

Chapter 6

Models of regulation

6.1 The previous Chapter determined that a single national regulator should be established for Not-For-Profit Organisations in Australia. This chapter determines the functions of such a regulator, based on the functions of established regulatory bodies for non-for-profit organisations in England and Wales and New Zealand.

The Regulator for Charity in England and Wales

6.2 A large number of submitters to this Inquiry commended the Charity Commission in England and Wales (also colloquially referred to as the UK Charity Commission) to the committee as an example of a regulator which is working well in a number of areas and could be modified for adoption in Australia:

The Charity Commission in the UK is the best practice model. It has as its focus the sustainability of the whole sector. It is the face of the nonprofit sector and focuses on more than disclosure regimes.¹

CSA points to the UK Charity Commission as one possible model for such a specialist regulator.²

Australian regulation does not differentiate between social enterprises and charities, failing to address the differences in their operations. FIA recommends the consideration of a model of regulation that recognises the difference between charities and social enterprises similar to the UK model.³

Mission Australia recommends the establishment of a national body that would regulate the charity sector, with a structure similar to the regulatory bodies established in the UK and New Zealand.⁴

6.3 The Charity Commission for England and Wales was established by law as both a regulator and a registrar for Charities. The aim of the Commission is 'to provide the best possible regulation of these charities in order to increase charities' efficiency and effectiveness and public confidence and trust in them'.⁵ The Commission notes that it fulfils the role by:

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- 1 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, QUT, *Submission 27*, p. 7.
 - 2 Chartered Secretaries Australia, *Submission 17*, p. 12.
 - 3 Fundraising Institute Australia, *Submission 77*, p. 9.
 - 4 Mission Australia, *Submission 174*, p. 5.
 - 5 Charity Commission, *About Us*, <http://www.charitycommission.gov.uk/tcc/ccabout.asp> (accessed 10 November 2008).

- securing compliance with charity law, and dealing with abuse and poor practice;
- enabling charities to work better within an effective legal, accounting and governance framework, keeping pace with developments in society, the economy and the law; and
- promoting sound governance and accountability.⁶

6.4 To achieve these aims, the Commission works in four ways. These include:

- (a) Using information and advice to influence behaviour – the Commission is responsible for gathering information on charities individually and collectively, and making this information public.
- (b) Equipping charities to work better – this is done through providing guidance and advice, visiting charities, requiring the modernisation of the constitutions of existing charities and by registration processes (which may include recognising new charitable purposes).
- (c) Promoting legal compliance through publications and casework.
- (d) Intervention and enforcement – the Commission evaluates complaints of mismanagement or misconduct or investigates other evidence of possible causes for concern. The Commission has powers to intervene in charities to protect charity assets, which can be used if formal investigation establishes serious mismanagement or abuse.⁷

6.5 In undertaking its work, the Commission follow seven principles, which include: accountability; independence; proportionality; fairness; consistency; diversity and equality; and transparency.

Register of Charities

6.6 In its role as Registrar of Charities, the Commission is responsible for maintaining a Register of Charities. The Register records details of organisations that:

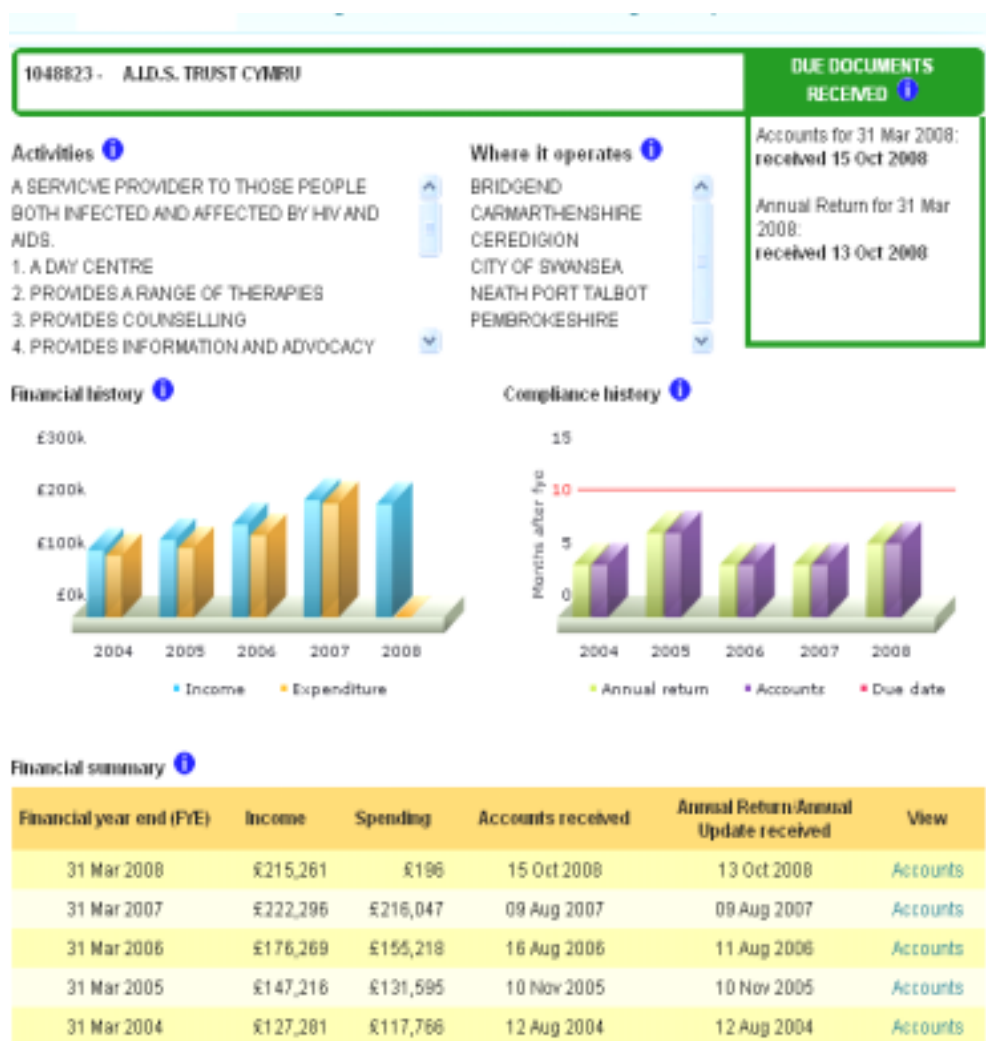
- have been recognised as charitable in law;
- hold most of their assets in England and/or Wales;
- have all or the majority of their trustees normally resident in England and/or Wales, or
- are companies incorporated in England or Wales.⁸

6 Charity Commission, *The Charity Commission and Regulation*, <http://www.charitycommission.gov.uk/spr/regstance.asp> (accessed 10 November 2008).

7 Charity Commission, *The Charity Commission and Regulation*, <http://www.charitycommission.gov.uk/spr/regstance.asp> (accessed 10 November 2008).

8 Charity Commission, *Welcome to the Register of Charities*, <http://www.charity-commission.gov.uk/Showcharity/RegisterOfCharities/RegisterHomePage.aspx?Language=English> (accessed 10 November 2008).

6.7 The Register is maintained online and is a searchable register that provides a range of key facts and figures about the work and finances of each charity. It records details about who is responsible for running the charity and records whether they have complied with their reporting and accounting responsibilities. Larger entities with an income in excess of £500,000 must also include a financial profile. Information for the Register is collected from Annual Returns provided by Charities.



6.8 The above was retrieved from the Register. The search term 'AIDS' was used which revealed that the Regulator monitors 13 AIDS-related charities in England and Wales. The register of the first entry on the list, A.I.D.S. Trust Cymru, is pictured. Each entry shows the registered number of the charity, its activities, where it operates, a financial history, a compliance history and a financial summary, with additional links to view the accounts of the organisation.

9 Register of Charities, *A.I.D.S. Trust Cymru*, <http://www.charitycommission.gov.uk/ShowCharity/RegisterOfCharities/CharityWithoutPartB.aspx?RegisteredCharityNumber=1048823&SubsidiaryNumber=0> (accessed 15 November 2008).

6.9 The Register also serves a purpose for those wishing to find out more about a charity in England or Wales, potentially to donate or offer volunteer services. For example, a person living in Bridgend who wished to donate to a local HIV charity could use the Register to locate A.I.D.S. Trust Cymru. It is likely that this function could be expanded to include all Not-For-Profit Organisations should a similar register operate in Australia.

New Zealand Charities Commission

6.10 The New Zealand Charities Commission was established by the *Charities Act 2005* and commenced operation on 1 July 2005. The Commission is an Autonomous Crown Entity, which is a body that has been established by, or under, an Act and is independent of Government, but which must have regard to government policy when directed by the responsible Minister.¹⁰

6.11 In announcing its intention to establish a charities commission, the New Zealand Government indicated that:

One of the key drivers for the Commission's establishment is the desire to uphold public trust and confidence in the charitable sector by increasing its accountability to donors, the public and the Government.¹¹

6.12 The *Charities Act 2005*, which was passed by the New Zealand Parliament in April 2005, specifies the functions of the Commission, which include:

- promoting public trust and confidence in the charitable sector;
- encouraging and promoting the effective use of charitable resources;
- educating and assisting charities in relation to matters of good governance and management though, for example, providing information to charities about their rights, duties and obligations under the Act, issuing guidelines or recommendations, and issuing model rules;
- establishing and maintaining a registration and monitoring system for charitable organisations;
- monitoring and promoting compliance with the Act;
- stimulating and promoting research about the charitable sector; and
- reporting and making recommendations to Government about charitable sector matters.¹²

10 Charities Commission (undated), *Statement of Intent 2007-2010*, Wellington, New Zealand.

11 Ministry of Economic Development, *Overview of Key Decisions. Regulatory and Competition Policy Branch*, online at www.med.govt.nz/templates/MultipageDocumentPage_7469.aspx (accessed 30 September 2008).

12 Clause 10, *Charities Act 2005* (New Zealand).

Registration and Monitoring

6.13 One of the Commission's primary functions is the registration and monitoring of charities. The Charities Register commenced registrations on 1 February 2007 and charities had until 1 July 2008 to register.

6.14 Registering with the Charities Commission is voluntary and has no bearing on the legal status of a charitable organisation. For example, registration with the Charities Commission does not replace incorporation under the *Incorporated Societies Act 1908*. Incorporated societies must, however, still register with the Charities Commission if they want to gain or maintain tax exempt status.

6.15 A charity that chooses not to register with the Commission may still call itself a charity and solicit funds from the public, however unregistered charities do not qualify for tax exempt status. Such organisations are also not entitled to refer to themselves as a 'registered charitable entity'.¹³

Monitoring

6.16 All charities registered with the Charities Commission are required to file an annual return, along with a copy of their financial accounts (audited or unaudited). The Annual Return Form collects information about the:

- sector and region in which the charity operates;
- activities undertaken by the charity and who benefits from those activities; and
- people involved in the charity, including number of employees and volunteers.

6.17 The return also requires financial information relating to income and expenditure, assets and liabilities, and equity, broken down into a number of categories, including: membership fees; donations; grants; salaries and wages; and investments. In addition to the annual return, registered organisations are required to notify the Commission of changes to a charity's name, address for service, balance date, rules, purposes or officers, within specified timeframes.

6.18 Financial penalties may be applied to charities that do not file Annual Returns in a timely fashion, and to organisations that fail to notify the Commission of changes to the organisation.

Costs

6.19 Registration is provided free of charge, however organisations are required to pay a fee for filing their annual return. In July 2008 the fee was \$50 if the return was

13 Charities Commission, *About Registration*, www.charities.govt.nz/guidance/about_registration.html (accessed 24 October 2008).

filed electronically online and \$75 if the annual return was filed in paper form. Organisations would also face compliance costs in ensuring that annual returns were correctly completed and filed on time.

An Australian Model

6.20 In addition to the endorsements for existing registers, the Committee heard numerous suggestions for the functions of an Australian register:

Its primary role shall be that of an enforcement authority with supportive advisory role.¹⁴

Such a body would:

- set the format for the way that information is reported;
- monitor organisational compliance, and
- act when organisations fail to comply with the regime (ie by failing to supply information, or by supplying inadequate information).¹⁵

[W]e believe such a body should take on more of an advisory role providing assistance and a level of accreditation of such organisations. These could involve:

- a. setting parameters and guidelines for best practice;
- b. approving exemptions from reporting requirements as referred to above;
- c. assisting in the establishment of training programs; and
- d. promoting the principals of good corporate governance.¹⁶

An Australian body should have a role to support charities to understand and comply with their obligations in the first instance, as well as enforcing standards and investigating breaches and complaints where they occur.¹⁷

6.21 In considering the possible functions of a national regulator in Australia, the committee examined the functions of the existing regulator for indigenous corporations operating in Australia.

Office of the Registrar of Indigenous Corporations – An Australian Case Study

6.22 The Registrar of Indigenous Corporations is an independent statutory office holder who is responsible for the administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). The Registrar has 'powers to intervene

14 CPA Australia, *Submission 98*, p. 5.

15 Wesley Mission Melbourne, *Submission 58*, p. 3.

16 Moore Stephens, *Submission 115*, p. 3.

17 Oxfam Australia, *Submission 116*, p. 12.

that are similar to those exercised by the Australian Securities and Investments Commission (ASIC).¹⁸ The role of ORIC is to support the Registrar.

6.23 ORIC is an agency of the Department of Families and Housing, Community Services and Indigenous Affairs. It is responsible for regulating approximately 2,600 Indigenous corporations, including charities and Not-For-Profit Organisations.

6.24 The key functions of the Registrar and ORIC are to:

- administer the CATSI Act and maintain the register of Aboriginal and Torres Strait Islander Corporations
- regulate corporations which are registered under the CATSI Act
- monitor the legislative compliance of corporations and assisting corporations to maintain compliance
- appoint special administrators when required
- provide training for directors, members and key staff in good corporate governance
- advise individuals and groups on the registration process
- register new corporations
- assist corporations to transition from the ACA Act to the CATSI Act
- provide advice and information to corporations
- assist with the resolution of disputes within and between corporations.¹⁹

6.25 Like the Charity Commission in England and Wales, ORIC has an enforcement function:

Under the CATSI Act the Registrar has the power to investigate alleged corporate offences, to identify cases that are appropriate for referral as a prosecution, and to refer these matters to the appropriate prosecution agency. These investigation and referral powers enable the Registrar to respond when alleged corporate offences come to light, further increasing the transparency and security of Indigenous corporations for funding bodies and the broader business sector.²⁰

6.26 ORIC's system of regulation has not been comprehensively evaluated to date. However, in its recent publication *Overcoming Indigenous Disadvantage: Key Indicators 2007*, the Productivity Commission designated ORIC's training program,

18 Office of the Registrar of Indigenous Corporations, *About the Registrar and ORIC*, http://www.orac.gov.au/about_ORIC/default.aspx (accessed 10 November 2008).

19 Office of the Registrar of Indigenous Corporations, *Submission 161*, p. 2.

20 Office of the Registrar of Indigenous Corporations, *Submission 161*, p 13.

and ORICs training partnership with the Victorian state government and Swinburne University, as 'Things that work' in the field of increasing governance capacity and skills.²¹

Committee View

6.27 The committee notes the aims, objectives and functions of the national regulators in the UK and New Zealand. The committee is also aware that neither system of regulation can be copied and implemented without change into Australia. The two fundamental differences between an Australian regulator and the overseas model are that:

- Australia's Commission should regulate both charities and other Not-For-Profit Organisations; and
- All Not-For-Profit Organisations should be subject to the regulator, regardless of size (appropriate disclosure regimes for organisations based on size are discussed in Chapter 10).

6.28 However, the committee believes there is sufficient comparability between the Australian and UK environment to propose certain functions of the Australian national regulator. The committee has also had regard to the role of ORIC, which is already operating successfully in Australia, in recommending the following functions:

- (a) Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.
- (b) Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis. (Chapter 2 provides additional justification for this function.)
- (c) Secure compliance with the relevant legislation.
- (d) Develop best practice standards for the operation of Not-For-Profit Organisations.
- (e) Educate / Advise Not-For-Profit Organisations on best practice standards.
- (f) Investigate complaints relating to the operations of the organisations.
- (g) Educate the public about the role of Not-For-Profit Organisations.

21 Productivity Commission, *Overcoming Indigenous Advantage: Key Indicators 2007*, http://www.pc.gov.au/data/assets/pdf_file/0003/69276/keyindicators2007.pdf, p. 646, (accessed 27 November 2008).

6.29 Under a single, national regulator, ORIC would cease to operate as an entity. The new regulator would assume the responsibility of regulating indigenous Not-For-Profit Organisations, allowing these organisations the same access to the benefits that other Not-For-Profit Organisations are expected to gain from the introduction of the national regulator (as identified in Chapters 7, 9 and 10).

6.30 The committee notes that requiring all Not-For-Profit Organisations to register will have the added advantage of allowing for the first time a comprehensive descriptive analysis of the Sector.

6.31 The committee also believes that the introduction of a single national regulator will have extensive benefits for those operating Not-For-Profit Organisations. It is anticipated that an Australian National regulator would have an educative function, providing training courses, advice, basic IT spreadsheet systems and help for those establishing Not-For-Profit Organisations with a 'starter kit'. The regulator would also offer free help and advice for organisations wishing to amalgamate with similar organisations.

6.32 The regulator would also assist organisations with sharing part time staff, and providing details of pro bono lawyers and accountants if required. This function would be especially helpful for Not-For-Profit Organisations operating in rural and regional areas.

6.33 A national regulator would also give the general public a role in monitoring the Sector. Any person could check that an organisation that fundraises or doorknocks is a genuine, well regulated Not-For-Profit Organisation simply by looking up that organisation on the Register. If an organisation does not appear on the Register's website, indicating that it is not registered as required, it could be reported to the regulator for further investigation and possible prosecution.

6.34 To offset the cost of operations, larger Not-For-Profit Organisations should pay a fee, as with the New Zealand Regulator. The committee believes that micro Not-For-Profit Organisations should be exempt from this fee. The payment of an annual fee may also serve as a reminder to organisations with minimal reporting requirements under the regulator to ensure that their details are current.

Recommendation 4

6.35 The committee recommends that the Australian National Regulator for Not-For-Profit Organisations should have similar functions to regulators overseas, and particularly in the UK, including a Register for Not-For-Profit Organisations with a compulsory sign-up requirement. The committee recommends consultation with the Sector to formulate the duties of the National Regulator.

6.36 **As a minimum, the Regulator should:**

- (a) **Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each**

organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.

- (b) **Develop and maintain an accessible, searchable public interface.**
- (c) **Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis. (Chapter 2 provides additional justification for this function.)**
- (d) **Secure compliance with the relevant legislation.**
- (e) **Develop best practice standards for the operation of Not-For-Profit Organisations.**
- (f) **Educate / Advise Not-For-Profit Organisations on best practice standards.**
- (g) **Investigate complaints relating to the operations of the organisations.**
- (h) **Educate the public about the role of Not-For-Profit Organisations.**

6.37 The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.

Recommendation 5

6.38 The committee recommends that the Commonwealth Government develops the legislation that will be required in order to establish a national regulator for Australia.

Recommendation 6

6.39 The committee recommends that, once a Register is established and populated, this information should be provided to the ABS, who should prepare and publish a comprehensive study to provide government with a clearer picture of the size and composition of the Third Sector.