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Submission to the Parliamentary Joint Committee on Corporations and Financial Services concerning the *Australian Charities and Not-for-profits Commission Bill 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

1 Who we are

(a) Our organisation is the Anglican Church Diocese of Sydney (the Diocese).

(b) This submission is made on behalf of the Standing Committee of the Synod of the Diocese.

(c) Our contact details are –

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2 Preliminary comments

(a) We are grateful for the opportunity to make submissions on the Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (the Bill). We wish to acknowledge the considerable efforts of Treasury and Government to date in responding to various issues of concern we have previously raised in relation to the Bill.

(b) We have supported and continue to support the establishment of a national regulator for the charities and not-for-profit sector. However we consider that the regulatory framework contained in the Bill remains, in places, more far-reaching than we think is necessary while, in other places, risks not delivering on necessary reforms.

(c) In our initial submission to Treasury back in February 2011 on the *Scoping Study for a National Not-for-profit Regulator* we provided the following caution –

> "The Government must commit to a clearly identified program of harmonisation and simplification of the regulatory environment in which the sector operates and ensure that this is effectively implemented by Commonwealth agencies which interact with the sector. Corresponding commitments to reform also need to be obtained from State governments. Unless a high level of commitment to a clearly defined program of broader reform is achieved, we consider that the Government would be ill-advised to proceed down the path of establishing a NFP regulator. To do so would involve costs to both the Government and the sector not justified by any marginal benefits that might be achieved in an environment devoid of broader reform."

(d) We also made the following comments in respect of the scope of a not-for-profit (NFP) regulator –

> "Many of the activities typically undertaken by the sector, such as health-care, aged-care, welfare, education and fundraising, are already subject to a high degree of Government regulation which, in many cases, applies to government and for-profit entities undertaking the same activities. This is because such activities give rise to a level of risk to the community which already justifies a high level of regulation by relevant Government departments and agencies. Given the expertise which has been developed to manage risks associated with these activities, it is unlikely that Government departments and agencies with existing regulatory responsibilities will relinquish this role in favour of a NFP regulator. Indeed it is probably inadvisable that they do so."

(e) We concluded by suggesting that the gaps which remain for a NFP regulator to provide meaningful oversight for the sector would not be significant.

(f) The first Exposure Draft Australian Charities and Not-for-profits Commission Bill proposed a much more extensive regulatory framework than we envisaged was necessary. Many of the functions and powers of the new regulator were justified, it seemed, by the proposed object of the draft Bill, namely "to promote public trust and confidence in not-for-profit entities that provide a public benefit". We and many others strongly objected to an object in these terms, principally on the basis that public trust and confidence in the Australian NFP sector was not a matter of particular concern, significant breaches of public trust and confidence had not been demonstrated and, therefore, public trust and confidence should not be used as a primary driver for formulating the functions and powers of the ACNC.

(g) The subsequent recasting of the public trust and confidence object "to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector" (in the second Exposure Draft) and the inclusion of a further object in the Act "to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector" (in the form of Bill introduced into Parliament) were both helpful changes. However we believe that the initial and, to some extent, continuing focus on public trust and confidence has led to a Bill which, in places, remains over-engineered.

(h) We believe that important changes are still needed if the Bill is to come close to establishing a regulatory framework which will be of genuine benefit to both the sector and the broader community.

(i) The remainder of this submission outlines the areas which we believe should be addressed to achieve this outcome.

3 Report-once-use-often framework

(a) An important function of the ACNC, if it can be made to work, is the establishment of a report-once-use-often framework, particularly for charities which interact with multiple Government departments and agencies for funding.

(b) We acknowledge that there have been discussions with relevant Commonwealth, State and Territory agencies to determine how this function can be made to work. We also acknowledge transitional arrangements in the Bill which not only defer the commencement of financial reporting obligations until the 2013-14 financial year but also permit the ACNC to treat statements and reports already provided by existing charities to Australian government agencies as satisfying the reporting obligations to the ACNC under the Bill, at least until the 2014-15 financial year.

(c) Nonetheless, we consider that until the Government is in a position to comprehensively deliver on a report-once-use-often framework, including with State agencies, independent reporting obligations to the ACNC should be deferred, if necessary, beyond the current transitional arrangements.

(d) We also suggest that consideration be given to further limiting the financial reporting obligations under the Bill to registered entities which receive substantial funding from Government or which are endorsed as deductible gift recipients (DGR). Further limiting the

financial reporting obligations in this way would arguably achieve a better balance between the object of the Bill to maintain public trust and confidence in the sector and the recently included object of the Bill to promote the reduction of unnecessary regulatory obligations on the sector.

4 Governance standards and education

(a) In our submission to Treasury on the *Scoping Study for a National Not-for-profit Regulator*, we envisaged a NFP regulator providing appropriate governance education. We did not envisage a NFP framework involving mandatory governance standards. We indicated that charities and not-for-profits involved in delivering health, education, aged care and welfare services are already subject to stringent governance requirements through a range of government agencies. We suggested that the benefit of imposing further governance standards, even at a fairly low level across the sector generally would be insufficient to justify their cost.

(b) We subsequently engaged in the question of governance standards in our submission to Treasury regarding its *Review of Not-for-profit Governance Arrangements*. We believe that the decision made following that consultation process to defer until 1 July 2013 the implementation of generic governance standards for the sector was wise.

(c) We remain unconvinced that it is possible to formulate generic governance standards for the sector which go beyond statements of principle and which will add genuine value to the sector in its full diversity. Generic governance standards established as statements of principle are, in turn, unlikely to have significant beneficial community impact.

(d) We would also be concerned if any proposed governance standards were implemented by way of regulation rather than in the Bill itself.

(e) Accordingly, we suggest that the current provisions included in the Bill which contemplate the implementation of, as yet unspecified, governance standards by regulation from 1 July 2013 be removed from the Bill at this time. These provisions should be reintroduced directly into the ACNC Act if and when both the Government and the sector can reach a consensus on governance standards which will not only give effect to the object of the Bill to maintain public trust and confidence, but will also give effect to the other two objects of the Bill namely –

- to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector, and
- to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

(f) In the meantime, we consider that the most effective way of enhancing governance across the sector and perhaps gaining a clearer sense of whether generic standards for the sector are both possible and desirable would be for the ACNC to source and disseminate across the sector appropriate information about governance in the NFP context.

5 Entitlement to register

(a) Another important function of the ACNC is the registration of charities in order to give them access to basic tax concessions. We are generally satisfied with the registration provisions included in the Bill.

(b) However one area of concern relates to the ongoing confusion between the purpose of an entity and the activities the entity undertakes in pursuit of that purpose in determining an entity's entitlement to register as a particular subtype of charity under section 25-5.

(c) We appreciate that some attempt has been made to address this issue through the recent inclusion of additional commentary in the Explanatory Memorandum (at 3.30). However the reference to "activities" at 3.45 of the Explanatory Memorandum is unhelpful, as is the example given at 13.79 which persists with a focus on the activities of the church, rather than its purpose, in determining whether the church would be regarded simply as a religious

subtype of charity, or whether "non-religious" activities will trigger the need for the church to register as another subtype. The point that needs to be made at 13.79 is that an incidental purpose, rather than incidental activities, will not trigger an entitlement to registration as a subtype.

(d) This issue has significant implications for a range of reasons, not least of which being that if an entity which is registered as a subtype of charity for the advancement of religion has an entitlement to register as another subtype, the entity will lose its status as a Basic Religious Charity under section 205-35(1)(c). A clear articulation of the relevance of purpose and activities in determining whether an entity is a charity will also be important when further consideration is given to replacing the common law meaning of charity with a statutory definition.

(e) If this issue is not clarified directly in the Bill, we suggest that the Explanatory Memorandum be amended to clarify the matter.

6 Basic Religious Charities and gift deductible funds

(a) The inclusion of the Basic Religious Charity (BRC) definition in the Bill is a welcome initiative which recognises the particular characteristics of religious entities and the challenges they face. We expect that the main types of entity that will rely on the BRC status will be local churches and parishes, although other religious charities will also qualify. These entities typically operate within and are accountable to a broader denominational community.

(b) Having included the concept of BRC in the Bill, it is important that the concept works in practice.

(c) The recent inclusion of a minimum $100,000 annual threshold for BRCs to receive Government grants without losing this status is helpful. We also accept that entities which are endorsed as DGRs as a whole, for example public benevolent institutions such as ANGLICARE, should not be regarded as BRCs.

(d) However, as currently drafted, the definition of BRC will exclude many local churches and parishes from being BRCs where such charities are endorsed as a DGR for the operation of a fund as part of their broader operations (section 205-35(3)). For example, many churches are endorsed as DGRs for the operation of a school building fund.

(e) In order to address this issue, we suggest that BRCs which are endorsed as DGRs for the operation of a fund should be subject to financial reporting and governance obligations in relation to the fund, as if the fund were a registered entity for the purposes of section 205-25 of the Bill (small, medium and large entities). This would enable the broader operations of the BRC to remain exempt from financial reporting and governance obligations.

(f) An alternative solution might be to include in the transitional provisions for the Bill a mechanism by which such funds can be readily transitioned to stand alone DGR entities with a separate ABN. For example, the transitional provisions could provide that if a BRC obtains an ABN for such a fund and notifies the ACNC of its existence within, say, 12 months of the commencement of the ACNC Act, the ACNC will register the fund as a charity on a stand-alone basis. This would avoid the need for religious entities, which have, in good faith, structured themselves with a DGR fund as part of their broader operations, from having to go through a full process of winding-up the existing fund and obtaining registration and endorsement of a new DGR fund on a stand alone basis. However in order for this solution to work, it would be necessary to determine whether the funds to be transitioned were entities in their own right (eg trusts) capable of registration.

(g) Similar notification provisions for other transitional purposes already exist in the Bill.

7 Facilitating interactions with large multi-entity charitable organisations

(a) There are a number of large charitable organisations, both religious and non-religious, which include groups of entities which share common governing rules. Usually there is an entity within the broader organisation which has the power to make changes to these common governing rules.

(b) An example of this is the 270 parishes of the Anglican Diocese of Sydney. Although each parish will be a separately registered charity, each shares a common set of governing rules, namely the *Parish Administration Ordinance 2008*. These rules are amended from time to time by the Synod of the Diocese. Under the Bill, as currently drafted, any change made by the Synod to the *Parish Administration Ordinance 2008* would trigger a requirement on each of our 270 parishes to notify this change to the ACNC.

(c) Paragraph 7.12 of the Explanatory Memorandum indicates that if a group of entities make changes to a common set of governing rules, it is sufficient that the ACNC is notified by one of the entities of the change affecting them all. We assume that this statement is supported by section 65-5(5) of the Bill which makes it clear that 2 or more notifications to the ACNC may be included in the same document.

(d) However, contrary to what is suggested by paragraph 7.12 of the Explanatory Memorandum and section 65-5(5) of the Bill, it would be more usual for the entity which has the power to change the common governing rules of other entities to not itself be subject to those rules. This is certainly the case for our Synod and parishes.

(e) In order to streamline interactions with the ACNC in these circumstances, we suggest that a new section 65-5(6) be included in the Bill along the following lines –

> "(6) For the purposes of paragraph (1)(d), a notification in relation to a change made to governing rules which 2 or more registered entities share in common may be made by the registered entity which has the power to make such changes."

(f) Similarly, since the accounting period for an entity will almost invariably be a matter dealt with in its governing rules, applications to the ACNC to approve a different accounting period for entities which share common governing rules would be considerably streamlined if a new section 60-85(4) is inserted in the Bill along the following lines –

> "(4) If 2 or more registered entities share common governing rules, an application to adopt such accounting period may be made, in the approved form, to the Commissioner for the Commissioner to make a decision under subsection (1), by the registered entity which has the power to make changes to such governing rules."

8 Responsible entities

(a) We note that, in the ordinary course, the responsible entities of an unincorporated association will be limited to the "directors" of the management committee of that entity. We believe that not extending the concept of responsible entities to include "shadow directors", as is the case under the Corporations Act, is appropriate in the NFP context.

(b) However given the diversity of structures within the NFP sector, there are a number of registered entities which are still likely to have a very substantial number of responsible entities. For example, in the context of the Synod of the Anglican Church in the Diocese of Sydney, although the 800 members of the Synod will not be regarded as responsible entities, it is likely that the members of the Standing Committee of the Synod, which comprises 60 members, would be regarded as the responsible entities for the Synod. We think that a meaningful application of the concept of "director" starts breaking down in these circumstances. We also think that the cost/benefit of a registered entity notifying the ACNC of such large numbers of responsible entities is questionable for both the registered entity and the ACNC.

(c) We are aware of other entities which are likely to have a similarly large number of responsible entities.

(d) We think it would be preferable to avoid restructuring the governance arrangements of entities which have served the sector well over a long period of time in order to achieve a more manageable number of responsible entities.

(e) Accordingly we suggest that a provision be included in the definition of responsible entity in section 205-30 of the Bill which would, on application to the ACNC, allow an agreed number of office holders within a registered entity to be treated as its responsible entities in circumstances where the number of responsible entities would otherwise exceed, say, 20.

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Submission to the Parliamentary Joint Committee on Corporations and Financial Services regarding the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

1 Introduction

(a) The name of our organisation is the Anglican Church Diocese of Sydney. This submission is made by the Standing Committee of the Synod of the Diocese.

(b) We welcome the opportunity to make further submissions concerning the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (the "Bill").

2 Summary of Recommendations

(a) We recommend that the words "or benefits" be omitted from subsections 30-18(3) and 50-50(4).

(b) We recommend that the legislation provide that where the use of money by recipient entities (whether or not the initial recipient) is to be taken into account for the purposes of subsections 30-18(3) and 50-50(4), the use should be determined by reference to what the exempt entity providing the money or property knew or should reasonably have known about its use.

(c) We recommend the Bill provide that the Australian Business Register (or public information portal of the ACNC once established) can be relied upon as conclusive evidence of whether an entity is a deductible gift recipient or tax exempt entity for the purposes of subsections 30-18(3) and 50-50(4).

(d) We recommend the reference to "conditions (if any) prescribed in the regulations for the purposes of this subsection" be omitted from subsection 50-50(5).

(e) We recommend that for the purposes of subsection 50-50(3), a definition of "substantive requirements of governing rules" be inserted along the lines of that in paragraph 1.100 of the Explanatory Memorandum (namely objects and not-for-profit clauses).

(e) We recommend that a suitable process for affording an entity an opportunity to rectify a breach of section 30-18 or 50-50, prior to disendorsement being instituted, should be included in the Bill.

(f) We recommend that proposed section 50-50(3)(b) be omitted as it is unnecessary and may be inconsistent with possible future reforms in respect of unrelated business activities.

3 Gifts and Donations

(a) We note that subsection 30-18(3) (for DGRs) and subsection 50-50(4) (for other exempt entities) require that if an exempt entity provides money, property or benefits to another entity that is not a DGR or an exempt entity (as the case may be), the use of the money by the recipient (or any other entity) be taken into account in determining whether the giving entity satisfies the requisite test about operating and pursuing its purposes in Australia. This gives rise to several matters.

Benefits

(b) The term "benefits", now included in subsections 30-18(3) and 50-50(4), has not been included in prior exposure drafts of the Bill. The explanatory memorandum does not give any indication as to why it has been included at this late stage.

(c) We are concerned about the lack of clarity concerning the scope and meaning of the term "benefits". Potentially it may extend to benefits that are not tangible which would not ordinarily be subject to the tax system. For example, an exempt entity allowing another entity with which it is affiliated to use its goodwill in promoting a project. There may also be circumstances where a mutual benefit is derived such as where an exempt entity sends its staff overseas on a short-term secondment with an entity overseas. Arguably these forms of assistance could constitute benefits. It seems to us that if a benefit takes tangible form in any material sense, that it will be in the form of either money or property and that these words are sufficient on their own to capture the intent of subsections 30-18(3) and 50-50(4).

Recommendation

(d) We recommend that the words "or benefits" be omitted from subsections 30-18(3) and 50-50(4).

No limit to enquiry

(e) Subsections 30-18 (3) and 50-50 (4) effectively impose an onus on donor entities to make enquiries about the ultimate destination of gifts they make. We note that neither subsection 30-18(3) nor subsection 50-50(4) set out any particular enquiries or other steps that must be undertaken by the giving entity to determine how the recipient entity uses the given amount. The problem is increased with the inclusion of the words "or any other entity" in brackets in those subsections. Potentially there is no limit to the enquiries the giving entity needs to make concerning its gift.

(f) We submit that this is an unreasonable compliance burden. In particular, it leaves exempt entities exposed to the possibility of disendorsement on the basis of misrepresentations by others about how its gifts will be used or where others do not apply gifts in the manner instructed by the exempt entity when making the gift.

Recommendation

(g) We recommend the Bill provide that where the use of money by recipient entities (whether or not the initial recipient) is to be taken into account for the purposes of subsections 30-18(3) and 50-50(4), the use should be determined by reference to what the exempt entity providing the money or property knew or should reasonably have known about its use.

Enquiries concerning tax status

(h) Subsections 30-18(3) and 50-50(4) will require the tax status of all recipients of donations (whether the initial recipient or subsequent) to be ascertained before any donations are made in order for the exempt entity to know whether the recipient's use of a donation outside Australia will be taken into account in determining the extent to which the exempt entity operates, and pursue its purposes, in Australia.

(i) Exempt entities need to have a definitive source of information concerning the status of recipients to which they can refer in order to satisfy themselves that the entity is exempt or has DGR status (as the case may be).

Recommendation

(j) We recommend that the legislation provide that the Australian Business Register (or public information portal of the ACNC once established) can be relied upon as conclusive evidence of whether an entity is a deductible gift recipient or tax exempt entity for the purposes of subsections 30-18(3) and 50-50(4).

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4 Disregarded amounts

(a) Subsection 50-50(5)(b) provides that use of non-deductible gifts or contributions received by an entity are to be disregarded in determining whether that entity operates and pursues its purposes in Australia.

(b) We note that subsection 50-50(5) includes a proviso that "…the entity must comply with the conditions (if any) prescribed in the regulations for the purposes of this subsection…". The explanatory memorandum lists the following conditions that are expected to be prescribed by regulation –

- the entity must demonstrate that any activities undertaken outside Australia and the use of any money or property outside Australia is effective in achieving the entity's purpose;
- the entity must comply with all Australian and foreign laws, Australia's international treaty obligations, and uphold the high reputation of Australia and its not-for-profit sector when sending money overseas; and
- the entity must show it has in place current and appropriate governance arrangements for the proper monitoring of any overseas activities undertaken by both it and any in-country partners to ensure that any money and property are being used in an proper and effective manner.

(c) The first bullet point's reference to demonstrating that the use of money or property is effective in achieving the entity's purposes is unduly subjective. We submit that a regulator is not in a position to judge whether an entity is effective or not in fulfilling its purposes, only whether it is pursuing those purposes.

(d) It is not clear how the condition contemplated in the second dot point will work in practice. Conceivably a charity would need to obtain legal advice from an overseas lawyer concerning the laws in force in the foreign jurisdiction and a lawyer specialising in international law concerning Australia's treaty obligations before it could forward any gifts or contributions overseas. The cost of compliance may mean that small-scale charities can in practice gain no benefit from the disregarded amounts provisions.

(e) The monitoring requirements in the third bullet point are also unduly subjective referring to "proper", "appropriate" and "effective" arrangements. It will be difficult for an entity to know whether its arrangements meet these requirements regardless of how careful it is in putting monitoring arrangements in place.

(f) We note that the *Income Tax Assessment Act 1997* presently contains a disregarded amounts provision that is not subject to conditions. The explanatory memorandum for the Bill does not disclose any difficulties with the present provision and to our knowledge there are none. There is therefore no apparent need to impose these further compliance burdens on entities that fund activities overseas via donations they receive from supporters from their after tax income.

Recommendations

(g) We recommend the reference to "conditions (if any) prescribed in the regulations for the purposes of this subsection" be removed from this subsection.

5 Compliance with substantive governing rules

(a) Proposed subsection 50-50(3)(a) requires compliance with "all the substantive requirements" in an entity's governing rules.

(b) There will be potential for uncertainty about which requirements are substantive requirements. Most entities will have substantive requirements in their governing rules which have little relevance to their tax status.

(c) We therefore submit that the legislation should define "substantive requirements" along the lines of paragraph 1.100 of the explanatory statement to mean those requirements "relating to an entity's object and purpose and those relating to an entity's not-for-profit" status.

(d) Further, we submit that a breach or failure of one person associated with a tax exempt organisation or an isolated instance of non-compliance by an organisation should usually not result in the immediate loss of entitlement of the organisation to income tax exemption. Unless the breach is very serious, the organisation should be given some ability to rectify the breach. As currently drafted this requirement is a continuing requirement and consequently a single breach would always be sufficient to disentitle an organisation to endorsement for its entire future.

Recommendations

(e) We recommend that a definition of "substantive requirements of governing rules" be inserted along the lines of that in paragraph 1.100 of the Explanatory Memorandum.

(e) We also recommend that a suitable process for affording an entity an opportunity to rectify a breach, prior to disendorsement being instituted, be included in the Bill.

6 Use of income and assets

(a) We note that proposed section 50-50(3)(b) has been revised to require that an entity must "use its income and assets solely to pursue the purposes for which it was established."

(b) These words would appear to prevent an entity from applying any income or assets in furtherance of incidental or ancillary purposes. Treasury's Consultation Paper on *The Definition of Charity* would seem to make clear that if there is to be a statutory definition of 'charity' then, regardless of whether the test is "exclusive charitable purpose" or "dominant charitable purpose", there will be allowance for non-charitable purposes which are ancillary or incidental to the charitable purpose or purposes, as the common law presently also allows. It would be anomalous if the definition of charity permitted a charity to have such ancillary or incidental purposes but the charity is not able to apply any resources in furtherance of those purposes.

(c) Further, it is not clear how section 50-50(3)(b) relates to the possible measures to remove tax concessions in respect of unrelated business activities of not-for-profit entities. In particular, it is not clear at this stage whether the retention of profits from an unrelated business activity of a not-for-profit entity will be regarded as a failure to use its assets and income to pursue the purposes for which it was established and hence raise the prospect of disendorsement of the whole entity – rather than the removal of tax concessions just in respect of the retained profit from its unrelated business activities.

(d) In any event, we question the need for this provision at all. In order to obtain endorsement, the Commissioner of Taxation already requires that the organisation have a non-profit clause requiring the income and assets of the organisation to be used in furtherance of its objects. Consequently, this section is unnecessary if section 50-50(3)(a) requires compliance with the objects and non-profit clause included in the governing rules of the entity.

Recommendations

(e) We recommend that proposed section 50-50(3)(b) be removed on the basis that it is unnecessary and may be inconsistent with possible future reforms in respect of unrelated business activities.

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