

ACNC – WHY THE FUSS

The Federal Government has issued an “Options Paper – Australia’s Charities and Not-for-profits. Options for Replacement Arrangements Following the Abolition of the Australian Charities and Not for Profits Commission July 2014” (“the Options Paper”) seeking stakeholder feedback by 20 August 2014.

It would be fair to say that the Options Paper does not seek “options”, but rather seeks comment on a preferred pathway. The options paper describes the following:

“The Government introduced the Australian Charities Not-for-profits-commission (Repeal (No.1) Bill 2014 (“The No. 1 Bill”) on 19 March 2014. The Bill repeals the Australian Charities and Not-for-profits Commission Act, but leaves open the proposed arrangements that will replace the ACNC.”

It is proposed that feedback from stakeholders will *“help inform drafting of the Australian Charities and Not-for-profits Commission (Repeal) (No. 2) Bill (“the No. 2 Bill”) to be introduced later this year.”*

Accordingly, the Repeal of the ACNC will be effected in two stages. In short, the No 1 Bill repeals the ACNC but will not come into effect until Schedule 1 of the No. 2 Bill commences.

We consider that the establishment of the ACNC was flawed from the outset and that conditions for any reasonable prospects for success were never established. The major design flaws in our view, included:-

1. “Reducing red tape” could not be significantly achieved without the agreement of all States and Territories with the then Federal Government. This was not achieved, but in fact reporting and registration obligations to the ACNC increased red tape. Whilst providing information and seeking approvals for various matters remained with each State jurisdiction and remains an issue for those NFP’s dealing across more than one State. Some have argued that the reporting to ACNC has only marginally added to the red tape. However the objective was to reduce red tape at both Federal and State levels.

Accordingly, in our view the necessary pre conditions were not established for the ACNC to achieve its often repeated objective of *“report-once use often”* as part of a *“one-stop shop”* for NFP regulation.

2. The ACNC has always been viewed through a charities prism with insufficient consideration to other not-for-profits accessing income tax concessions, (including, but not limited to, clubs and associations for community service, sport and culture).
3. It would prove inevitable that confusion would be caused between the ACNC and the Australian Taxation Office (“ATO”) on establishing charitable status and the “administration” of the tax concessions. Although we understand some protocols have apparently been agreed between the ACNC and the ATO in relation to charities. The issues for other NFP’s apparently have yet to be addressed.
4. The “turning off” of certain provisions of the Corporations Act, particularly regarding companies limited by guarantee, to be replaced by vague ACNC “Governance Principles” posed further uncertainty. The law on Directors Duties in our opinion has developed and is flexible under the Corporations Act. The ACNC needed greater clarity on its “Governance Principles” and a demonstrated willingness to assist charities. For those entities not covered by the Corporations Act could be covered by reference as has been substantially the case with the Associations Incorporation Reform Act (2012) Vic.

It is also apparent that in one case of a dispute between some directors of a charity that the ACNC was unwilling to intervene. This was an example of where timely and practical assistance from a body such as the ACNC would be helpful and efficient.

5. Frequently charities and their representatives have argued about difficulties with the ATO from an inherent conflict between “revenue raisers” (collectors) and the granting of charitable status. (ie income tax exempt status). The suggestion being that it is in the interests of the ATO (as a revenue raiser) to maximize revenue by reducing the number of income tax exempt entities.

In the writers opinion the ATO had managed this process well in the past and also offered assistance in meeting charities obligations to income tax legislation. Whilst there appeared to be an abnormally high number of charities tax issues determined by the courts in the past 8 years, who is to say the same issues would not have found their way to the courts in the ACNC / ATO tax environment. Perhaps the perceived problems caused by the ATO as seen by some have more to do with budgetary constraints and the loss of experienced ATO officers from the NFP area.

It is hoped that whichever body has responsibility for income tax status and administration that it is adequately resourced and offers assistance to NFP’s.

The writer wishes to make clear that the senior officers appointed to the ACNC were outstanding. But even outstanding people cannot operate effectively with their hands tied behind their backs.

It is agreed that the concept and objects of a body such as the ACNC, has considerable merit, but it needs to be empowered with the structure and powers to complete its intended objectives.

The Options Paper sets out some practical steps in the Repeal of the ACNC. It is not perfect by any means, but the ACNC was not either. For effective and efficient reforms the States and Territories need to be in agreement with the Federal Government over the reduction in red tape and the reduction in reporting obligations, applications, registrations and administration of income tax matters. Further adequate resourcing is a necessary precondition for any organisation to successfully carry out its charter. We hope the issues can be revisited to overcome the current fundamental flaws.

Date Published: 3 August 2014

Victor Hamit
Wentworth Lawyers Pty Ltd
Level 40
140 William Street
MELBOURNE VIC 3000

Tel: (03) 9607 8380
Mobile: 0408 590 706

Email: vhamit@wentworthlawyers.com.au
Website: www.wentworthlawyers.com.au

Disclaimer:

These materials are provided as a general guide on the subject only, not as specific advice on any particular matter or to any particular person. Please seek specific advice on your own particular circumstances as situations and facts vary.

Liability limited by a scheme approved under the Professional Standards Legislation