Submission in response to Exposure Draft of the Charities and Not for profits Commission Bill

Submission made by

Greg Mullins

gregmullins@optusnet.com.au

January 2012

Introduction

This submission deals in particular with the potential impact of the ACNC Bill on small not- for- profit entities. Small NFP entities receive little in the way of public benefit, and the focus of the proposed legislation in respect of these entities should be on reducing red tape rather than increasing accountability.

In doing so, I am mindful of the public benefit of the ACNC becoming the predominant registrar and regulator of the not for profit sector. This will be achieved over time if registration with the ACNC provides advantages for entities over the various current State and Territory based arrangements. This will be the case if the ACNC places fewer demands upon entities than the State and Territory based agencies, and is easier to deal with. It will not be the case if obligations to the ACNC are an additional overlay on those imposed by existing regulatory regimes.

This submission draws on my experience of working and volunteering in the not for profit sector; and on my employment in the public and private sectors in roles that involved working for and with regulatory agencies, and implementing regulatory requirements.

Object of the Bill, functions of the Commissioner, and 'public benefits'

The expression 'entities that provide public benefits' is used throughout the Bill but neither this expression nor the term 'public benefits' is defined. The table at clause 5-10(3) provides a list of types and sub types of registered entities. It is not clear whether for the purposes of the Bill 'entities that provide public benefits' is limited to those that are eligible for registration; whether the registrable entities is a sub-set of the broader population of 'entities that provide public benefits' or whether it is the intention that all 'entities that provide public benefits' are able to be registered under one of the types of registrable entity, in which case the Object of the Bill has application beyond registrable entities.

Clause 2-10(a) establishes the Commissioner's function for 'registering not-for-profit entities that provide public benefits'. When read together with the table at clause 5-10(3) it appears to imply that the population of entities that provide public benefits is limited to the population of entities that can be registered under the types and sub-types in the table.

In clause 2-10(b), the Commissioner's function is identified as 'promoting the good governance, accountability…and transparency of such entities'. The expression such entities references the entities described in sub clause (a). It is not clear whether 'such entities' are registrable entities, entities that have been registered, or 'entities that provide public benefits'.

I submit that the expression 'entities that provide public benefits' needs to be defined and that the clauses referring to 'such entities' need to be redrafted to more clearly articulate the Act's Object and the Functions of the Commissioner as they relate to:

- NFP entities;
- NFP entities that provide public benefits;
- NFP entities that are eligible for registration; and
- NFP entities that are registered.

Some further comments on this matter are provided in this submission in the discussion of Division 5.

Part 1-2 Sub-division 3-5

The opening two paragraphs in subdivision 3-5 under the heading *Background* state that (all) not for profit entities should be accountable to the donors, governments and the public. The justification for this is that the NFP sector (as opposed to all entities) 'is funded by donations… and by tax concessions, grants and other support from Australian governments'.

The implication that all NFP entities receive a public benefit and should therefore be regulated is false. In paragraph 1.12 of the explanatory memorandum, it is estimated that approximately 400,000 of the 600,000 NFP entities receive Commonwealth tax concessions. While tax concessions are only one form of public benefit, this suggests that a significant proportion of NFP entities do not receive any form of public support, or at least very limited public support.

The implications of this are significant. For entities that do not receive public support, the argument for public accountability is weak and there is only limited, if any, public benefit in regulating their governance requirements. There may still be good public benefit arguments for a publicly accessible register of NFP entities, but registration is much less onerous than prescribing governance requirements.

In assessing the regulatory requirements for these entities the starting point should be whether these entities should be subject to public accountability at all, and if so, whether the current regulatory requirements are excessive.

If this is not the starting point, there is a risk that these entities will be subject to excessive regulation, with the balance between reducing red tape and improving public accountability swinging too far in favour of public accountability. This imposes unnecessary costs on the entities, and also increases the costs of regulation without any concomitant public benefit.

Division 5- Entitlement to registration

Clause 5-10 (1A) sets out the requirements for registration. While sub clause (a) requires that the entity be a not- for- profit entity, it does not provide that it must be a not- for profit entity that 'provides public benefits'. Perhaps the requirement that it be registrable under one of the sub-types addresses this, but it is not clear that this is the case.

Clause 5-10(1A)(b) requires an entity meet the governance requirements set out in the governance section of this Act'. In its exposure draft form, the Bill does not appear to have a 'governance' section, presumably because this section is subject to separate consultation and will be inserted in the Bill at a later date. I submit that the governance requirements should not be applied to existing NFP entities that are already subject to governance requirements under other State, Territory and Commonwealth government legislation. Imposition of an additional layer of governance requirements would be contrary to the Bill's aim of reducing the regulatory burden on NFP entities.

The table at clause 5-10 lists all the registration types and sub-types. While there is the capacity to make regulations to exclude certain entities from registration, there is no capacity to expand the list so it must be concluded that it is considered to be comprehensive, and not in need of an 'other' category with the exception of a Charitable purpose entity that promotes 'other purposes beneficial to the community'.

It is worth considering whether a) there are not for profit entities that do not meet any of these categories, and b) whether there are not for profit entities that 'provide public benefits' which do not meet any of the registrable categories.

In respect of a), the answer appears to be 'yes'. For example, a political party is a not for profit entity, and yet there is no category which would provide for its registration. Similarly an organisation that is committed to pursuing a particular political outcome, such as making Australia a republic or an electoral reform, would not appear to be registrable.

As for b), again it could be argued that a political party provides public benefits by encouraging political discourses and participation in democratic behaviours. Similarly, a one issue lobby group may be performing a public service by promoting public debate of alternatives.

There are also other organisations that do not appear to fit neatly into one of the types or sub types. What about an organisation such as the Association of Superannuation Funds of Australia, a public company limited by guarantee? Its membership consists of individuals, trustees of superannuation funds and service providers to the superannuation industry. Its mission is *'to advance effective retirement outcomes for members of funds through research and advocacy, and to serve ASFA members by providing a range of services'*. In 2010/11 it had $10.6 million in revenue and $10.3 million in expenses. Its income is generated from its membership base, it does not receive any government funding, and does not solicit funds or donations from the public. It currently receives an exemption from income tax.

Promoting effective retirement outcomes for members of super funds certainly sounds like a public benefit. However, it is not clear that ASFA would fit any of the types or sub types of registered entity.

The best fit would appear to be 'Promotion of Australian Industry' although there is no apparent applicable subtype, except perhaps 'Promotion of the development of industrial resources'. Alternatively, is such an organisation intended to come under 'Community Service Purpose'? If so, how should ASFA's role as an advocate for the superannuation industry, including a number of large and profitable companies, be viewed? None of the registration types available look like they cover ASFA's range of activities, suggesting that it may not be registrable. This may the intended outcome, although it does highlight that there are probably a large number of not for profit entities that are not registrable.

Further, for an entity 'to meet the description of a type of registered entity' how much of the entity's activities have to meet on or other of the types and sub types? Again as an example, ASFA's mission contains two quite separate purposes, one about a public service, and the other a service to its members. Both are not for profit. Is it sufficient that one of its purposes be registrable and the other not? Should the entity's predominant activity be the registrable activity for it to be registrable? While I have used ASFA as an example, there are many other not for profit entities which have a mix of 'public' and 'private' functions where these questions will arise.

10-20 Dealing with an application for registration

Paragraph 1.34 of the Explanatory memorandum states that 'where the Commissioner has not made a decision on an application for registration within 60 days of receiving it, the Commissioner is taken to have decided to reject the application for registration.'

In fact, clause 10-20(2) gives the applicant the discretion to treat the application as if it has been refused, and must give the Commissioner written notice of this decision. While this gives the applicant the opportunity to then require reasons and object to the refusal, the onus of determining that the application has been refused falls on the applicant, which is unreasonable . The objection process will no doubt be lengthy. The applicant will be faced with the dilemma that if they just wait a few more days, the application may be accepted.

I submit that the Bill should provide that where the Commissioner has not made a decision on an application for registration within 60 days of receiving the application, the Commissioner is taken to have decided to accept the application for registration.

Assessment of registration applications is a key function and responsibility of the Commissioner. Why should the applicant entity be penalised because the Commissioner has failed to consider the application? Providing for acceptance after 60 days imposes a useful discipline on the Commissioner and provides an incentive to ensure that appropriate resources are committed to the registration task. Notifying the applicant of a decision to defer the decision for a further 30 days could be treated as a 'decision on an application', giving the Commissioner the capacity to manage periods of high workload while putting an onus on the Commissioner to communicate with the applicant.

To protect against abuse of this provision, a decision to extend the period should also be grounds for an objection under Clause 10-35.

55-85 Additional Reporting Requirements

Clause 55-85 refers to classes of registered entities. It is not clear whether this is meant to be a 'type or sub-type' of entities, in which case these expressions should be used, or whether it allows the Commissioner to determine the entities to which it will apply a determination without reference to a particular type or sub-types. Clarification of the intended meaning of 'class' would be useful.

55-90 Commissioner may approve a different accounting period

Clause 55-90 provides that the Commissioner 'may allow' a registered entity to adopt a different accounting period. Subject to the period not exceeding 12 months, it is not clear why the Commissioner's approval should be required. Changing the accounting period should be a matter for the entity to determine. Sub-clause (3) enables the Commissioner to make directions that are reasonably necessary in relation to the new accounting period. This sub- clause should be retained, and is sufficient to ensure that the Commissioner is able to continue to appropriately monitor the entity involved.

100-10 The Register

Clause 100-10 lists the details that must be collected by the Commissioner in the register. While it is clear that some items are required to enable the register to function, the reasons for collecting other information is not so clear.

The provision of each of these items and documents creates an administrative and compliance burden on each registered entity, and this burden should not be imposed without good reason. A more significant compliance burden relates to the presumed obligation on entities to ensure that the information remains current. (This obligation is 'presumed' because the current exposure draft of the Bill does not deal with a registered entity's obligation in this regard, but I assume this will be addressed as part of the final legislation or regulations.)

While the initial provision of this data on registration may not be significant the obligation to ensure this data remains current does create a significant burden. Any change in responsible persons, the governing rules, the name of the entity and the contact details will require a responsible person of the entity to recognise/remember the obligation to update the register, and to then provide the additional information. Presumably this will need to be done on the prescribed written form, completed by the appropriately authorised person/s, or lodged online by a person with the appropriate access to the system. There will also presumably be a penalty for failing to lodge

updated information within a specified period. The burden of this activity on small entities, and the likelihood of information not being updated promptly should not be underestimated.

I submit that there are two ways to reduce this burden. The first is to only collect the information that is necessary for the register (and this can vary by size and type of entity). There are further comments below on specific items that should not be required of all entities. The second solution is to only require most information to be updated on an annual basis as part of the annual return process. The only exception to this should be the contact details of two responsible persons nominated as contact persons for dealings with the Commission. Nominating two contact persons should deal adequately with situations where one contact person ceases to be available or involved with the entity.

Reducing the amount of data collected, and requiring it to be updated on an annual basis would strike the appropriate balance between red tape and accountability for smaller entities, which are typically operated and administered by volunteers on a part time basis, and for whom the core activities of the entity are a much greater focus than its compliance obligations.

I submit that there is no obvious need for the following items of information to be collected on the register for all entities. (There may be justification in doing so for larger entities.)

Item (l) anticipates recording the name of each responsible person of an entity and their qualifications and position. To what end is this data to be collected? There is no indication in the legislation that the Commissioner will vet appointments of responsible persons to entities, or routinely assess the collective competence and fitness of entities' governing bodies. There is no 'fit and proper' requirement, and while the Commissioner can prevent a person participating in the management of an entity, the Commissioner has no power to disqualify an individual form being the responsible person on any or all registered entities.

In the absence of such vetting and disqualification powers it is not clear what purpose is served by collecting this data. If the data is not to be used, it should not be collected. This is particularly the case because responsible persons can change frequently, creating a significant compliance burden on the registered entity to regularly update the register. If the Commissioner has reason to investigate an entity, and requires information about the responsible persons, this data can be collected at that stage.

Item (m) requires the register to hold the governing rules of each entity. Again, for what purpose is this information collected and how will it be used by the Commissioner?

The inclusion of governing documents in the register may be useful for larger entities in receipt of Government grants, if inclusion in the register can be an alternative to providing the governing rules in order to qualify for funding. However, this requirement has the potential to impose an unnecessary and unjustified burden on smaller entities. It would appear likely that the only point at which the Commissioner will need to peruse the governing rules of an entity is if he or she is investigating the entity. This is only likely to occur in a small number of cases, and the rules of the entity can be collected at that point.

If the intention is to make the details of the responsible persons and the governing rules of every registered entity available to the general public for their perusal, as a public accountability measure, I question whether the public benefit of doing so outweighs the administrative and compliance costs to both the Commission and the registered entities of doing so. While I have doubts about the effectiveness of this measure- I suspect very few members of the public will peruse entities' governing rules, or responsible persons' details- I am also not satisfied that this degree of public accountability is justified for small registered entities that receive little or no public benefit.

The argument for public accountability is only valid where registered entities receive some form of public benefit. As previously noted, in paragraph 1.12 of the explanatory memorandum to the exposure draft of the Bill it is estimated that approximately 400,000 of the 600,000 NFP entities receive Commonwealth tax concessions. While there are other forms of public benefit, it seems reasonable to assume that a large number of registrable entities do not receive any form of public benefit. For these entities, there does not appear to be a public interest justification for making their governing rules publicly available, and the balance should be tipped in favour of reducing red tape.

As an alternative to recording the governing rules in the register, it would be possible to record the entity's purpose/mission. This information will need to be collected at the time of registration to enable the entity's type and subtype to be determined, and is unlikely to change often, thus imposing a minimal burden on entities. This information is also likely to be of some public benefit in addition to the types and subtypes under which the entity is registered.

An item that is not included in the register is the entity's size- i.e whether it has been categorised as small, medium or large. Provision of this information in the register may assist the public to understand the nature of the entity and its obligations, for example whether it is required to lodge financial returns.

Item (o) is financial reports. I submit that financial reports should not be required of all entities, and that there should not therefore, be a requirement for their inclusion in the register for all entities.

The following proposal is made in respect of the registration (and maintenance of the register for small registered entities. It is predicated on the basis that small entities receive little or no public benefits, and that there is therefore a need for only very limited public accountability. These requirements should form the minimum basis for all registration requirements, with additional obligations for medium and large entities or specific types and sub-types imposed where they are warranted by the public interest.

1. At registration, a small registered entity should only need to provide basic information, about its operations, including the name of the group, its purpose/mission, its revenue, and the contact details of two of its responsible persons.
2. On an annual basis, the primary contact person should be asked to confirm that the recorded details remain correct (or update them) and make a declaration that the entity continues to operate for the stated purpose, is active and solvent; has complied with its governing rules; and remains accountable to its members/stakeholders.
3. There should be a presumption that this information is correct without the need for it to be further substantiated by the entity. The Commissioner should have the power to require further information to be provided in support of an individual investigation or on a 'project' basis, but small entities should not be required to provide large amounts of information on a routine basis for statistical purposes.
4. Small entities should not be subject to an obligation to ensure on an ongoing basis that the information recorded with the Commission remains up to date, relying instead on the annual review to provide updates (with the exception of the details of the contact person).

This risk based approach to registration and regulation will lead to a more efficient use of public and NFP entities' resources.

Items (e) and (f) anticipate that an entity will always have an ABN. Unless provision of an ABN is to be a mandatory condition of registration, allowance needs to be made for entities which do not have an ABN. However, the use of an ABN as a registration number rather than the creation of a new registration number is supported, and if this is to be the case then clearly the ABN will be mandatory.

120-10 Investigation powers

Clause 120-10 deals with the Commissioner's power to require an entity to provide information, and sub clause (4) makes it clear that this entity may be an individual. This is consistent with the definition of 'entity' in the Glossary, which is very broad.

This is a sweeping power to compel any individual, body corporate, partnership etc. to provide information about any entity, and be examined by the Commissioner. Failure to comply is a strict liability offence. The only restriction on the power is that Commissioner must exercise this power for the purposes of the Act.

It not clear what ability a person has to challenge a direction under this section, or to seek a review of the decision. Failure to comply is a strict liability offence, which seems unreasonable and unnecessary. (Contrast this with Clause 140-110, which provides the right to object to a direction made under Clause 140-10.)

120-20 Failure to Comply

Clause 120-20 imposes an offence of strict liability on an entity which refuses or fails to comply with a requirement under section 12-10. This raises the question of whether the registered entity or an individual responsible person would be held liable where, for example the notice that has not been complied with was addressed to an individual in their capacity as responsible person of an entity.

If it is the individual who is (or may be) liable, consideration needs to be given to the implications of this for discouraging responsible persons and issues relating to registered entities indemnifying responsible persons against such penalties. (Similar debates have occurred in the past in relation to the individual liability of company directors.)

This clause can be contrasted with Clause 140-120 which more clearly distinguishes offences committed by a registered entity and offences committed by a responsible person of a registered entity.

120-100 General powers of investigation

Clause 120-100 provides the Commissioner with a power to conduct an investigation, but does not provide a general power to refer a matter to police, the taxation Commissioner etc. It would seem that such a power would be desirable. Clause 180-30 permits disclosure of information to an authority of the Commonwealth, State, or a Territory, but only if it is for the purposes of this Act. In the absence of a clause authorising the Commissioner to refer matters, it is not clear that disclosure of potential criminal behaviour, for example, would be 'for the purposes of this Act'.

140-120 Non- compliance with a direction

There is a typographical error in subclause (1): '…a registered entity ~~is~~ commits and offence if:….'

161-5 Commissioner, and 162-15 Acting Commissioner

All powers are vested in the Commissioner by Clause 161-5, effectively meaning that if the Commissioner is absent or incapacitated for any period, the Commission is unable to function. While clause 162-15 provides for the Minister to be able to appoint an acting Commissioner, in practice arranging an appointment can take time. Consideration should be given to the appointment of a Deputy Commissioner, with the capacity to act in the place of the Commissioner, whenever the Commissioner is unavailable.