Submission to the Commonwealth Treasury

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

Dr Marina Nehme
Senior Lecturer at the School of Law
University of Western Sydney

And

Elen Seymour
Lecturer at the School of Law
University of Western Sydney

University of Western Sydney
: Bringing knowledge to life

Introduction

The Australian Charities and Not-for-profits Commission Bill 2012 Exposure Draft proposes to introduce a new regulator to deal with the existing fragmentation of the not-for-profit sector. The proposed new regulator, the Australian Charities and Not-for-profits Commission (ACNC) will be a national regulator that provides a one-stop-shop for not-for-profit organisations. This submission briefly considers the changes that are currently being proposed.

If any of the responses require further explanation please contact Dr Marina Nehme at m.nehme@uws.edu.au or Elen Seymour at e.seymour@uws.edu.au.

The Provisions

Section Number	Section heading	Submission
Chapter 1	**Introduction**	
Section 2-15	Constitutional limits	Section 2-15(a) notes that the commission may perform the functions and exercise the powers that this Act confers on him or her where it is necessary in order to administer taxation laws. We have three comments regarding this subsection: • The ATO is in charge of taxation issues. Will the creation of the ACNC mean that the new regulator will administer taxation laws? If this is the case this objective should be included in s 2-10. • How will this ensure non-duplication of regulatory activity and not directly defeat the stated objective of "report once, use often" framework? • This provision has a very wide net as it allows the ACNC to deal with a range of entities that are not registered under it but have taxation matters outside the not-for profit sector.
Chapter 2	**Registration of not-for-profit entities**	
Section 5-10	Entitlement to registration	Section 5-10(1A)(d) may need to be changed, as the proposed provision may not allow a transition of existing entities to the new regime. This will mean that if an existing company limited by guarantee wishes to be regulated by the ACNC instead of the Australian Securities and Investments Commission ('ASIC'), it may need to deregister first then apply for registration with the ACNC.
Section 10-55	Revoking registration	This section provides the Commissioner with the power to deregister an entity in certain situations. This power, in its proposed form, is too broad. For example, s 10-55(1)(c)(i) allows the Commissioner to deregister the entity because of non-compliance with the law. This means that if an entity breaches any part of the Act, even if it is a minor breach, the Commissioner has the power to deregister the company. This provision needs to be narrowed. For instance, the provision may state that the Commissioner may deregister an entity if it wilfully or consistently fails to comply with this Act or the regulations. Additionally, we query whether the presumptions of insolvency should be introduced in the context of s 10-55(1)(d). Under the *Corporations Act 2001* (Cth), the presumptions of insolvency under s 459C are relied upon for the purpose of proving insolvency in the context of compulsory winding up. The presumptions do not apply regarding ASIC's deregistration power which can be found under s 601AB.

Section Number	Section heading	Submission
		The implication of this provision is that the Commissioner will have the power to revoke registration of an entity if the entity has not complied with a statutory demand. No other ground may be needed to prove insolvency in such instances as one of the presumption of insolvency under s 459C has been proven. More evidence should be provided to the Commissioner when revoking a registration as deregistration is a very serious matter and may have a negative impact on a number of people. The reference to insolvency in s 10-55(1)(d) may be replaced with: A registered entity is unlikely to pay its debts (test of insolvency based on s 95A of the *Corporations Act 2001* (Cth). Additionally, we believe that this provision should also be altered to ensure transparency and fairness of the process. Revocation of registration should not take place except if a written notice to the registered entity is sent by the Commissioner inviting the entity to give the Commissioner a written notice on why the Commissioner should not revoke the registration of the entity. Such a process is a step forward toward ensuring that procedural fairness is being complied with.
Section 10-62	Notice to registered entity to show cause	The words 'may give written notice' should be replaced with 'must give written notice'. If a registered entity is no longer entitled to be registered, serious implications will be attached to such a matter. As a consequence, the Commissioner must and not just 'may' provide a notice to the registered entity. This is essential to ensure the transparency of the regulator's decisions.
Section 10-65	Entries on Australian Business Register	A look at this provision highlights that the burden is on the Australian Business Registrar to ensure that the information about the entity is correct. This burden may be onerous as the Registrar may not have the resources to deal with this matter. An obligation should be imposed on the entities to report changes to the Registrar who in turn can update the register.
Additional comments regarding this Chapter		Provisions regarding the impact of registration akin to ss 119 and 124 of the *Corporations Act 2001* (Cth) and ss 42-1 and 42-2 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) may be added. Such provisions will highlight that the registered entities are separate legal entities. Further, the internal governance rules of the registered entities have to be determined. Additionally, provisions regulating funding and winding up of registered entities need to be considered in the Bill.
Chapter 3	**Duties of Registered Entities**	
Section 50-5	Registered entities must keep records	We propose that s 50-5(4) should be revised. This subsection notes that 'the registered entity must retain the records for 5 years after the transactions, operations or acts covered by the records are completed.' This highlights the inconsistencies that

Section Number	Section heading	Submission
		exist between different legislations. While such a duration of time is consistent with the tax recording requirements, it is not in line with other legislations (see for example, s 286(2) *Corporations Act 2001* (Cth) and s 322(2) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Further, the adoption of period of 5 years is not consistent with s 55-50 which requires auditors to keep records of audits of review papers of the responsible entity for 7 years. Additionally, the penalty that will apply if a registered entity does not comply with this provision is minor. Civil penalties may need to be introduced against officers of registered entities for non compliance with the provisions. This will be similar to s 344 of the *Corporations Act 2001* (Cth). Additionally, criminal offence should also apply in case of dishonesty.
Section 55-15	Contents of annual financial report	The penalty that will apply if a registered entity does not comply with this provision is minor. Civil penalties may need to be introduced against officers of registered entities for non compliance with the provisions.
Sections 55-40- 55-65	Audits	These provisions deal with the responsibilities and duties imposed on auditors. These duties are akin to the duties present in the *Corporations Act 2001* (Cth). However, the questions that may arise are the following: • Will the ACNC be monitoring and taking action against auditors in case of non-compliance with their obligation or will ASIC be doing that? • If the ACNC will be monitoring and enforcing auditors' duties, then the ACNC should be provided with civil penalties in additional to criminal ones to ensure that auditors are complying with the law. • If ASIC will be monitoring and enforcing auditors' duties, a provision should be added in the legislation stating that the ACNC should be reporting any non-compliance of auditors with their duties to ASIC. This will also help ensure cooperation between both regulators. Further, this option will avoid duplication and will cut red tape. It will prevent scenarios where both ASIC and the ACNC take action against an auditor for the same conduct.
Section 55-70	Reporting to the Commissioner	We propose that civil penalties be introduced to the ACNC to deal with the breach of this provision.
Chapter 4	**Regulatory Powers of the ACNC**	
Section 120-10 and 120-100	Commissioner's Investigation powers	The provision deals with the Commissioner's or delegated officer's powers of investigation. These powers are akin to the one present in sections 263 and 264 of the *Income Tax Assessment Act 1936* (Cth) ("ITAA 1936). However, the questions that may arise are as follows: • Is the power in s120-10 meant to be as broad-based as

Section Number	Section heading	Submission
		those contained in s264 of the ITAA 1936 see, inter alia, *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* • Is the power in s120-100 meant to be narrower than s263 of the ITAA 1936 wide-ranging power by the limiter "has reason to suspect"? Further, the Exposure Draft: Australian Charities And Not-For-Profits Commission Bill 2012 Explanatory Materials, Chapter 6, p.47 paras 1.09 to 1.14 indicates that the requisite standard to trigger investigatory action by the Commissioner is a "reasonable suspicion" of inappropriate conduct or actions. We propose that this restriction should not be imposed upon the Commissioner and that the broad based powers given to the Tax Commissioner to investigate randomly including without a reasonable suspicion of wrongdoing be granted. The justification behind such a move relates to the fact that NFPs occupy a privileged position in society attracting government money both directly and indirectly through tax concessions. Consequently an agency overseeing NFPs should not be limited in ensuring the protection of public monies.
Section 120-200	Commissioner may issue formal warning	We propose that, in addition to formal warning, the ACNC should also have the power to publicise such warning. The requirement to disclose the commission of a minor breach of the law to the public will aim to expose and police undesired behaviour.
Section 120-410 and 120-425	Power to Enter Premises by consent or under a warrant	This provision gives the Commissioner the power to enter premises for investigative purposes after consent is obtained or having obtained a warrant. This provision is clearly narrower than granted to the Tax Commissioner under s 263 of the ITAA 1936 as it requires express consent before entry or a warrant. This raises the following issues: If protection of public monies is a concern why is the limitation imposed? It is of concern that it is possible to read s120-100 as granting separate but overlapping powers than given under s120-410 to the extent of creating an inconsistency that may give rise to litigation. For example s120-100 may also be read as granting the Commissioner the power to access premises in undertaking 'such investigation as he or she thinks expedient for the due administration of this Act'. It is proposed that any such ambiguity of interpretation be removed from the Bill to ensure that s120-410 and s120-415 are given the intended priority.
Section 141-5	Enforceable undertakings	The introduction of the sanction of enforceable undertakings to the ACNC will provide the regulator with a flexible tool to remedy

Section Number	Section heading	Submission
		minor breaches of the law. The advantage of this sanction is that it has the following aims: the protection of the public, the prevention of similar breaches from occurring in the future and corrective action.
Additional comments regarding this Chapter		Sanctions can act as a catalyst to ensure that laws are complied with, because they allow law enforcers to promote desired behaviour and punish undesirable acts. The threat of a sanction may be an incentive towards improved outcomes and compliance with the rules. Further, without sanctions, a regulator will be powerless to uphold the law. Consequently, the ACNC, as a regulator, need to be provided with a range of sanctions. While the Bill provides it with a range of administrative sanctions, the ACNC does not have any civil penalties at its disposal. Further, it can only deal with strict liability offences. Consequently, the ACNC is not equipped with tools to deal with more serious breaches of the law. Our proposal is that the ACNC should be provided with the following powers: • The ACNC should be able to issue banning orders; • The ACNC should be able to initiate civil proceedings to deal with contravention of the law. Civil penalties may need to be introduced in the system; • The ACNC should be able to initiate criminal proceedings- other than just dealing with strict liability offences.
Chapter 5	**The Australian Charities and Not-for-profits Commission**	
Section 161-15	Working with the Advisory Board	We propose that s 161-15(2) should be altered to: 'The Commissioner or his/her representative must attend Advisory Board meetings.'
Chapter 6	**The Advisory Board**	No Comment
Chapter 7	**Miscellaneous**	No Comment

Conclusion

While the introduction of this bill is a step forward to deal with the fragmentation that exists in the not-for-profit sector, the exposure draft of the bill is still in its infancy. Consideration regarding the impact of the proposed provisions has to take place. For example, the picture represented by the exposure draft is not clear regarding the structure

of the new entities or the powers provided to the new proposed regulator or the review and appeal system that should be in place.

Further, the potential application of this bill on different entities such as indigenous corporations has major draw-backs. Indigenous corporations should not be regulated by such legislation as the proposed Act as it does not take into account indigenous peoples' needs. A legislation that specifically empowers indigenous Australians to run their non-profit organisations based on their own customs and traditions should always be there. This will aid the government in closing the gap between indigenous and non-indigenous Australians by recognising their right to self-determination. The removal of such a right would be a step backward in such a quest.

It is understood that any introduction of a regulatory authority into a sector should be done with a view to minimising detrimental impact on current compliant entities. It is also understood that a due emphasis on educating the sector is the preferred approach to achieving a high level of compliance. Nonetheless the Bill also presents an opportunity to introduce legislation that will allow the ACNC to monitor activities of entities and to stop abuses of the system. Such powers need not be "first call" of the ACNC but to deny them a similar power to monitor and intervene in protecting public monies seems to perpetuate the privilege for no apparent reason. If public confidence in the sector is a goal then an effective monitoring agency is a prerequisite and not an afterthought.

Marina Nehme & Elen Seymour
18/01/2012