

Our ref: CO:AC

20 July 2012

Committee Secretary
Standing Committee on Economics
PO Box 6021
Parliament House
CANBERRA ACT 2600

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

Dear Sir/Madam

Australian Charities and Not-For-Profit Commission Bill 2012 (the Bill)

I am writing to you with my comments on the Exposure Draft of the Bill.

I am a lawyer and I have been engaged in legal practice for over 33 years in Australia, England and Hong Kong. I practise in the area of corporate law, trusts and estates and the not for profit sector. I am also a board member of a charity and advise charities. My comments are made from the perspective of a lawyer as well as someone engaged in management and corporate governance of a charity. My comments are as follows:

1. Section 25-5 - Entitlement to Registration

The Common Law has over several centuries established the definition of a "charity" and what is necessary in order to be considered a charity. Where attempts are made to codify Common Law or import concepts developed by the Common Law into legislation (as appears to be the case in section 25.5) it is possible that subtle nuances may be lost.

It appears that sub-clause 25-5(5) attempts to summarise in one table the Common Law definition of a charity.

I appreciate that sub-clause 25.5(6) is intended to import the Common Law into the definitions.

I am concerned that it should be made clear beyond any possible doubt that Item 4 in the Table, "Entity with another purpose that is beneficial to the Community" specifically recognises the sub-categories of charities which fall within that term under the Common Law. These include:

- agriculture
- propagation of the arts;
- relief of human distress;
- protection of animals.

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I believe that this can be dealt with the Explanatory Memorandum by stating words to the following effect:

“The intention of section 25-5 sub-section (60 of the Bill is to preserve the Common Law insofar as it relates to what is a charity in relation to items 1, 2, 3 and 4. “Purposes beneficial to the Community” will continue to apply to charities which have been recognised under this category, including:

- agriculture;
- propagation of the arts;
- relief of human distress;
- protection of animals.”

2. Section 35-10 – Revoking Registration

I am concerned that the Commissioner may revoke a registration under 35-10(1)(c) if the Commissioner considers that an entity “is likely to contravene a provision of the Act”. I have concerns with regard to this provision:

- (1) The section is quite draconian and unusual in allowing cancellation even before a contravention; and
- (2) There is no threshold of materiality.

3. Section 205-25(3) – Definition of “Large Entity”

I believe that a threshold of annual revenue of \$1 million, which determines that an entity is a large entity is low. I suggest that a figure of \$3 million be set with a provision for indexation.

Also, in the not for profit sector earnings through large donations or legacies under wills can distort earnings in any single year. Before an entity is considered to be a large entity the relevant revenue threshold should have been met for 2 consecutive years.

In any event, an entity should not have to determine part way through its financial year whether it is a “large entity”.

4. Section 60-80 – Additional Reporting Requirements

I have concerns that the Commissioner can impose a further set of requirements over and above the legislation. There needs to be certainty in regulation. At the very least, any additional requirements should be set by statutory instrument, where there will at least be the opportunity for Parliament to review it.

5. Division 75 – Monitoring

I have concerns about the concept of monitoring without the ACNC having to show cause. A large number of charities are small community organisations and do not have ready access to professional advice, which is increasingly expensive.

The process of an unannounced “visit” from the regulator can be quite daunting for lay people.

I would prefer to see the monitoring provisions deleted, or at least modified so that the

Commissioner must have reasonable grounds for suspecting a possible contravention.

Where a monitoring inspection is to be undertaken in circumstances where the Commissioner does not have reasonable cause to inspect a contravention, then this should be on notice (not less than 14 days) to the entity, so that the entity can ensure that relevant officers are available to assist.

I hope that my comments will be taken into account.

I would respectfully point out to legislators the Parliamentary draftsman and the policy branch that it is increasingly difficult to persuade people to take on roles in the not for profit sector. Many of those involved do so in their free time without a salary. I am concerned that increasing regulation and concern about legal exposure (particularly for "technical" infringements) will be a serious disincentive for people to become involved.

Yours sincerely

 CHRIS OSBORN