

Chapter 1

Introduction

The referral

1.1 On 23 August 2012, the House of Representatives referred the Australian Charities and Not-for-profits Commission Bill 2012 ('the ACNC Bill'), the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 ('the TLAB') to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report.

1.2 The same day, the Senate Selection of Bills Committee referred the three bills to the Senate Community Affairs Legislation Committee for inquiry and report by 12 September 2012. As at the date of this report, the Senate Community Affairs Legislation Committee had not presented its report.

1.3 The Parliamentary Joint Committee (PJC) on Corporations and Financial Services was established under section 243 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) to monitor, among other matters, the operation of Australia's corporations legislation and to inquire into the activities of the Australian Securities and Investments Commission (ASIC). The committee is therefore particularly interested in those aspects of the bills that relate to ASIC and the operation of the Corporations Act (see chapter 3).

1.4 This inquiry follows an inquiry by the House of Representatives Standing Committee on Economics into the exposure draft of the ACNC Bill and the Consequential and Transitional Bill. That committee made 11 recommendations to amend the draft legislation, all of which the government accepted. Part of the PJC's immediate interest, therefore, is to gauge stakeholders' views on whether these amendments adequately meet their concerns (see chapter 2).

1.5 Although this inquiry has had a truncated timeframe, it is broader in remit than the House Economics inquiry in that the PJC has also considered the provisions of the TLAB (see chapter 4).

Conduct of the inquiry

1.6 The inquiry was advertised in *The Australian* newspaper on 29 August 2012. Details of the inquiry, the bills and associated documents were placed on the committee's website.

1.7 The PJC and the Senate Community Affairs Committee agreed to send joint invitations to stakeholders to make a submission. Individuals and organisations were

given the option of lodging a submission with one or both committees. The committees wrote to 59 organisations and individuals inviting submissions by 30 August 2012.

1.8 The PJC received 47 submissions which are listed in Appendix 1. The Senate Community Affairs Committee received 48 submissions, which are listed on its website.¹ Forty organisations submitted to both committees. Readers wanting a full list of submissions to both committees should note that the following organisations submitted only to the Senate committee: Catholic Social Services Australia, FamilyCare, YouthCare, PilchConnect, Aid to the Church in Need, the Green Institute and the Australian Conservation Foundation.

1.9 A public hearing was held on 3 September 2012 at Parliament House in Canberra. A list of witnesses who gave evidence at the hearing is in Appendix 2. The Senate Community Affairs Legislation Committee held its public hearing the following day. The following witnesses appeared before both committees: Treasury, the Department of the Prime Minister and Cabinet, the Australian Charities and Not-for-profit Implementation Taskforce, the Not-for-Profit Reform Council, the Community Council for Australia and World Vision.

Acknowledgements

1.10 The committee thanks those organisations and individuals who made submissions to the inquiry, and those who gave evidence at the public hearing. It is mindful of the abridged timeframe for this inquiry and is grateful to all those who participated at short notice. It is particularly thankful to those witnesses who gave evidence to both committees (see paragraph 1.9).

1.11 The committee also thanks Mr David Crosbie for his willingness to give evidence on the day of his father's funeral. Mr Crosbie is the Chief Executive Officer of the Community Council for Australia, which represents a number of high profile not-for-profit organisations. The committee recognises his significant contribution to the reform process and to the not for profit sector generally.

Note on references

1.12 The references in this report to submissions are to individual submissions as received by the committee, not to a bound volume. References to Committee Hansard are to the proof Hansard transcripts available on the Parliamentary website. Please note that page numbers may vary between the proof and official Hansard.

1 See Senate Community Affairs Legislation Committee, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/charities_commission/submissions.htm (accessed 5 September 2012).

Overview of the not-for-profit sector

1.13 In its seminal 2010 report into the contribution of the not for profit sector, the Productivity Commission (PC) found that there are approximately 600 000 not-for-profit organisations operating in Australia.² This figure excludes body corporates such as strata titles. Approximately 440 000 are small unincorporated organisations, and 58 779 have an 'active tax' profile through employing staff or accessing tax concessions. The PC also noted that not-for-profit organisations are significantly underpinned by volunteer staffing arrangements.³ The report highlighted the diversity of the not-for-profit sector, which encompasses a broad spectrum of entities and service areas including charities, churches and religious organisations, advocacy groups, medical research organisations, educational organisations, animal protection and welfare organisations, labour unions and cooperative schemes.⁴

1.14 Statistical analysis provided by the Australian Charities and Not-for-profits Commission Implementation Taskforce aligns with the PC's findings:

- Australia's NFP sector is large and diverse (around 600 000 entities) which serves the community in a range of economic, social, cultural and environmental areas.
- Of these, around 60 000 are charities (21 000 with DGR [deductible gift recipient] status as at July 2011).
- About 5000 of these charities are constituted as companies limited by guarantee.
- About 136 000 NFP incorporated associations were registered with State and Territory governments in Australia in the 2008–09 financial year.
- About 440 000 organisations are small unincorporated NFPs.⁵

1.15 As the statistics provided by the PC and the Australian Charities and Not for Profits Implementation Taskforce indicate, there is significant diversity in the constitution and formation of not-for-profit entities. Approximately 11 000 not-for-profit entities (including 5000 charities) are incorporated as companies limited by guarantee under the *Corporations Act 2001*.⁶ Not-for-profit entities may adopt other

2 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. xxiii.

3 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. xxvi.

4 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. xxvii.

5 Australian Charities and Not-for-profits Commission Implementation Taskforce, *Key Statistics*, <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=statistics.htm> (accessed 30 August 2012).

6 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.25.

company structures regulated under the Corporations Act,⁷ however, ASIC has advised that 'company limited by guarantee' is the prevalent form of incorporation for charities and not-for-profit entities.⁸ Alternatively, not-for-profit entities may operate as incorporated associations under State and Territory legislation.⁹

1.16 At present, the regulation of the not-for-profit sector is fragmented both across jurisdictional boundaries and at the federal level:

- The Australian Taxation Office (ATO) regulates not-for-profit entities' access to tax concessions including income tax exemptions, deductible gift recipient status and fringe benefit tax.¹⁰ As Treasury has noted, this effectively positions the ATO as the regulator that determines whether an entity is a charity.¹¹
- Not-for-profit entities that adopt a company structure must report to ASIC and fulfil their obligations under the *Corporations Act 2001*.¹²
- Indigenous corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* are regulated by the Office of the Registrar of Indigenous Corporations.¹³

7 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.25.

8 Australian Securities and Investments Commission, *Registering charities and not-for-profit organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations>, (accessed 30 August 2012).

9 Australian Securities and Investments Commission, *Registering charities and not-for-profit organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations>, (accessed 30 August 2012).

10 Australian Taxation Office, *Tax concessions – overview – tax basics for not-for-profit organisations*, <http://www.ato.gov.au/nonprofit/content.aspx?doc=/content/33743.htm&mnu=45419&mfp=001/004> (accessed 30 August 2012).

11 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.20.

12 Australian Securities and Investments Commission, *Registering charities and not-for-profit organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations>, (accessed 30 August 2012); Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraphs 1.24–1.26.

13 Office of the Registrar of Indigenous Corporations, *About the Registrar*, [http://www.orac.gov.au/Content.aspx?content=aboutUs/aboutTheRegistrar.htm&menu=about&class=about&selected>About the Registrar](http://www.orac.gov.au/Content.aspx?content=aboutUs/aboutTheRegistrar.htm&menu=about&class=about&selected>About%20the%20Registrar) (accessed the August 2012); Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraph 1.727

- At the State and Territory level, each jurisdiction regulates not-for-profit entities that operate as incorporated associations. Not-for-profit organisations are required to comply with State and Territory laws, such as laws relating to fundraising activities.¹⁴

1.17 It has long been recognised that these arrangements have created an onerous reporting burden for the sector, unnecessarily diverting resources from community and related services and making it difficult for the public to connect to the work of NFPs. The case to reform the regulatory framework for the not-for-profit sector was put well in the PC's 2010 report.¹⁵ It stated:

NFPs' compliance costs are minimised when they have to face a single clear set of requirements—whether in regard to registration, tax endorsement or fundraising with common reporting standards and requirements, and where one report satisfies most, if not all, obligations. The public benefits when it can easily access information on an NFP from a trustworthy source, as do philanthropists and government agencies. The challenge is to provide a regulatory system that offers these advantages, but that is proportionate to the risks posed by different types of NFPs.¹⁶

The bills and the report structure

1.18 Chapter 2 of this report examines the provisions of, and submitter views on the ACNC Bill. The bill establishes the ACNC as the Commonwealth regulator of the not-for-profit sector. It also confers on the Commission and, in particular, the Australian Charities and Not-for-profits Commissioner, administrative and enforcement powers underpinned by offences and administrative sanctions that would apply to not-for-profit entities registered with the Commission.

1.19 The Explanatory Memorandum to the ACNC Bill notes that the ACNC is intended to operate as a 'one-stop shop' for not-for-profit entities accessing Commonwealth services and concessions. As a portal to Commonwealth services and benefits, it is intended that the introduction of a single Commonwealth regulator will increase efficiencies for the not-for-profit sector by minimising regulatory duplication.¹⁷ The ACNC Bill provides that the new regulator will be established on 1 October 2012.

14 Further detail is provided in Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profit Commission (Consequential and Transitional) Bill 2012, paragraphs 1.28.

15 The committee thanks the Chair of the Not-for-profit Reform Council, Ms Linda Lavarch, for drawing its attention to this quote. *Proof Committee Hansard*, 3 September 2012, p. 15.

16 Productivity Commission, *Contribution of the not for profit sector*, January 2010, p. 115.

17 Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012, p. 4.

1.20 Chapter 3 of this report examines the provisions of, and views on, the Consequential and Transitional Bill. This bill proposes to amend 34 Commonwealth Acts to support the operation of the ACNC and ensures there is no duplication of responsibilities between agencies. It also contains transitional provisions designed to assist not-for-profit entities to adjust smoothly to the new national regulatory framework.

1.21 Neither the ACNC Bill nor the Consequential and Transitional Bill contain details on the governance standards and reporting requirements that the Commission will require of not-for-profit entities. These details will be set out in the regulations and will come into effect on 1 July 2013. The government has planned an extensive consultation process with the sector on these governance and reporting arrangements. Following 1 October 2012, the ACNC will play a key role in these negotiations.

1.22 Chapter 4 of the report outlines the provisions and the purpose of the TLAB. This bill has also been referred to as the 'In Australia' bill:

- it restates the 'in Australia' special conditions for income tax exempt entities by ensuring that they generally must be operated 'principally' in Australia and for the broad benefit of the Australian community;
- it codifies the 'in Australia' special conditions for DGRs, ensuring they must generally operate solely in Australia and pursue their purposes solely in Australia. Overseas aid funds and some environmental organisations are exempted from this provision; and
- it introduces a consistent definition of a 'not-for-profit entity' throughout the tax laws.

1.23 Chapter 4 notes that while there has been some anxiety about the changes in the tax bill, the amendments essentially restore income tax exemption arrangements for the not-for-profit sector as they existed prior to a 2008 High Court decision.¹⁸

18 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55.