



Law Council
OF AUSTRALIA

Legal Practice Section

8 October 2024

Senator Andrew Bragg,
Chair, Economics References Committee
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Chair

Submission to the Inquiry into Not-for-profit Entities—Tax Assessments

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (the **Committee**). The Committee welcomes the opportunity to make this submission to the inquiry into Not-for-profit Entities—Tax Assessments within the following terms of reference:

The implementation by the Australian Taxation Office of the requirement that certain non-charitable not-for-profit entities that self-assess as income tax exempt must lodge an annual not-for-profit self-review return to confirm their eligibility to self-assess as income tax exempt from 1 July 2023, with particular reference to:

- (a) *the implications of this requirement for Australia's not-for-profit community and the Australian Charities and Not-for-profits Commission;*
and
- (b) *any other related matter.*

2. The Committee has been very concerned about the implementation of this requirement for certain non-charitable not-for-profit entities (**NFPs**), that self-assess as income tax exempt, to lodge an annual not-for-profit self-review return to confirm their eligibility to self-assess as income tax exempt (the **requirement to lodge a return**) since it was announced in the 2021–22 Budget papers. In particular, we wrote to the Assistant Minister for Competition, Charities and Treasury and the Assistant Treasurer and Minister for Financial Services about this issue on 11 July 2024 (copy of the letter is attached) requesting the threshold be increased and that adequate consultation occurs for the 2025 return.
3. We endorse and agree with the issues raised in relation to the requirement to Lodge a return which are clearly set out in the paper by Myles McGregor-Lowndes in June 2022 entitled "A Primer on Reform of Tax Exempt Nonprofit Entities".¹

¹ McGregor-Lowndes, M (2022) A Primer on Reform of Tax Exempt Nonprofit Entities, Australian Centre for Philanthropy and Nonprofit Studies, QUT. Available at https://eprints.qut.edu.au/232181/8/EG_Reform_of_Tax_Exempt_Nonprofit_Entities_June_2022.pdf

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4. Our concerns can be summarised as:
- (a) lack of adequate consultation on the initial policy proposal;
 - (b) lack of proportionality of the measure given the large number of micro-organisations in the population and no identified tax abusive behaviour;
 - (c) lack of incremental implementation over several tax years for those above a defined threshold of revenue, given the complexities in identifying whether the NFP is a charity;

We note that, in a submission to the Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation, the ATO advised:

The current regulation of non-charity NFPs, particularly those entities with a large turnover, seems out of sync with charities in terms of their level of accountability and transparency. We do not seek to place a regulatory burden on small NFPs or build unnecessary bureaucracy. However, ACNC regulation could readily extend to those NFPs that wish to access tax concessions that have a turnover that warrants a higher level of transparency. Adopting the existing ACNC categories for medium and large charities the first stage could require currently self-assessing NFPs with a turnover of \$1M per annum to register with the ACNC and complete an annual information statement (AIS). In the table above there are 1,277 entities in this category (inclusion of donations in turnover would increase this number). In stage two that ACNC regulation could be extended to those NFPs with a turnover of \$250,000 to \$1M per annum (2,350 in the table above).²

- (d) the increase in regulatory burden and red tape for volunteer community groups at a time of decreasing engagement in voluntarism and giving;
 - (e) lack of any assessment of the benefit to government or risk to the public, in the context of the burden on NFPs;
 - (f) lack of any threshold or explanation as to why small NFPs are subject to this red tape.
5. Consultation on the policy would have alerted the government to the issues currently being faced by NFPs, the ACNC, advisers, and the ATO, and would have allowed time for the government and the ATO to consider an appropriate threshold, education and phase-in process.
6. The ATO has suggested the requirement to lodge a return is not onerous as NFPs should have been conducting an annual self-review of their tax status. However, consultation may have shown this was not the case, as many NFPs have been alarmed and confused by receiving the communications from the ATO in relation to lodging a return.

² 30 April 2018. Available at https://treasury.gov.au/sites/default/files/2019-12/c2017-t246103_submission_ato.pdf.

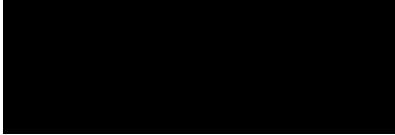
7. Further, contrary to the ATO's statements, it is often not a simple matter (and the ATO guidance does not assist) to:
 - (a) determine whether the NFP is charitable or not;
 - (b) if it is not charitable, which category it can self-assess as income tax exempt; and
 - (c) to set up the online access to the ATO in many NFP governance scenarios.
8. As it is not easy to decide if the NFP is charitable, there have been an avalanche of applications from these entities to the ACNC, resulting in extremely long waiting times for processing applications.
9. The differing guidance on the ATO and the ACNC websites demonstrates the complexities of determining the current category of these NFPs, and neither guidance adequately deals with how services provided to members impacts the tax status. We will not go through the guidance critiques in detail but provide the following three indicative examples:
 - (a) *self-assessing community service organisation and a charity*—the ATO's guidance³ appears to describe charitable purposes (community welfare) but does not explain what would make the NFP not charitable. The ACNC stresses that the purposes of providing social interaction will make the entity not eligible as a charity,⁴ however the ATO also notes that social clubs are not eligible for self-assessing—neither guides the reader as to the characteristics that make the other listed community welfare groups charities or not.
 - (b) *self-assessing cultural organisation and a charity*—again neither website identifies the distinguishing feature that would bring an NFP within the ACNC or within the self-assessment regime. The examples on the ATO website again appear to meet the description of being registered as a charity.
 - (c) *self-assessing educational organisations and a charity*—if possible, this category is even more confusing as most of the examples listed as NFP self-assessing types of educational organisations are in fact registered as charities e.g. universities, schools, colleges.
10. Now that the ACNC has processed a number of applications from self-assessing NFPs, it would be helpful if it could update the guidance to clarify what factors have prevented NFPs from being registered as charities.
11. The Committee is aware of many confused and concerned NFPs that don't know where to turn for assistance, which is why we welcome this review by the Senate Economics References Committee.

³ <https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/your-organisation/does-your-not-for-profit-need-to-pay-income-tax/types-of-income-tax-exempt-organisations/community-service-organisations>

⁴ <https://www.acnc.gov.au/organisations-have-been-self-assessing-income-tax-exempt>

12. We are happy to respond to any queries the Senate Economics References Committee may have. In the first instance, please contact the Charities and Not-for-profits Committee Chair, Bridgid Cowling, on [REDACTED]

Yours sincerely



Geoff Provis
Section Chair