations with the States and Territories on national regulation for the NFP sector.

COAG has agreed to progress national NFP reforms and a Commonwealth, State and Territory NFP Working Group

has been set up to progress national regulation reforms, reporting to COAG through the Standing Council of Federal Financial Relations.

While noting that the greatest reduction in red tape can only be achieved with national coordination, the Commonwealth has committed to lead the way by establishing the ACNC and through it, eliminating overlap in government regulation of the NFP sector at the Commonwealth level.

COMMONWEALTH CONSTITUTIONAL POWERS

Under the Australian Constitution the Commonwealth is given legislative powers with respect to specific subject matters. The Commonwealth does not have any power specifically with respect to the NFP sector. The Commonwealth must therefore rely on a 'patchwork' of powers (for example, the power with respect to taxation) to make laws in this area. The limits of this patchwork are uncertain, and unlikely to support comprehensive regulation of the NFP sector.

The Commonwealth could fill any gaps in coverage only with the cooperation of the States, who may 'refer' additional powers to the Commonwealth under the Constitution. However, the Commonwealth clearly has power to regulate certain aspects of the NFP sector, and the ACNC exposure draft Bill has been prepared on that basis.

CONSTITUTIONAL POWERS AND THE ACNC EXPOSURE DRAFT

The exposure draft establishes the ACNC and a national regulatory framework for the NFP sector. It confines regulation at this stage to areas clearly within the scope of Commonwealth constitutional power. The precise scope and nature of the regulatory arrangements is a matter that will be kept under review as the draft is developed.

FREQUENTLY ASKED QUESTIONS

Which entities will be subject to regulation by the ACNC?

Generally speaking, the ACNC will be able to exercise its regulatory powers:

- where it is necessary to administer taxation laws;
- in relation to entities that are constitutional corporations, or where entities have a trustee which is a constitutional corporation; and
- where the entity is in a Territory or outside Australia or the activities to be regulated are in a Territory or outside Australia.

What is a constitutional corporation?

Broadly speaking, a constitutional corporation is a foreign corporation or a trading or financial corporation formed in Australia. Subsection 51(xx) of the Australian Constitution gives the Commonwealth Parliament power to make laws with respect to corporations of this sort.

Do the gaps between the Commonwealth and State laws affect registration?

No. Other Commonwealth laws will require that all charities that wish to access tax concessions or any other Commonwealth exemptions, concessions or benefits, will be required to be registered and meet the conditions of registration under the ACNC legislation.

What is the Commonwealth doing to work with the States and Territories on setting up a single national regulator?

The Australian Government has been engaging with the States and Territories through the COAG NFP Working Group, which has been set up to examine regulatory reform options with a view to simplifying NFP regulation especially in the area of governance and reporting.

Once the ACNC has been established, then subject to agreement, the Commonwealth will continue to work with the States and Territories to examine options to remove duplication of regulation and move towards a single national regulator for the NFP sector.

What will happen if the States and Territories do not want national regulation?

In the first instance, the Australian Government is focused on 'getting its own patch in order' by establishing the ACNC and through it, eliminating overlap in government regulation of the NFP sector at the Commonwealth level. Once the ACNC has been established and the Australian Government's NFP reform agenda has progressed, the Australian Government will seek to work with the States

and Territories where appropriate on opportunities for removing regulatory duplication.

If the States and Territories do not wish to support a comprehensive national regulation approach, the ACNC will retain its initial regulatory focus. In this event, the Commonwealth will continue to work with the sector to ensure that public trust and confidence in the sector is maintained, through appropriate governance, accountability and transparency.

However, in that event, the Commonwealth may not be in a position to apply graduated regulatory and enforcement mechanisms to ensure entities comply with all requirements expected in relation to entities receiving public monies. Rather, the Australian Government may have to rely on blunter enforcement tools such as revoking registration of non-complying entities and removing access to Commonwealth tax concessions for what could be minor, unintentional, or temporary infringements.