

MOORESLEGAL

# Submission

*Australian Charities and Not-  
for-profits Commission Bill  
2012 Exposure Draft*

*27 January 2012*

## **1. Introduction**

Moore's Legal is an Australian law firm with a team that practices exclusively in the area of Not for Profit ("NFP") law and governance and advises a wide range of organisations in the NFP Sector and philanthropists.

This submission is based on our understanding of the history, policy, case law and client needs of the NFP Sector and the application of NFP law.

In this submission Moore's Legal provides comment and recommendations on a limited number of issues that it sees as particularly significant. It does not address every issue.

Moore's Legal welcomes the Government's intention to establish the Australian Charities and Not-for-Profit Commission ("ACNC"). It presents an opportunity for the Government to partner with the Sector to enhance the wellbeing of Australian communities that the NFP Sector serves.

However the ACNC, as proposed by the current exposure draft, is not what the Sector expected. It appears to be inconsistent with the Government's previously stated policy objectives for the Sector.

Further, we note that the exposure draft was incomplete – particularly in respect of some fundamental protections. Accordingly, we consider this to be an inadequate exposure to the proposed legislation.

It is the view of Moore's Legal that the establishment of the ACNC should not proceed without a redrafting (and in some cases a first draft with public comment) of important clauses in the exposure draft and explanatory materials.

## **2. Independence from the Australian Taxation Office ("ATO")**

The overwhelming response of the NFP Sector to the Scoping Study for a National NFP Regulator was that an independent regulator was needed to overcome actual and perceived conflict of interest of the ATO when dealing with the NFP Sector.

The Government response was to commit in the 2011/12 Federal Budget to the establishment of such a regulator.

We affirm the provisions for the appointment of the Commissioner and the independent role of the Commission. However, we are concerned the ATO will play a substantial role in regulation of NFPs. We refer in particular to s 163-5 of the exposure draft. Section 163-5 provides for the ACNC to be staffed by persons "made available for the purpose by the Commissioner of Taxation".

We appreciate that initially some staff may shift from the ATO to the ACNC. However, we query the basis in principle upon which all staff should be "made available" by the Commissioner of Taxation. This contradicts the expectation of the Sector that it would have a truly independent regulator free from the conflict of interest inherent in the ATO. In our view s 163-5 should be deleted.

### **3. Objects of the Act**

We refer to section 2-5 of the exposure draft which sets out the objects of the Act.

Moore's Legal is concerned by the objects stated in that section. We recognise that public faith in the Sector is important, as is good governance, accountability and transparency. However, in our view, they ought not be the principal objects of the Act.

It is our view that these provisions should be redrafted. We recommend the object of the Act should be to "facilitate and enable not-for-profit entities in achieving their goals".

We note that this recommendation is similar to the object proposed by the University of Melbourne Law School's Not For Profit Project in its submission. We concur with the University of Melbourne submission recommendation that the promotion of public trust and confidence, loyalty to mission, and enhancing the effectiveness of the sector are "second-order" goals, while transparency and accountability are "third-tier" goals.

Redrafting the objects' provisions is, in our view, a critical issue. It is of symbolic importance and it will frame the way that the Sector and the new regulator interact. We are concerned that the objects, as currently drafted, paint a picture of mistrust of the Sector on the part of the Government. By contrast, our recommended object reflects more accurately the Government's intended policy objectives, as stated in the 'National Compact'. That is, to develop a partnership with the Sector based on respect, to "build a stronger not-for-profit sector".

### **4. Reducing red tape and regulation**

The Government committed in its 'National Compact: Working Together' to "reduce red tape and streamline reporting" and "implement consistent, simple financial arrangements across government".

Given this commitment, we are concerned that the exposure draft of the ACNC would result:

- (a) in a greater number of NFPs now having to report where they previously had no obligation to do so – at state or commonwealth level; and
- (b) where the obligation to report already existed, to increase the burden of that obligation.

On this issue Moore's Legal draws attention to the submission by Moore Stephens Accountants & Advisors and endorses their recommendations in relation to reporting and auditing.

In addition, Moore's Legal would make the following comments and recommendations:

- (a) Moore's Legal considers that it is important to establish a reporting system that is proportionate to the size of the organisation and commensurate with the risk. Moore's Legal is concerned that the focus solely on revenue and the stricter requirements for Deductible Gift Recipients ("DGRs") is not an accurate reflection of the size of the organisation or the risk posed by the organisation. The number of employees, the nature of the assets, the

number of volunteers, the distribution values for the financial year and the nature of the governing body (whether its members are “responsible persons”) are just some examples of factors that influence size of organisation and risk potential. A reporting structure that is not focused solely on revenue and whether an entity was a DGR ought to be considered.

- (b) Moores Legal considers that the threshold reporting requirements are relatively low given the onerous reporting obligations. Consideration to raising the threshold for each tier ought to be given. For example, small NFPs are those with less than \$2m in revenue, medium NFPs with revenue from \$2m - \$5m and large NFPs with revenue exceeding \$5m.
- (c) Moores Legal considers that requiring DGRs to meet the same reporting requirements as medium or large registered entities places an undue burden on all DGRs. Even small DGRs will be required to expend considerable resources to satisfy the new requirements.
- (d) The slogans of “report once, use often” and a “one-stop-shop” do not reflect the reporting requirements under the new Act. The proposed Annual Information Statement for charitable entity Tiers 1, 2 and 3 do not comply with the Standard Chart of Accounts (“SCOA”). This is because there is a request for financial information other than is defined in the SCOA data dictionary. Nor does the Act conform to the Australian Accounting Standards. Consistency in reporting obligations is critical to streamlining reporting and reducing the burden on NFPs.
- (e) Sections 55-5 and 55-10, state that the registered entity must report to the Commissioner no later than 31 October in the following financial year. We are concerned that there is a specific date and not a time period inserted here. We recommend it should be consistent with the usual arrangement for returns of companies and associations, being 5 months from the end of financial year.
- (f) The exposure draft states that as a default, all entities’ financial years will finish 30 June. This will cause significant issues for NFPs. There will be competition for pro bono work performed by accountants and auditors. Where it is not available it may result in increased costs. We recommend that the default position under the exposure draft should be that an entity nominates its preferred end-of-financial year date and the time for reporting is calculated from that date.
- (g) We refer to s 55-25 which sets out the requirements of the responsible individual’s declaration. It provides that the declaration must be signed by a responsible individual who is authorised to do so by each of the other responsible individuals. The definition of responsible individual is broad and encompasses persons other than those on the governing body. We recommend that the obligation to provide financial reports only apply to members of the governing body of the organisation. Those members of the organisation that are not on the Board should not be expected to form an opinion as to whether the entity can pay its debts or whether the entity’s financial statements and notes are in accordance with the Act. That is not consistent with the organisational practice of many NFPs.

## 5. One-stop-shop

Moore's Legal notes recommendation 6.5 of the Productivity Commission 'Report into the Contribution of the Not for Profit Sector' (2010):

*The Australian Government should establish a one-stop-shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations.*

*Responsibility for endorsement for Commonwealth tax concessional status for not-for-profit organisations ... should sit with the Registrar. ...*

*The Australian Commissioner for Taxation should have the right to seek a review of decisions of the Registrar in relation to the endorsement of not-for-profit organisations for tax concessional status. The Commissioner should also have the power to issue a directive to the Registrar for the dis-endorsement of an organisation where there has been a breach of taxation compliance requirements.*

The current exposure draft appears to leave responsibility for endorsement and assessment of satisfaction of any special conditions necessary for endorsement with the ATO.

This is inconsistent with the recommendation made by the Productivity Commission. It represents the retaining by the ATO of considerable regulatory authority over NFPs. Satisfaction of the special conditions necessary for endorsement is a substantive task. For example, it potentially includes consideration of issues such as where an NFP's expenditure is incurred, whether an organisation has complied with every clause in its governing rules, and myriad other issues going to the heart of whether an NFP is achieving its purpose. It is difficult to conceive how the policy objective of establishing an independent regulator is achieved if the task of endorsement remains with the ATO.

Similarly, it is difficult to see how the policy objective of reducing red tape is achieved when an application for taxation concessions must be approved by two regulatory bodies rather than one. The assessment of an application by both the ATO and the ACNC presents significant practical difficulties. Clearly, it will increase the length of time. But more importantly, if the ACNC is going to operate as a one-stop-shop by taking responsibility for applications for endorsement (presumably by considering it, making a determination and then sending it on to the ATO for its determination), it removes the direct communication between the NFP and the ATO officer assessing the application. In our professional experience this communication is important. It provides an opportunity for questions to be asked and answered informally and for the following-up of applications when a response has not been received.

It is our recommendation that the policy objectives of an independent regulator and a streamlined one-stop-shop will only be achieved if the ACNC has full responsibility for making a determination about the entitlement of an entity to taxation concessions – subject to the right of the Commissioner to seek a review as recommended by the Productivity commission.

## **6. Procedural fairness and natural justice**

One of the key issues with respect to the current provisions of Chapter 4 of the exposure draft is that while the provision imposes regulatory powers of the Commissioner with respect to NFP entities, it does not in turn accord procedural fairness and natural justice to such entities in the process of the Commissioner exercising its decision making powers.

It is fundamental to the rules of natural justice in Australia that a person have the right to be notified of a decision and have the opportunity to be heard *before* a decision has been made. There should also be fair procedures in relation to the making of a decision. NFP entities should therefore be accorded natural justice in relation to any exercise of powers by the Commissioner under Chapter 4 in order to comply with the principles of decision making and natural justice under Australian administrative law.

The exercise of decision making powers has potential to severely affect NFP organisations given the broad scope of the Commissioner's regulatory powers. When an exercise of regulatory powers has such potential impacts on a NFP organisation, this strengthens the need for NFP organisations to be given the opportunity to receive notice and be heard prior to the making of a decision.

We note that the University of Melbourne's submission specifies in detail the ways in which Chapter 4 does not accord procedural fairness and natural justice to NFP entities. We commend their submission and recommendations to the Treasury Department on this point.

## **7. Reviews and appeals procedures**

Moore's Legal notes that Part 4-2 Reviews and Appeals has not yet been included in the Bill. The notes to the Part state that Part 4-2 will be 'drafted in a manner similar to Part IVC of the *Taxation Administration Act 1953*'.

It is the view of Moore's Legal that the reviews and appeals procedures are important and legislation should not be tabled before Parliament before the Sector has been provided with an opportunity to review and comment on the exact wording of the proposed review and appeal provisions.

The fact that Part 4-2 will be drafted in a manner 'similar' to Part IVC of the *Taxation Administration Act 1963* provides only limited information about the way in which the reviews and appeals process will operate under Part 4-2 of the Act. This is because a drafting of a reviews and appeals process in a manner specified to be only 'similar' to Part IVC can result in a significant variation from the provisions of the *Taxation Administration Act 1963*. This yields considerable uncertainty for NFPs who wish to appeal or apply for a review of the Commissioner's actions or decisions which can significantly affect their organisation.

Further, the powers of the Commissioner conferred under Part 4-1 of the Bill are exceptionally broad and therefore potentially onerous for NFPs. This strengthens the need for a clear and certain Review and Appeals process.

## **8. Removal and suspension of trustees**

It is the view of Moores Legal that the power to remove or suspend a trustee (Division 143), or to give directions (Division 140) should not be exercisable by the Commissioner as of right. Such action should only be taken by Court by way of injunctive relief on application by the Commissioner.

The exercise of those powers could have severe practical impacts on the operability of NFP entities. Also, there are serious questions about the exercise of those powers in the context of religious organisations where the effect is that the State is in control of religious organisations and their assets by virtue of appointing or removing the leader of a religious organisation.

Moores Legal also notes and affirms the submission by the University of Melbourne that subdivision 143-B regarding the suspension or removal of trustees may be unconstitutional given that some trustees are outside the corporations power not being constitutional or trading corporations.

## **9. Scope of regulatory powers exercisable in furtherance of the “objects of the Act”**

Various regulatory actions in Chapter 4 are triggered by reference to the objects clause of the Bill. For example:

- (a) Clause 120-200 provides that the Commissioner may issue a formal warning if the Commissioner has reasonable grounds to believe that a registered entity has contravened ‘an Australian law that relates to the object of this Act’;
- (b) Clause 140-10 provides that the Commissioner may give a registered entity a direction if the Commissioner has reason to believe that, ‘the registered entity has contravened, or is likely to contravene, a provision of...any other Australian law that relates to the object of this Act; or...the direction is otherwise necessary to promote the object of this Act’; and
- (c) Clause 143-135 provides that the Commissioner may suspend all of the trustees of a registered entity ‘if any of the trustees is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence mentioned in subsection 2-5(1)(Object of this Act).

We submit that by having a broad objects clause this sets a very low and ambiguous threshold for triggering regulatory action, leading to potential for the ACNC to over-regulate NFP entities. With the additional non-inclusion of the Reviews and Appeals clause, this provides an unsatisfactory position for us to support the passing of the current Bill.

## **10. Responsible individuals**

We submit that the definition of “responsible individual” is too broad. We draw the attention of the Treasury Department to the submission of Moore Stephens on this issue and endorse their recommendations.

## **11. Registration**

We are concerned by the requirement to register as a sub-type of entity. The common law currently recognises multiple charitable purposes – it is quite

common for this to exist. For example, the community care and welfare arms of religious organisations which reflect the advancement of religion and public benevolent purposes. The fragmenting of organisations by a determination of a sub-type based on “activity” as suggested in the explanatory materials is contrary to the common law and inconsistent with the current structuring of NFPs. We recommend that an entity not be required to register as a sub-type of entity.

## **12. Transitional provisions**

Moore's Legal notes that the transitional provisions are yet to be drafted. This is a major concern for NFPs as with the strict reporting requirements being imposed on a large percentage of NFPs, there will be increased compliance costs across the sector for this large percentage. Unless the transitional provisions are very generous, a lot of NFPs will be unable to meet this time and financial burden.

## **13. University of Melbourne Law School Not for Profit Project Submission**

Moore's Legal has had an opportunity to read the submission made by the University of Melbourne Law School Not for Profit Project (“the University of Melbourne Submission”). Moore's Legal acknowledges the expertise of the University of Melbourne Law School Not for Profit Project in this area.

Moore's Legal commends the University of Melbourne Submission and the substance of its recommendations to the Treasury Department, save where an alternative has been proposed in this submission.

## **14. Conclusion**

The Government committed in the ‘National Compact: Working Together’ to “work together [with the Sector] in new ways based on partnership and respect”.

We had hoped this would be reflected in the exposure draft for the establishment of an independent regulator. Instead, the exposure draft paints a picture of mistrust. The legislation appears to be drafted not to enable the Sector but to constrain the Sector.

The concept of a one-stop-shop was to increase efficiency and streamline reporting procedures. At this point, the most that can be said is that it is “expected” to reduce regulation in the long-term. We do not share the confidence of the drafters of the exposure draft.

It is our view that the establishment of the ACNC should not proceed without a redrafting of important clauses in the exposure draft and explanatory materials in accordance with the recommendations made in this submission and the submission made by the University of Melbourne Law School.

We thank the Treasury Department for the opportunity to comment on the exposure draft.

## **15. Acknowledgements**

This submission was prepared by Elizabeth Turnour with assistance from Murray Baird, Aaron Farr, Wendy Ooi, Chelsea Pietsch and Nikki Hughes on behalf of the Moore's Legal Not for Profit team.



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