

24 January 2012

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Dear Sir/Madam

Australian Charities and Not-for-profits Commission (ACNC)

As General Counsel of The University of Melbourne, I am actively involved in its governance and compliance frameworks, including those for trusts administration.

I have taken the opportunity to review the two discussion papers on not-for-profit governance arrangements and on the implementation design for the ACNC, both dated 9 December 2011, and the exposure draft for the ACNC Bill, also released on that date.

I have not been in a position to follow closely earlier consultation initiatives, including those on the introduction of a statutory definition of 'charity', and I see that in any event submissions on the relevant consultation paper were due on 9 December 2011.

I understand that comments on the not-for-profit governance arrangements discussion paper, and on the draft legislation are now due on 27 January, whereas comments on the discussion paper dealing with the implementation design for the ACNC are due on 27 February.

Discussion papers

I am not in a position to provide detailed comment on the various consultation questions in each of the discussion papers, other than to note that a proportionate, risk based approach to governance seems appropriate, and consistent with similar principles for regulation under the recently enacted Tertiary Education Quality and Standards Agency (TEQSA) legislation.

The TEQSA related model of regulation seems appropriate also in the context of charities and the not-for-profit sector. There may be a need to make more of a distinction between entities coming within the sector, so that for example, large public universities such as The University of Melbourne, which has sophisticated governance arrangements derived from its accountability framework, are not caught up in other requirements which may be imposed by new legislation, and which are more referable to an entirely different component of the broader not-for-profit sector.

The threshold standards in the TEQSA legislation, for example, cater for different categories of higher education providers, and set out a compliance framework that can be followed by the relevant category of provider. A similar approach may well be workable in relation to this broad sector, rather than having a framework in place

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which is meant to apply to the sector as a whole, without any recognition of the significant differences that exist within the sector. To the extent that the ACNC is to be a regulator of the charities and not-for-profit sector, there may well be other analogies with TEQSA, and how it functions, which can be applied in the case of the ACNC. I assume you have considered such issues in order to minimise the need for different frameworks and approaches being developed for what could be comparable regulatory purposes.

Many of the consultation questions in both discussion papers are also difficult to answer at a general level (partly reflecting my lack of involvement to date), and when in the context of the university sector, a governance framework is already in place through individual State enabling legislation, and overarching reporting requirements referable to Federal and State legislation.

This University also has a significant charitable trust portfolio which calls for different levels of accountability than what may apply in relation to the general management and governance responsibilities of the University as a body politic and body corporate.

Exposure draft – ACNC Bill

Whilst I have no substantive issues with what is contained in each of the two discussion papers, other than to note in some cases where the circumstances of this University may differ from the broader not-for-profit sector (for example, under section 4 of the governance discussion paper dealing with pressures faced by the not-for-profit sector), I offer some comments on the exposure draft for the legislation to establish the ACNC which may be of some use or interest.

In doing so, I note that other draft legislation is under preparation, particularly dealing with a statutory definition of ‘charity’, and hopefully other key terms as were proposed in the Charities Bill 2003, so my comments need to be considered in that context. To that end, I assume the meaning of any such terms will also apply in this proposed legislation to establish the ACNC.

Functions of Commissioner

Section 2-10(a) provides that one of the functions of the Commissioner is to register not-for-profit entities ‘that provide public benefits’. Section 4-1(2) also provides that Part 2-1 provides for ‘the registration of entities that provide public benefits’.

However section 5-10(1) provides that only an entity that meets the requirements in subsection (1A) is entitled to registration as a type of registered entity, one of such requirements being that ‘the entity is a not-for-profit entity’.

There is no definition at present of a ‘not-for-profit entity’, other than by reference to the types or subtypes of registered entity set out in the table comprising section 5-10(3). I assume that this will be addressed in legislation now under preparation, as noted earlier.

Entitlement to registration

I note that the glossary of terms and definitions from page 28 of the discussion paper (ACNC – Implementation Design – 9 December 2011) states that a ‘not-for-profit entity is an entity whose principal objective is not the generation of profit’, although a more comprehensive and different definition appears in the draft Charities Bill 2003.

Some of the entities listed in section 5-10(3) of the exposure draft may not necessarily be providing a 'public benefit', for example, entities for the encouragement of games or sport to the extent they may be a not-for-profit entity, at least in accordance with the definition in the discussion paper, but otherwise established as, for example, a private club and therefore not providing a 'public benefit', unless their existence can be said to complement an overall public benefit in the encouragement of community entertainment.

More clarity is required as to what are not-for-profit entities, and as to what is meant by the provision of public benefits. I appreciate that these issues may well be addressed in further draft legislation to be made available early 2012, dealing with a statutory definition of charity and standardising the term 'not-for-profit'. I note also that the Government will be building on its work done on the Charities Bill 2003, which included definitions of not-for-profit entities and public benefit, and hopefully similar definitions will be reflected in any new draft legislation as a means of complementing references in the exposure draft for the ACNC Bill.

Recordkeeping

Section 50-5(4) provides that the registered entity must retain records for five years, whereas section 55-50 provides that audit working papers are to be retained for seven years. Should they not be the same?

Reporting

Sections 55-5(2) and 55-10(2) should be qualified by reference to section 55-90, and/or the reference in section 55-90(2)(b) should be to each of the other two sections.

ACNC register

Section 100-10(1) provides that the register is to include the name of each registered entity, and the types and subtypes under which each registered entity is registered.

Section 210-5 provides that an 'entity' means not only a body corporate or a body politic, but also a trust, with paragraph (4) providing that 'a legal person can have a number of different capacities in which the person does things. In each of these capacities, the person is taken to be a different entity'.

This University is established under the *University of Melbourne Act 2009* (Vic), and exists as a body politic and corporate (section 4(2)). It also has a number of wholly-owned subsidiaries, all of which are not-for-profit entities insofar as the principal objective of each subsidiary is not the generation of profit, to the extent the definition of a not-for-profit entity in the glossary to the ACNC discussion paper has any application in the legislative context. Some or all of such entities are also 'tax concession charities', again as defined in the said glossary. The said glossary also defines a not-for-profit entity as either a single entity or 'a group of entities comprising the parent entity and each of the entities that it controls'.

The University is also trustee for more than 800 charitable trusts which have been established over its history from 1853, having a combined capital value of around \$400 million, and with the terms referable to each such trust being contained in University trust records which are accessible through the University website. (<http://www.unimelb.edu.au/unisec/utr/index.html>) Further information on trusts

administration at the University is available under Trusts at the University – <http://www.unimelb.edu.au/trusts/>.

The exposure draft the ACNC Bill is not clear as to whether an entity such as the University (apart from the transitional registration from 1 July 2012 applying by reference to ATO records) should be registered as one entity, or separately also in relation to each of its subsidiaries, and secondly, whether any separate registration is required (or at least desirable) for each of its 800 or so charitable trusts.

The University is the trustee for each of the charitable trusts, all of which are for the charitable purpose of the advancement of education, but obviously for a prescribed purpose set out in each case in the relevant trust instrument. Division 3 of Part 6 of the *University of Melbourne Act 2009 (Vic)* gives the University power to create and administer all such trust funds, including through the use of investment common funds with other funds of the University.

Whilst the University should be entered in the ACNC register as a registered entity, along with its subsidiaries, (and query whether this happens as a group or separately, as noted above), it would indeed be onerous for all such trusts also to be the subject of separate registrations. No such procedures currently apply, and apart from the use of the University's DGR status for the purpose of receipting a tax deductible gift in the first instance (including those for establishing charitable trusts), no benefit to the University would appear to be forthcoming from any such separate registrations.

There seems to be no point in the University processing multiple registrations covering all of its trusts where the purpose of any legislation is directed at the governance and accountability of the University, and as a 'large registered entity', its annual financial report can be given to the ACNC Commissioner as provided in section 55-10 of the ACNC Bill. The annual report incorporates financial information on the University's trusts.

The application of Sub-division 143-B, relating to suspension and removal of trustees, is also unclear in the context of an entity such as the University if it was to be registered as a trust on a multiple basis, rather than on a once-off basis in its capacity as a body politic and corporate.

General

The University has accountability frameworks under other Federal and State legislation in relation to the University itself under the *University of Melbourne Act 2009 (Vic)*, and in relation to the sector as a whole under, for example, the *Higher Education Support Act 2003* (Commonwealth) and the *Tertiary Education Quality and Standards Agency Act 2011* (Commonwealth). The University is also subject to other Victorian legislation as part of the annual reporting process for Victorian public universities, in particular the *Financial Management Act 1994 (Vic)* and the *Audit Act 1994 (Vic)*.

It would be an adverse development if any new obligations arising as a consequence of the passage of legislation proposed in the exposure draft to the ACNC Bill were to create further reporting obligations, when the purpose of the legislation is to provide a once only reporting framework which can then be used for a variety of accountability purposes under Federal and State legislation.

Given the important role of universities in any new framework regulating charitable and not-for-profit entities, you may wish to consider whether more clarity is needed in any draft

legislation as to its potential application to key sub-sectors, such as universities, in order to avoid further compliance obligations being imposed on universities beyond what already exists in Federal and State legislation.

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I trust that you find these comments of assistance.

They do not represent any formal position of the University, as it has not been possible to coordinate properly with colleagues at this time of the year and in the time available. I am however aware that Melbourne Law School is making a detailed submission as part of its Not-for-Profit Project which is a three year research project funded by the Australian Research Council that began in 2010. From a brief review of a draft of that submission, I can see that there are many important issues addressed which will no doubt be most useful to your review.

I am happy to discuss these and other issues relevant to this review process should that be desired, and to the extent you wish to have a better understanding of issues that may be relevant to the University and higher education sector in general as an important component of the broader constituency that will be affected by these important reforms.

Subject to the foregoing, I wish you well in implementing these changes.

Yours faithfully



Chris Penman
General Counsel