



Law Council
OF AUSTRALIA

Legal Practice Section

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Dear Ministers

Thresholds for lodging returns for NFPs: Taxation Laws (Requirement to Lodge a Return for the 2024 Year) Instrument 2024

I write on behalf of the Charities and Not-for-Profits Committee (**Committee**) of the Law Council of Australia's Legal Practice Section about the thresholds for non-charitable not-for-profit entities (**NFPs**) lodging returns.

The Committee submits that the thresholds for non-charitable NFPs, currently in the Taxation Laws (Requirement to Lodge a Return for the 2024 Year) Instrument 2024 (**2024 Instrument**), are unreasonable and should be significantly increased in the Taxation Laws (Requirement to Lodge a Return for the 2025 Year) Instrument 2025, which will be enacted for the 2025 income year (**2025 Instrument**).

The Committee notes that many of the issues outlined in this letter were raised in a submission made by the Queensland Law Society to the Commissioner of Taxation on 9 April 2024 (**QLS Submission**) as part of the consultation process for the 2024 Instrument.

Context

As part of the 2021–22 Federal Budget, the Australian Government announced that it had provided \$1.9 million in capital funding for the ATO to build an online system to enhance the transparency of income tax exemptions claimed by exempt non-profit entities.¹ The announcement appeared to be connected to a review by the Australian Charities and Not-for-profits Commission (**ACNC**) that recommended that large NFPs (that are not charities) with a revenue of over \$5 million register with the ACNC in order to access tax concessions.²

¹ 2021-22 Budget Paper No. 2, 11 May 2021, 22. <https://archive.budget.gov.au/2021-22/index.htm>.

² *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review - Report and Recommendations*, 31 May 2018. <https://treasury.gov.au/publication/p2018-t318031>.

The Committee supports efforts to ensure the integrity of the taxation system. However, a careful balance is required not to place an unreasonable burden on small (generally volunteer-run) NFPs.

For the current financial year:

- all NFPs that self-assess as income tax exempt under Division 50 of the *Income Tax Assessment Act 1997* (Cth) (**self-assessing NFPs**) must lodge an *NFP self-review return 2024* to the ATO;³ and
- all taxable NFPs must lodge a tax return if their taxable income is above \$416.⁴

Key issues

- (a) The requirement for all self-assessing NFPs to file a self-review return is not proportionate to the tax risk, and is unduly burdensome on small entities.
- (b) The tax-free threshold of \$416 for taxable NFPs is outdated and inappropriate, and should be increased.
- (c) The consultation period in respect of the 2024 Instrument was inadequate and further consultation needs to be carried out in order to set balanced sensible thresholds in the 2025 Instrument.

Self-review return requirement is disproportionate and unduly burdensome

The requirement for all self-assessing NFPs to file a self-review return is disproportionate to the mischief the legislation is seeking to address.

The vast majority of self-assessing NFPs are small and micro-organisations with no employees and volunteer committees of management.⁵ These organisations do not represent a risk to taxation revenue, nor is there any evidence, indication or credible risk that they are currently involved in significant tax abusive behaviour.

The Committee submits that imposing the review requirement on all self-assessing NFPs imposes incommensurate compliance costs for micro and small organisations. These organisations provide valuable social capital, however they are fragile in the face of unwarranted regulatory burdens such as this.

The burden is not only completing the NFP self-review return but understanding the issues and making the assessment prior to getting to completing the return. Many small NFPs will not have considered the tax application to their minor income streams.

The issues are technical and confusing as can be ascertained by working through the numerous pages on the ATO website:⁶

- There are 8 broad categories for self-assessment (with sub-categories within those)—many of which are very similar to charitable purposes. Each NFP must overcome the first difficulty of assessing what category might apply, and then the second of assessing whether they should in fact be registered as a charity. This has resulted in a surge in charity applications by self-assessing NFPs as a means of assessing whether they are a 'non ACNC type of entity'. The categories

³ 2024 Instrument, s 6(11).

⁴ 2024 Instrument, s 7(11)(a).

⁵ For estimates of the numbers of small organisations see 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. (**QUS Discussion Paper**).

⁶ See, <https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/statements-and-returns/in-detail/reporting-requirements-to-self-assess-income-tax-exemption/who-needs-to- lodge>.

themselves are not well understood, and the analysis of whether an NFP is eligible is neither simple nor likely to result in a clear answer.

- If the NFP is not covered by one of the categories and is not eligible to be registered as a charity by the ACNC, it must then move to consider whether its income is exempt under the mutuality principles which are extremely complicated, particularly where there are multiple sources of income.
- Individuals then need to connect through their own personal MyGovID which has proven to be a significant administrative barrier for small NFPs with turn-over (often annually) of volunteer committee members.

The Committee submits that a reasonable threshold should be introduced to exempt small NFPs (regardless of their purpose or activity) from annual self-assessment. The annual self-assessment return should be limited to NFPs of a more substantial nature. The thresholds should be subject to consultation and could, for example be consistent with other thresholds such as:

- the ACNC minimum reporting threshold of \$500,000 for small organisations; or
- the GST non-profit threshold of \$150,000.

In our respectful view, a higher threshold could also be considered while still ensuring proportionality in relation to the tax risk. It would also ensure that small organisations that provide many social and cultural benefits to Australian society, often operating with minimal resources, can continue to provide those benefits to the community.

Tax-free threshold for taxable NFPs is too low

Section 7(11)(a) of the 2024 Instrument provides that taxable NFPs are not required to file an income tax return if their income is \$416 or less. This threshold of \$416 is in line with the exemption provided for taxable NFPs in section 23(6) of the *Income Tax Rates Act 1986* (Cth).

The threshold is outdated and requires amendment. As noted in the Not-for Profit Sector Tax Concessions Working Group paper, *Fairer, simple and more effective tax concession for the not-for-profit sector*,⁷ this threshold does not appear to have been increased since its introduction in the mid-1960s, when it was the same as the tax-free threshold for individuals (£209 pounds in 1963). It is an extreme example of bracket creep.

The Committee submits that the threshold should be significantly increased and the amount should be subject to consultation. But it would make sense for it to be at the same threshold as set for self-assessing NFPs after or as part of the consultation referred to above.

Consultation is required

The QLS Submission outlines in clear detail the concerns regarding the consultation period for the 2024 Instrument under 'Consultation concerns'. The Committee reiterates these concerns, namely:

- while there were targeted consultations conducted from February 2024 on the *implementation* of the 2024 Instrument, those consultations were not on the suitability of the policy or alternative policy approaches;

⁷ Available at: <https://treasury.gov.au/sites/default/files/2019-03/NFP-Sector-WG-Final-Report.pdf>.

- information regarding the consultations was scant on the ATO website, social media and on other professional updates and bulletin services; and
- conducting the consultation from 12 March to 9 April 2024 over the Easter and school holiday period provided inadequate time for response—this is especially the case in the context of organisations run by volunteer office bearers who do not ordinarily meet during school holidays.

Given this is the most significant change to reporting obligations for the non-profit sector in over a decade, the consultation has been inadequate.

In the Committee's experience, many organisations affected by the 2024 Instrument did not become aware of the consultation period. As a result, the consultation could be regarded as not meeting the requirements under section 17(2) of the *Legislation Act 2003* (Cth) of ensuring that persons likely to be affected by a proposed instrument have an adequate opportunity to comment on its proposed content.

We acknowledge that the 2024 Instrument is now in effect. However, the Committee urges the ATO to conduct adequate consultation, and take into account our suggestions above, before the legislation that applies to 2025 is enacted.

Conclusion

The Committee wishes to express its concern that valuable social and community benefit organisations and their volunteers are having to shoulder the burden of unnecessary and unreasonable regulation. The burden outweighs any benefit or tax risk and therefore is not good regulation and is contradictory to the Government's commitment to reducing red tape.

We submit that this legislation introduces a de minimis threshold for the filing of returns for self-assessing NFPs, and that it increases the current tax-free threshold for taxable NFPs.

The Committee would welcome the opportunity to discuss these issues further and provide additional information as required. In the first instance, please contact the Chair of the Committee, Bridgid Cowling at BCowling@abl.com.au.

Yours sincerely



Geoff Provis
Section Chair