

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

By Email & Post

NFPReform@treasury.gov.au

27 January 2012

Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

To the Manager

Clayton Utz - Submission on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bill 2012

Thank you for the opportunity to comment on the Exposure Draft to the Australian Charities and Not-for-profits Commission Bill 2012 (the **Bill**).

Clayton Utz acts for a number of not-for-profit entities including entities with various tax and fundraising concessions and endorsements. Accordingly, a number of our clients are likely to be affected by the introduction of a not-for-profit regulatory body and relevantly, the draft provisions in the Bill. Clayton Utz also has a strong pro-bono practice and an interest in ensuring that the not-for-profit sector is well resourced, efficient and effective for its pro-bono clients.

In this submission, we summarise our general comments in respect of the Bill. We trust our comments provide a constructive contribution to the finalisation and implementation of the Bill.

Recommendation 1: *That Treasury provide further opportunities for consultation and discussion in respect of the Bill given the importance of various provisions which are yet to be drafted.*

It is difficult to provide comprehensive and meaningful comments and recommendations in respect of the Bill given critical sections of the Bill are not drafted. This includes:

1. the objection, review and appeal provisions. Although these are to be based on the provisions in the *Taxation Administration Act 1953*, modifications will presumably need to be made to take into account the particular aspects of the decisions that will be the subject of review;
2. full details regarding the annual information statements;
3. the penalty provisions and the regulations;
4. governance requirements. Although these are intended to be one of the key objectives of the Australian Charities and Not-for-profits Commission (ACNC), the provisions are not yet drafted, nor does there appear to be provision for these sections within the Bill; and
5. consequential amendments and transitional provisions. We note the view that these are likely to be technical in nature and so are not required to be the subject of public consultation. However, these provisions are likely to be important to not-for-profit entities for a number of reasons. For instance, although registration with the ACNC is voluntary under the Bill, it is likely that the

consequential amendments and transitional provisions will be relevant to determining which entities will need to seek registration and, therefore, which will be affected by the consequences of registration. Further, the Bill as currently drafted does not provide guidance as to how the ACNC will affect the reduction of regulatory duplication and compliance burden within the sector. In particular, the Bill does not provide for a mechanism by which regulation of the sector will move from a multi-authority domain to the single ACNC regulator. These provisions may also be covered in the consequential and transitional amendments.

Given the importance of this Bill and the role of the ACNC in the not-for-profit sector, interested parties should be given further opportunity to provide constructive feedback in respect of a full draft of the Bill.

Recommendation 2: *That entitlement to registration under the Bill is not limited only to those entities that have not previously been a registered entity.*

Section 5-10(1A)(d) of the Bill limits registration with the ACNC to those entities who have not previously been a registered entity. It is recommended that entities that may be deregistered from the ACNC be afforded the opportunity to re-register with the ACNC at a later date, including where an entity voluntarily deregistered or where deregistration was the result of an incorrect or inappropriate decision by the Commissioner of the ACNC (**Commissioner**).

Recommendation 3: *That registered entities be able to voluntarily deregister.*

Although registration is voluntary, the Bill does not provide for registered entities to voluntarily elect to deregister. Registered entities may wish to deregister voluntarily so that they are no longer regulated by the ACNC (or entitled to relevant concessions or entitlements) and the Bill should provide for this.

Recommendation 4: *That registration may only be revoked after adequate notification and appeal rights have been exhausted by a registered entity.*

As the Bill is drafted, the Commissioner can deregister an entity for a number of reasons, including:

1. under section 10-55(1)(c)(i), any failure to comply with the Act or regulations (whether or not the non-compliance is significant or material in any way); or
2. under section 10-55(1)(b), the provision of information that was false or misleading in a material particular in an application for registration (apparently even if the entity is otherwise entitled to registration, given this is covered by section 10-55(1)(a)).

Deregistration can occur without providing the entity with any prior notification or reasons. Additionally, it is unclear when revocation may take effect as it is not clear when an objection is taken to be "unsuccessful" or "resolved" under section 10-57, given likely review and appeal rights.

Revocation of ACNC registration is likely to significantly affect a registered entity, including its ability to obtain funding, its reporting and taxation obligations, public confidence and reputation of the entity and exposure of responsible persons to various penalties.

Given this effect, registered entities should be provided with rights to appropriate and timely warning from the Commissioner of any intention to utilise his or her revocation powers. Further, entities should be afforded adequate objection and appeal rights to any revocation decision by the Commissioner before the decision takes effect. This should include, for example, a requirement that the Commissioner provide

reasons and explanation as to any revocation proposed or made, with show-cause notices (currently provided in section 10-62) a pre-requisite to any revocation. Section 10-57 should be clarified to ensure that revocation only takes effect once all avenues of appeal are exhausted.

Additionally or alternatively, to ensure that the Commissioner's powers to revoke registration are used in a manner intended:

1. the Commissioner could be provided with guidance as to factors to be considered when determining whether revocation of registration is appropriate. This could include, for example, consideration of whether factors leading to potential revocation of registration were beyond the control of responsible individuals or have been rectified; or
2. the Commissioner could be allowed to deregister an entity without prior notification only where an entity's non-compliance with its obligations are significant or it is engaging in fraudulent or otherwise illegal conduct.

Recommendation 5: *That the presumptions relating to insolvency be clarified.*

Section 10-55(2) of the Bill provides that section 459C of the *Corporations Act 2001* has effect for the purposes of the Commissioner being satisfied as to a registered entity's solvency. It is noted that section 459C concerns presumptions that a Court must make in determining an application for winding up in insolvency. It is not clear whether the reference in section 10-55(2) is intended to mean that the Commissioner must himself make the same presumptions that a Court must make or whether he or she is required to have regard to a decision made by a Court, noting the presumptions are rebuttable.

Recommendation 6: *That record keeping duties within the Bill are consistent and provide for the Commissioner's discretion in respect of record keeping offences.*

The Bill provides for varying timeframes for which records must be kept (5, 6 and 7 years, for example in sections 50-5(4), 55-80(6) and 55-50). In the interests of simplifying compliance, it is recommended that timeframes for retention of records and information in the Bill be consistent with requirements under the current tax legislation to retain most documents for 5 years. The Bill should also provide the Commissioner with discretion to remit or reduce penalties associated with failure of registered entities to maintain records in situations including where these records cannot be retained due to factors beyond the control of the entity.

Recommendation 7: *That information should only be uploaded to the register after any appeal and objection process is exhausted.*

Division 100 currently enables the Commissioner to make publicly available on an electronic register substantial information regarding each registered entity. This information includes any warnings issued to registered entities (section 100-10(n)) and any other information in respect of the entity as requested by the Commissioner (section 100-10(q)).

Clayton Utz welcomes the publication of registered entity information on a public register, however is mindful of the potential serious reputational consequences to registered entities that may occur if information including warnings to the entity (which may be later withdrawn) are published prior to any objection or appeal processes being finalised. It is therefore recommended that the Bill limit the power of the Commissioner to publish information on the register until any appeals and objection process is exhausted and finalised. To that end, section 110-20 of the Bill should be clarified to reflect this process.

Recommendation 8: *That there is a clearly defined process and guidance to the Commissioner regarding the issuing of directions and adequate review and objection processes for entities.*

As currently drafted, the Bill provides the Commissioner with broad powers to issue and enforce directions to registered entities. To ensure that the Commissioner utilises this power as intended, it is recommended that the Bill clearly outline the circumstances under which the Commissioner may give a direction and the factors that the Commissioner should consider when determining whether to issue a direction. These factors could include costs to the entity, the resource impact on the entity, the reasonableness of any direction and any defences to compliance with a direction.

Further, the Bill should clarify that there should be no enforcement of a direction if that direction is under review or appeal.

Recommendation 9: *That Treasury consider whether civil penalties may be more appropriate to the sector and consider provision of proper defences to offences.*

As the Bill is currently drafted, several of the activities which will be regarded as offences under the Bill are strict liability offences, for which no provision has been made for reasonable defences. The use of strict liability offences may be seen as unnecessarily burdensome and harsh to a sector which is heavily reliant on volunteers and pro bono support.

The use of strict liability offences within the Bill, and lack of provision for reasonable defences (for example, a defence of illness or absence for responsible persons), may discourage participation in the sector (for example, auditors who must comply with section 55-70 of the Bill) and fails to acknowledge the major and positive contribution that not-for-profits have on the community and economy.

In light of the nature of the not-for-profit sector, it may be more appropriate to consider graded civil penalties and provision for defences in the Bill.

Recommendation 10: *That the Bill reflect the educational role of the ACNC.*

It is understood from information previously provided by Treasury, including Facts Sheets such as the Education, Compliance and Enforcement Not-for-profit Reform Factsheet dated 9 December 2011, that the role of the ACNC includes "ACNC will be responsible for the provision of educational information to the NFP sector" and that "...providing education and support will be the largest function of the ACNC."

This function is not reflected in the Bill, which only briefly mentions ACNC's educational role in section 2-10(c)(i). It is recommended that further provisions be incorporated within the Bill to outline and guide ACNC's educative role and to ensure that ACNC's objects and role reflect those intended by Treasury. A suggested method of communicating such advice to the sector could take, for example, a public and private rulings type format, similar to that currently employed by the Australian Taxation Office.

Yours sincerely



Clayton Utz