

RECENT DEVELOPMENTS IN AUSTRALIAN CHARITY LAW: ONE STEP FORWARD AND TWO STEPS BACKWARD

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Introduction

In 2007 the Federal Government of Australia moved to a Labor party majority. This change of government heralded some significant developments in charity law that had been foreshadowed in previous government reports and reviews. This period of time coincided with several court cases dealing with important principles relating to charity law, two at the Australian High Court level (the highest judicial authority).

These significant developments in charity law were the introduction of the Australian Charities and Not-for-Profits Commission (ACNC) in 2012, the introduction of a statutory definition of charity which came into effect on 1 January 2014 and the proposal of an unrelated commercial income tax for charities. These developments were not just momentous by themselves but came after a lengthy period of inertia in Australian government policy relating to charity oversight and regulation.

This article is divided into three parts. The first briefly touches on the historical context of Australian charity law with particular regard to the regulation of charities. The second deals with Australian developments in the regulation of charities and not-for-profits (NFPs). The most significant development from the perspective of administration and oversight of charities is the shift from de facto regulation of the charity and NFP sector at the Federal level by the Australian Taxation Office (ATO) to the introduction of the ACNC. This part also details the statutory definition of charity that came into effect on 1 January 2014 and the

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proposal to tax the unrelated commercial income of charities. Part three of the paper analyses the political outfall from the above developments due to a change in Federal Government to a Liberal/National Party Coalition in late 2013. This Government has publicly stated that it intends to abolish the ACNC and that it is opposed to a statutory definition of charity, although it has recently withdrawn from Parliament legislation proposing a return to the common law. It has also distanced itself from the introduction of income taxation on commercial activities of charities.

Historical Context of the Regulation of Charities in Australia

In 2000 the Federal Government for the Commonwealth of Australia established an inquiry (commonly referred to as the Sheppard Inquiry) into the definition of charities and related organisations.¹ There were several terms of reference for the Inquiry; however, the main one was that the Committee examine and report on existing definitions of charitable, religious, and community service NFP organisations. The administration of charities and the role of the ATO in endorsing charities as exempt from income tax and as deductible gift recipients (to enable taxpayers to claim a tax deduction for donations) was not a specific term of reference although the fourth term of reference did state that:²

The Committee will provide options for enhancing the clarity and consistency of the existing definitions in Commonwealth law and administrative practice with respect to charities, religious and community service not for profit organisations. These should lead to legislative and administrative frameworks at the Commonwealth level that are appropriate for, and adapted to, the social and economic environment of Australia.

In view of this, the majority of submissions addressed the issue of the definition of 'charity', the problems with the common law definition and how this applied to their own organisation. Most did not consider how the Commonwealth Government, through the ATO, determined their charitable status. Of the 373 submissions made to the Sheppard Inquiry, 52 however discussed the role of the ATO in determining charitable status. Of these 52 submissions, 47 were in favour of an independent regulator.

The final Report recommended that an independent administrative body be established to determine the status of charities and related entities. The Sheppard

1 Commonwealth of Australia, Ian Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001).

2 *ibid* 291.

Inquiry also encouraged cooperation between the Federal Government and the State Governments for a national definitional framework. The Report stated that:³

A clear and consistent accountability framework would help to maintain and enhance public confidence in the integrity of charities and related entities. From the sector's point of view, there should also be scope to develop a common framework of reporting requirements that could meet the needs of all relevant government agencies, and thus reduce the administrative burden associated with complying with the current diverse reporting requirements.

This Report was preceded in 1995 by an Australian Industry Commission review *Charitable Organisations in Australia* which investigated the size, scope, efficiency, and effectiveness of the services provided in Australia by charitable organisations and of the funding arrangements for services delivered overseas by charitable organisations.⁴ This Review did not perceive a need for a national monitoring agency however it did consider that uniform regulation should be introduced.⁵

In December 2008 the Senate Standing Committee on Economics report *Disclosure Regimes for Charities and Not For Profit Organisations* recommended that a single independent national organisation to regulate NFPs be introduced.⁶ In 2010 a national review of Australia's taxation law system also made this recommendation⁷ and in 2010 the Productivity Commission also supported the introduction of an independent regulator of the charities and NFP sector.⁸

None of these recommendations were acted upon until in 2011 the Australian Treasury (a Federal Government agency) again opened up the issue of whether there should be a national regulator of the charities and NFP sector in Australia when it released *Consultation Paper: Scoping Study for a National Not-For-Profit*

3 *ibid* 293.

4 Commonwealth of Australia, Industry Commission, *Charitable Organisations in Australia* (Report No 45, 16 June 1995).

5 *ibid* 210.

6 Commonwealth of Australia, Senate Standing Committee on Economics, *Disclosure Regimes for Charities and Not For Profit Organisations* (2008) 2.

7 Commonwealth of Australia, *Australia's Future Tax System: Report to the Treasurer* (2010) Ch B, B3 - Tax concessions for not-for-profit organisations: B3-3 Reform directions, Recommendation 41.

8 Commonwealth of Australia, Industry Commission, *Contribution of the Not-for-Profit Sector* (2010).

Regulator.⁹ This Paper indicated that the Australian regulator would be similar to the Charity Commission for England and Wales, an independent regulator of the charities sector in those countries.

The Federal Government proposed that legislation include certain ‘principles-based’ governance standards for charities and NFPs. This aspect was motivated by two issues: to enable the ACNC to take over regulation of companies limited by guarantee from the corporate regulator, the Australian Securities and Investments Commission (ASIC), and to impose ‘common’ standards upon diverse legal entities. Despite continued reference to ‘principles-based’ governance, however, the Consultation Paper on this aspect of the reform discussed matters such as imposing the equivalent of directors’ duties across all entities, and requiring compulsory insurance.¹⁰

The Government encapsulated its reform agenda into three main objectives. These were ‘to maintain trust and confidence in the NFP sector’, to ‘protect against the misuse of charitable monies’ and to better describe ‘the front line delivery of services and benefits’ to the community.¹¹ The first of its initiatives to be implemented was the ACNC.

The Australian Charities and Not-for-Profits Commission

The Australian Charities and Not-for-Profits Act 2012 (Cth) (ACNC Act) was passed in November 2012 and the ACNC became officially operative on 3 December 2012 (although staff had been progressively appointed since the preceding February).

The ACNC Act is an act of the Australian Commonwealth Government and therefore is only binding on areas within the authority of the Commonwealth Parliament. This means that it does not apply to Australian state laws relating for example to charitable fund raising or licensing of charitable service providers such as aged care facilities or NFP hospitals unless there has been an agreement between the Commonwealth and the relevant state.

9 Commonwealth of Australia, *Consultation Paper: Scoping Study for a National Not-For-Profit Regulator* (2011).

10 *ibid.*

11 Commonwealth of Australia, Budget, May 2011.

Overview of the ACNC

The ACNC is part of the Australian Commonwealth government.¹² The objects of the ACNC are enshrined in the legislation and provide that it should:¹³

- maintain, protect and enhance public trust and confidence in the Australian NFP sector;
- support and sustain a robust, vibrant, independent and innovative Australian NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the sector.

To achieve these objects the ACNC registers organisations as charities,¹⁴ provides information, guidance, advice and other support to charities and maintains a free and searchable public register so that anyone can look up information about registered charities. The ACNC also advises that it is working with state and territory governments to develop a ‘report-once, use-often’ reporting framework for charities. In this way it hopes to overcome the unnecessary red tape that exists in Australia particularly when charities operate in more than one state or territory and must therefore complete reports and other paperwork for each separate jurisdiction that essentially cover the same function.

The ACNC Act establishes a Commissioner and provides that the Commissioner is the national regulator for NFP entities including charities. The Commissioner is responsible for registering NFPs according to their type and subtypes. Registration with the ACNC is a necessary precondition for access to certain Commonwealth taxation concessions, including exemption from income tax.¹⁵ Registration under the Act is also a prerequisite for other exemptions, benefits and concessions provided under other Australian laws.¹⁶

Section 15-10 of the ACNC Act establishes a set of comprehensive principles that the Commissioner must have regard to when she exercises her powers and functions. There are overarching and general guidelines such as the maintenance, protection and enhancement of public trust and confidence in the NFP sector and the maintenance and promotion of the effectiveness and sustainability of the sector. There are also more specific and practical guidelines such as the need for transparency and accountability of NFPs by ensuring the public has access to

12 ACNC Act, s 105-5.

13 *ibid* s 15-5. Also see ACNC website <http://www.acnc.gov.au/>

14 It is intended that it will also register NFPs.

15 ACNC Act, s 15-5(3).

16 *ibid* s 15-5(4).

information about these entities. The Commissioner is required to have regard to minimising procedural requirements and duplication. She is also required to consider the benefits gained from assisting NFPs in their compliance with and their understanding of the ACNC Act by providing them with guidance and education. The final principle in section 15-10(h) is that the Commissioner should have regard to the unique nature and diversity of NFPs and the distinctive role that they play in Australia.

Reporting to the ACNC

The ACNC Act establishes a single reporting framework proportional to the size of the registered charity.¹⁷ The differential reporting framework is intended to minimise compliance costs, whilst ensuring appropriate levels of accountability and transparency. Once registered, a charity is required to provide an annual information statement for a financial year¹⁸ which in Australia is 1 July until 30 June. There is a set format for the information statement as approved by the Commissioner.¹⁹ The information statement has different levels of reporting requirements depending on the charity's status as small, medium or large.

A charity is considered small if it has annual revenue of less than Australian \$250,000.²⁰ Although a small charity will need to provide an information sheet it will not have to provide financial reports. Revenue is calculated in accordance with the accounting standards in force at the relevant time.²¹ Medium charities, those with revenue between \$250,000-\$1 million,²² will, in addition to the information statement, have to provide financial reports. These reports will be subject to an annual review but not a full audit. Charities with revenue of \$1 million or more will be classified as large²³ and have to provide audited financial reports.

The parameters of the financial statements and reports are provided in the regulations.²⁴ The regulations establish the accounting standards that apply and

17 *ibid* Div 60.

18 *ibid* s 60-5.

19 *ibid* s 60-5(1).

20 *ibid* s 205-25(1).

21 *ibid* s 205-25(4).

22 *ibid* s 205-25(2).

23 *ibid* s 205-25(3).

24 Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) (the ACNC Regs).

provide that the financial statements and notes ‘must give a true and fair view of the financial position and performance of the registered entity’.²⁵ The regulations further provide that if the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements.

Registered charities are also required to notify the ACNC of certain matters in addition to lodging financial reports. These include changes to contact details and any significant contraventions of the ACNC Act or governance standards that would disentitle the charity to registration.

Governance standards for charities

Before a charity can be registered with the ACNC it must meet a set of governance standards²⁶ (unless it is a basic religious charity). The charity must continue to meet these standards to stay registered. These standards set out a minimum standard of governance and their stated aim is to help promote public trust and confidence in charities. They apply from 1 July 2013.

There are five Governance Standards. Standard one relates to the purposes and NFP nature of a registered entity. It provides that charities must be NFP and work towards their charitable purpose. They must be able to demonstrate that they are NFP and provide information about their purpose to the public. Standard two is in respect of accountability to members of the charity and states that charities that have members must take reasonable steps to be accountable to their members and provide their members adequate opportunity to raise concerns about how the charity is governed. Standard three requires compliance with Australian laws. Charities must not commit a serious offence (such as fraud) under any Australian law. Standard four requires that all charities check that their responsible persons (such as board, committee members or trustees) are not disqualified from managing a corporation under the Corporations Act 2001 (Cth) or disqualified from being a responsible person of a registered charity by the ACNC Commissioner. Charities must take reasonable steps to remove any responsible person who does not meet these requirements. Standard five states that charities must take reasonable steps to make sure that responsible persons understand and carry out certain duties. These duties include to act honestly and in the best interests of the charity and to ensure that the financial affairs of the charity are managed responsibly.

25 *ibid* reg 60-10.

26 *ibid* Div 45.

Public portal

A further very innovative development of the ACNC is that it now maintains a public information portal. This register includes key details of registered charities which are publicly available on the portal (eg, governance structures, purposes, activities, contact details, annual reporting information).

The portal is intended to provide transparency around the activities of charities. It is also designed to assist charities in explaining what they do and to help donors, funders and the general public to find out about charities and how they operate.

Enforcement powers of the ACNC

In order to be able to enforce its reporting and other requirements the ACNC has certain powers that include information gathering, issuing warning notices and applying to the courts for an injunction to prevent registered charities contravening the Act. Chapter 4 of the Act enables the ACNC to: gather information, monitor activities and inquire about matters relating to general compliance with, or potential breaches of, the provisions of the Act; issue a warning notice or a direction to a registered charity; accept enforceable undertakings from registered charities to comply with the Act, governance standards or external conduct standards; apply for injunctions to restrain registered charities from contravening the Act, or to compel compliance with the Act; and suspend or remove a responsible person (for example, a trustee or board member) of a registered charity.

To ensure the accuracy of information provided to the ACNC, the Act provides a proportional administrative penalty regime, consistent with the Taxation Administration Act 1953 (Cth).

ACNC and Charity Commission for England and Wales

Many of the functions of the ACNC are similar to the Charity Commission for England and Wales (the Charity Commission). For example, the annual reporting requirement and the registration function for charities. The Charity Commission website states that although it is part of the Civil Service it is completely independent of Ministerial influence and also independent from the sector it regulates. In the same manner the ACNC is part of the Commonwealth Government of Australia.²⁷

The Charity Commission however advertises itself as a regulator of the charities sector in England and Wales. This is clear from its website which states that it is ‘The regulator for charities in England and Wales’.²⁸ This statement heralds a different approach to that of the ACNC which has a softly, softly touch and a more educative role. The Charity Commission also has a number of quasi-judicial functions where it uses powers similar to those of the High Court in England and Wales. For example, it has the power to create *cy-près* schemes to amend a charity’s objects under sections 62 and 69 of the Charities Act 2011 only where the trustees cannot amend their purposes under their own powers or amend their purposes under section 275 of the Charities Act 2011. The ACNC does not have these powers.

A final significant difference is that Australia has six states and two territories. These states and territories have important responsibilities relating to charitable entities. The reporting and other requirements of the states and territories place significant compliance burdens on charities that operate in these jurisdictions. This is particularly onerous if they operate at a multi-state level. Due to the constitutional limitations of the Commonwealth Government it is not possible for the ACNC to override these powers.²⁹ Therefore successive governments have recognised that harmonisation of laws and regulations that relate to charities and NFPs, is a long term issue that will need state and territory agreement.³⁰

Statutory Definition of Charity

Until 2014 charity law in Australia had been solely a creature of the common law with its antecedents in English common law. Over the last six years the High Court of Australia has reviewed the case law relating to the definition of a charity and confirmed its place as the foundation of the law of charity in Australia. The common law, as stated in these cases, is that Australia recognises that the words ‘charity’ and ‘charitable’ have a technical legal meaning that is based in the Preamble to the Charitable Uses Act 1601 (commonly referred to as the Statute of Elizabeth) and the subsequent case law. In *Central Bayside General Practice Association Limited v Commissioner of State Revenue*,³¹ *Commissioner of Taxation v Word Investments Ltd*³² and *Aid/Watch Inc v Commissioner of Taxation*³³ the High Court confirmed that the Preamble and the guidelines set out in

28 Charity Commission website <http://www.charitycommission.gov.uk/>.

29 Australian Government, *Final Report: Scoping Study for a National Not-for-Profit Regulator*, April 2011, 65, 68.

30 *ibid.*

31 [2006] HCA 43.

32 [2008] HCA 55.

33 [2010] HCA 42.

*Commissioners for Special Purposes of Income Tax v Pemsel*³⁴ established the technical legal meaning of charity.

However in 2013 the Federal Government drafted a statutory definition of charity and this law came into force on 1 January 2014 as the Charities Act 2013 (Cth). Under the Charities Act, an entity is ‘charitable’ if it is a ‘charity’.³⁵ This means it must satisfy four requirements:³⁶

- it is a not-for-profit entity;
- all of the entity’s purposes are *charitable* and for the *public benefit* (or are ancillary or incidental to *and* in furtherance or in aid of such purposes);
- none of the entity’s purposes are disqualifying purposes; and
- the entity is not an individual, political party or government entity.

Charitable purposes

In general terms the Charities Act follows the approach of the common law in:

- preserving the charitable purpose and public benefit requirements; and,
- determining an entity’s purpose from its governing rules, activities and other relevant matters.

However, it significantly expands and elaborates on the types of charitable purposes (in particular, the fourth type - other purposes beneficial to the community) and expands the rules for determining whether a purpose is for the public benefit.

Charitable purposes are defined in section 12 of the Act as:

- advancing health, including preventing and relieving sickness, disease or human suffering;
- advancing education (one of the four traditional heads);
- advancing social or public welfare, which expands the traditional head of ‘relief of poverty, age or impotence’ and includes
 - relief of distress and disadvantage of individuals and families;
 - caring for and supporting the aged and disabled, children and young individuals;

³⁴ [1891] AC 531.

³⁵ Charities Act 2013, s 5.

³⁶ *ibid* ss 5, 6, 11 and 12.

- caring for, supporting and protecting children and young individuals, and, in particular, providing child care services,
- and, a new category of assisting the rebuilding, repair or securing of assets after major disasters in prescribed circumstances;
- advancing religion (one of the four traditional heads);
- advancing culture, including promoting and fostering culture and preserving and protecting Australian heritage;
- promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- promoting and protecting human rights;
- advancing the security or safety of Australia or the Australian public, including promoting the efficiency of the Australian Defence Force;
- preventing or relieving the suffering of animals;
- advancing the natural environment;
- any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned above; and,
- promoting or opposing a change to any matter established by a law, policy or practice in the Commonwealth, a State, a Territory or another country so long as the promotion or opposition is in furtherance, or aid, of any of the purposes mentioned above.

This final charitable purpose recognises the High Court's decision in the *Aid/Watch*³⁷ case which held that generating public debate by lawful means about government policy is charitable. This is a significant departure from the common law position established in *Bowman v Secular Society*³⁸ which maintains that charitable purposes cannot include political advocacy on the basis that:³⁹

a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

37 Above n 33.

38 [1917] AC 406.

39 *ibid* 442.

The public benefit requirement

Public benefit is defined as a purpose that would be of benefit to the public and available to the general public or a sufficient section of it. The Act continues the exemption first recognised in the *Extension of Charitable Purpose Act 2004* (Cth) that open and non-discriminatory self-help groups and closed or contemplative religious orders are exempt from the public benefit requirement.

The Act further provides that the following purposes are presumed to be for the public benefit, as long as there is no contrary evidence:⁴⁰

- (i) preventing and relieving sickness, disease or human suffering (there is no such presumption under the common law);
- (ii) advancing education;
- (iii) relieving the poverty, distress or disadvantage of individuals or families;
- (iv) caring for and supporting the aged or individuals with disabilities (there is no such presumption under the common law); and,
- (v) advancing religion.

A purpose is considered to be for the public benefit if its achievement would be of benefit to the public, and the benefit is available to the general public or a sufficient section of it.

Exceptions to the public benefit requirement

There are two significant exceptions to the public benefit requirement. The first is where the purpose is relieving the necessitous circumstances of one or more individuals in Australia. This appears to continue the common law exemption⁴¹ that purposes for the relief of poverty of particular individuals or private groups of individuals are charitable, despite not being open to the public.⁴² The second is where the purpose is directed to Indigenous Australians and the entity receives, holds or manages benefits related to native title or other traditional rights of ownership, occupation, use or enjoyment of land. This exception expands the application of the law of charity to NFPs that are for the benefit of certain

40 Charities Act 2013, s 7.

41 *Davies v Perpetual Trustee* (1959) 59 SR (NSW) 112 and subsequently confirmed in respect of Indigenous Australians in *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197.

42 Charities Act 2013, s 8.

Indigenous Australians and whose beneficial group is defined through family relationships.⁴³

The background to this change in the law is complex but hinges on the concept of public benefit as it relates to charities that are for the ultimate benefit of a related group of persons, in this case, Indigenous Australians. Australian courts have followed the English common law in this area. The legal principle is summarised by the 1945 decision of *Re Compton, Powell v Compton*.⁴⁴ In this case the English Court of Appeal refused to find a public benefit in a trust to educate the descendants of three named persons because the beneficiaries were defined by reference to a purely personal relationship to those persons. It was considered 'in its nature a private or family benefaction'.⁴⁵ Lord Greene MR expressed the public benefit principle:⁴⁶

They do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of their specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are AB, CD and EF but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were individuals AB, CD and EF, I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character.

In *Davies v Perpetual Trustee Co Ltd*⁴⁷ the Privy Council was required to consider this issue in the context of Australia charity law. The question was whether a trust for the education of descendants of Presbyterians from Northern Ireland who were alive on 21 January 1897 and who had settled in the Colony (New South Wales) was charitable. The Privy Council held that even though the purpose of the trust was charitable because it was for the advancement of education, there was no public benefit because the class of persons to be benefited was defined through their descent from certain ancestors. In other words, there was a family

43 *ibid* s 9.

44 [1945] Ch 123.

45 *ibid* 128.

46 *ibid* 129-130.

47 (1959) 59 SR (NSW) 112.

relationship that defined the recipients of the charitable benefit which meant that there was no public benefit.

This principle has also been applied in respect of Indigenous Australians. In *Aboriginal Hostels Ltd v Darwin City Council*⁴⁸ Justice Nader of the Supreme Court of the Northern Territory confirmed that in order to be a charity, the Aboriginal Hostels Ltd had to benefit a section of the community that was not defined through family relationships. His Honour stated that ‘the character that marks the potential beneficiary must not be a relationship to a particular person or persons such as one of blood or employment’.⁴⁹

The Australian common law therefore states that a NFP is not for the benefit of a section of the public if the quality that distinguishes the class of beneficiaries from other members of the public depends on their relationship to a person and it is impossible for anyone outside this relationship to enter. This means that there is no public benefit for an otherwise charitable purpose where the beneficiaries of this purpose are defined through descent from a common ancestor.

Although the cases have accepted that Indigenous Australians are a sufficient section of the public for charity law purposes, the family restriction posed a legal impediment to charities for the benefit of native title groups as envisaged under the *Native Title Act 1993* (Cth) and owners of traditional lands under other Australian land rights legislation. This was because claims to traditional land are often determined through kinship and descent from a common ancestor. Thus any charity established to advance a charitable purpose in respect of these groups would previously have failed the public benefit requirement.

The change in the common law is limited to Indigenous Australians but in addition the relevant charity must also be in receipt of money or non-cash benefits in respect of Indigenous traditional lands.

Unrelated commercial income tax of charities

In 2008 the High Court of Australia decision of *Word Investments* confirmed that a charity that engaged in a business could still maintain its charitable status. Briefly, the facts of this case are that in 1975 Word Investments Ltd was established as a company limited by guarantee by members of the Wycliffe Bible Translators Australia. Wycliffe engaged in Christian evangelical objectives and was recognised by the ATO as a charity for the advancement of religion. The memorandum of association of Word Investments allowed it to carry on business

48 (1985) 75 FLR 197.

49 *ibid* 209.

activities in connection with its other purposes (which were all clearly charitable as being for the advancement of religion). Any funds from these activities went directly to Wycliffe and other related entities to support the evangelical work and therefore the religious charitable purpose. Word however engaged in the business activity of running a funeral business along commercial lines although it distributed all surpluses towards its charitable purposes. The funeral business was open to the general public.

The crucial legal issue in the decision was whether a NFP could be considered charitable when it carried on an unrelated business, the funds from which went towards its purposes, which were all charitable. In reaching its conclusion the majority in the High Court emphasised that Word Investment's powers to carry on business activities were a means to it achieving its religious charitable purposes and therefore did not preclude charitable status.⁵⁰ The Court stated:⁵¹

Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.

As a result of this case, the ATO issued a Decision Impact Statement that confined the decision to its facts.⁵² Then in the 2011 Federal Budget the then Labor Government announced that there would be reforms to the charities and NFP sector to ensure that any income tax exemption did not apply to unrelated business income.⁵³ The Government stated that it would ensure that the income tax exemption was targeted only at those activities that directly further a NFP's altruistic purposes. Under this measure, the NFP income tax concessions would only apply to profits generated by unrelated commercial activities that are directed back to a NFP entity to carry out its altruistic work. This means that NFP entities would pay income tax on profits from their unrelated commercial activities that are not directed back to their altruistic purpose (that is, the earnings they retain in their commercial undertaking). Commercial activities that further a NFP entity's altruistic purposes, as well as small-scale and low-risk unrelated commercial activities, were excluded from these changes.

The Labor Government also announced that it would delay the start date for these new arrangements from 1 July 2011 to 1 July 2012, and that they would initially

50 [2008] HCA 55 [24].

51 *ibid* [24].

52 Australian Taxation Office, Decision Impact Statement, *Commissioner of Taxation v Word Investments Ltd*, 26 May 2009.

53 Australian Government, Budget 2011-12, *Not-for-profit sector reforms*.

affect only new unrelated commercial activities that commenced after 10 May 2011.⁵⁴ Draft legislation was planned for release in late 2012.⁵⁵ However, this was not forthcoming before the Federal election. In December 2013 the current Federal Government stated that ‘the Government will not proceed with the measure to “better target” not-for-profit tax concessions at this stage, but will explore simpler alternatives to address the risks to revenue’.⁵⁶ One commentator has stated that ‘the Coalition has indicated it is predisposed not to proceed with this measure’.⁵⁷

A Change in the Federal Government leads to a Change in Policy Direction for Charity Law and Regulation

An Australian Federal election was held in September 2013 and this resulted in a change in the Parliamentary majority from the Labor Party to a Liberal/National Party coalition. The latter is a traditionally conservative political alliance. One of its implicit political policies is the reduction of what it terms ‘red tape’.⁵⁸

At a speech to the Australian Institute of Company Directors’ NFP Directors Lunch in Melbourne on 29 January 2014 the Federal Social Services Minister Mr Kevin Andrews confirmed his commitment to the abolition of the ACNC.⁵⁹ His rationale is that ‘we’ll abolish the Australian Charities and Not-for-Profit Commission which in the view of this Government imposes an unnecessary and ponderous compliance burden on the sector’.⁶⁰ He went on to say that the Government intended to establish a National Centre for Excellence and that the

54 David Bradbury, Assistant Treasurer and Mark Butler, Minister for Social Inclusion, ‘Extended Start Date for 2011-12 Budget Measure to Better Target Not-For-Profit Tax Concessions’ (Joint Media Release, 30 March 2012) available at <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/009.htm&pageID=003&min=djba&Year=&DocType>

55 University of Melbourne, Australian Research Council Project, ‘Defining, Taxing and Regulating the Not-for-Profit Sector in Australia: Law and Policy for the 21st Century’. See http://tax.law.unimelb.edu.au/files/ACLA_seminar_state_of_reform.pdf

56 Arthur Sinodinos, Assistant Treasurer, Media Release, ‘Integrity restored to Australia’s tax system’, 14 December 2013.

57 Elizabeth Turnour, Moores, Solicitors, *NFP Reform Agenda Update*, 9 December 2013.

58 See e.g. speech by Joe Hockey, Treasurer, The Global Age of Responsibility - reinventing Bretton Woods Committee Conference, 2014.

59 Pro Bono News, ‘Charity Navigator’ Model Tipped to Replace ACNC’ available at <http://www.probonoaustralia.com.au/news/2014/01/%E2%80%98charity-navigator%E2%80%99-model-tipped-replace-acnc#>

60 *ibid.*

ultimate aim was to transfer the National Centre for Excellence's ownership to the social sector. He considered that this move would ensure a transfer from coercive compliance and regulation to collaborative education, training and development.⁶¹ Minister Andrews concluded with the view that he hoped to get the legislation to abolish the ACNC into Parliament within the following two months and to have the National Centre for Excellence up and running by early next financial year. He also announced as part of the plan that there would be a return of powers to Federal government agencies, in particular the ATO, which previously regulated parts of the sector.⁶²

Legislation abolishing the ACNC was presented to the Federal Parliament in March 2014. The Senate (Australia's upper house) referred the Bill to the Senate Economics Legislation Committee for inquiry and to report on this matter on 27 March 2014. This Committee has called for public submissions and advises that it is due to report by 16 June 2014.⁶³ The Bill states that the ACNC will be abolished but not until a replacement is in place. However, to make matters even more uncertain, there are no details in the Bill about what this will involve.⁶⁴

A Bill to repeal the Charities Act was submitted to Parliament with a suite of other proposals in March 2014 but then withdrawn before it could be debated. There has been no official announcement regarding whether or not the Federal Government intends to proceed with the repeal of the statutory definition of charity. The Opposition (the Labor Party) and the Greens (a minority party) have stated that they oppose the repeal. Those parties control the Senate until 1 July 2014, so it is unlikely that the Government will be able to progress its reform agenda until after that date. Then, the outcome remains uncertain, as the Government will still be required to negotiate with several independent Senators, whose positions in respect to the definition are unknown at this stage.

Regarding the taxation of unrelated commercial activities of charities it does appear, from the comments discussed earlier in this paper, that this reform is not being pursued by the Federal Government at present. This is good news to the sector as there was widespread concern that this move would result in a dramatic

61 *ibid.*

62 *ibid.*

63 Email dated 1 April 2014 from Senate Economics Legislation Committee.

64 Australian Charities and Not-for-Profits Commission (Repeal) (No 1) Bill 2014. Item 3 of the Bill states that the 'successor Agency' is the Agency specified in a determination under sub-item (2). Sub-item (2) states that 'The Minister may, by legislative instrument, make a determination specifying an Agency (within the meaning of the Financial Management and Accountability Act 1997) for the purposes of sub-item (1).

increase in charities' compliance costs and that, as has occurred in the United States of America, very little additional revenue would be collected.⁶⁵

Background to the burden of 'red tape' for Australian charities

A 2007 study undertaken by the National Roundtable of NFP Organisations found there are more than 170 different laws across Australia, administered by 95 different government bodies making separate decisions about whether a particular organisation meets their criteria for a charity.⁶⁶ Of these laws 15 are Commonwealth Acts and 163 are State and Territory Acts under which entitlement to a benefit or some other legal outcome turns on the charitable purpose or status of an organisation.⁶⁷ Victorian organisations for example are potentially regulated by up to 30 different laws requiring them to prove they are NFP or charitable, or provide ongoing financial and operational reporting to a range of government agencies. These laws range from incorporation, charitable tax concessions and deductible gift recipient status to fundraising, minor gaming, raffles and liquor licensing.⁶⁸ As Liz Morgan from Justice Connect (a NFP that conducts research and advocacy on behalf of the NFP sector, widely recognised as a source of credible research and information) states, 'It is precisely this frustrating and confusing experience of "red tape" that the ACNC was designed to overcome'.⁶⁹

The second reading speech of Mr Andrews supporting the Bill abolishing the ACNC summarises the government policy behind the abolition of the Commission. He states:⁷⁰

...the process has resulted in an increased red tape burden for many organisations.

The commission was established with the intention of it being a single reporting point for charities. However, this has not eventuated - the majority of charities continue to provide information to multiple jurisdictions in the course of conducting their business as charities.

65 See Micah Burch, 'Australia's proposed unrelated commercial activities tax: Lessons from the US UBIT' (2012) 7 *Journal of the Australasian Tax Teachers Association* 21.

66 National Roundtable of Nonprofit Organisations, *The Assessment of Charitable Status in Australia: Current Practice and Recommendations for Improvement*, 27 November 2007.

67 *ibid* 1.

68 *ibid* 17-18.

69 Liz Morgan, Justice Connect, 'Charities Deserve Better Regulation', 11 December 2013, available at <http://www.justiceconnect.org.au/charities-deserve-better-regulation/>

70 Mr Kevin Andrews, Minister for Social Services, Second Reading Speech, Australian Charities and Not-for-Profits Commission (Repeal) Bill, March 2014.

Establishing the commission has introduced new powers in information collection, monitoring and compliance that are not available to Commonwealth bodies with comparable powers in relation to enforcement and removing responsible persons (such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority).

The additional oversight and reporting burdens on the charitable sector are particularly onerous given the absence of harmonisation across all jurisdictions.

There are several aspects of the above arguments for the abolition of the ACNC which require closer scrutiny. First, the Minister points out that the ACNC is not the only reporting agency for charities and NFPs and that it has not replaced the reporting obligations required by the states and territories. This is correct, but the fault does not lie with the ACNC. The Commonwealth Government does not have the constitutional power to implement comprehensive regulation of the NFP sector due to the powers of the states over certain areas such as fund raising.⁷¹ The recommendations of the Labor Government when establishing the ACNC emphasised that the Federal level government would seek agreement with the states and territories on a single national regulator through the peak intergovernmental forum, the Council of Australian Governments (COAG).⁷² This is a time-consuming process and there has been little time to progress the complex legal and political negotiations. At this stage, only the governments of South Australia and the Australian Capital Territory have announced that they are moving towards harmonising reporting and regulation requirements with the ACNC so that Federal and local obligations are no longer duplicated.⁷³

Second, progress in minimising reporting requirements amongst Federal Government agencies has however been made. The Australian Securities and Investments Commission (ASIC), Australia's corporate, markets and financial services regulator has functions that include registering Australian companies, administering notifications and reports and maintaining a public register of information. ASIC organisations may also be registered with the ACNC as charities. Of the 1.9 million companies registered with ASIC, it is estimated that

71 Australian Government (n 29) 65, 68.

72 *ibid* 68. Council of Australian Governments, <https://www.coag.gov.au/>. The COAG website describes itself as the peak intergovernmental forum in Australia. Its members are the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association.

73 ACNC, 'Red Tape Reduction, Announcement of State and Territory Governments' available at: https://www.acnc.gov.au/ACNC/About_ACNC/Redtape_redu/ACNC/Report/Red_tape.aspx?hkey=02c36842-0881-4e67-98ad-0533e728658a

about 6,000 are charities. These charities will need to submit Annual Information Statements to the ACNC for the 2013 reporting period onwards but this means they will no longer be subject to the company annual review process required by ASIC, nor will they need to pay the ASIC annual review fee.⁷⁴

Third, there is also evidence that the ACNC has established a strong relationship with the ATO and that this has streamlined the process of obtaining federal level tax concessions by charities. Several submissions to the Senate Economics Legislation Committee's review of the repeal of the ACNC Act, state that the turnaround time in processing, advising and supporting charities has decreased since the introduction of the ACNC.⁷⁵ Furthermore, other members of the NFP sector state that they prefer the ACNC to the ATO as they perceive that the Commission's decisions are not unduly influenced by a concern to protect the Commonwealth's revenue.⁷⁶ A Pro Bono Australia survey in August 2013 of over 1,500 NFP respondents found 81 per cent support for the ACNC and only 6 per cent supporting the ATO regulation of the sector.⁷⁷

Response of the NFP sector

In their submissions to the review of the Bill to abolish the ACNC many organisations have come out strongly in favour of keeping the current Commission. They see the collection of data and the availability of this information free to any members of the public as a major step forward in accountability and an aid to reducing lack of information on the part of donors. For example, the Fielding Foundation, a private ancillary fund that donates large amounts to charities, submits that for the past 10 years it had invested:⁷⁸

[A] considerable amount of time and energy conducting due diligence on the charities we are considering making a contribution to ... The introduction of the ACNC and in particular the Annual Information Statement (AIS) has significantly reduced this workload on The Fielding Foundation - thereby making it easier to identify and donate to well performing and transparent charities ... The loss of a central register and

74 Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth).

75 See Submissions by The Uniting Church of Australia National Assembly 29 April 2014; Associate Christian Schools, April 2014; Amnesty International 2 May 2014.

76 National Native Title Council submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 2 May 2014.

77 Pro Bono Australia, 'Not for Profit Sector Election Survey' (Research Survey Report, 15 August 2013).

78 Fielding Foundation submission the Senate Economics Legislation Committee review of the repeal of the ACNC Act, May 2014.

the AIS system would be a major retrograde step in terms of making grant making more effective and efficient.

The Shepherd Centre, a small charity supporting children with hearing loss, also strongly supports the retention of the ACNC, on the basis of ‘transparency’ and reducing the ‘regulatory burden’.⁷⁹

Over 160 submissions have been made to the review. These submissions have been made by large charities such as Amnesty International, the Uniting Church in Australia National Assembly and Associated Christian Schools, smaller organisations, academics and individual researchers. The overwhelming majority of these submissions express concern that the abolition of the ACNC will be a retrograde step. The majority express the view that the implementation of the ACNC has increased transparency in the sector and actually reduced compliance costs and ‘red tape’.⁸⁰ The main opponent of the ACNC, the Australian Catholic Bishops Conference, prefers less regulation of its activities but still concedes that there must be a process for registration of entities as charities and to access tax concessions. Its submission also concedes that a national agency ‘has an important role to assess an entity’s status to access Commonwealth tax concessions and issue the unique charity identifier’ and that if this role is returned to the ATO ‘there should be clear statutory independence to overcome perceptions of conflict of interest’.⁸¹

International perspectives of the ACNC

Australia hosted the 6th International Charity Regulators Forum in April 2014. At this conference, representatives of regulators of the NFP sector from overseas found time to praise the operations and achievements of the ACNC. For example, Kenneth Dibble, the Chief Legal Officer with the Charity Commission for England and Wales said that he was very impressed with the way that the ACNC is flexible

79 Shepherd Centre submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 15 April 2014.

80 See Myer Family Company, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act; The Uniting Church in Australia National Assembly, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 29 April 2014; Amnesty International, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 2 May 2014; Emma Tomkinson, Social Impact Analyst, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act.

81 Australian Catholic Bishops Conference, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 2 May 2014.

and sensitive to the NFP sector's needs, and that the success of the ACNC in such a short time had been 'extraordinary'.⁸²

David Robb, the Chief Executive of the Scottish Charity Regulator, an agency similar to the ACNC in function, also praised the Australian model. He stated:⁸³

The ACNC team here has done a fantastic job, learning from the international experience ... They have put together cutting edge practice with online services and achieved a lot in a short space of time. The agency has good relationships with other government offices, crucially the Australian Tax Office.

Conclusion

This analysis demonstrates that there have been seismic shifts in the law and regulation of charities and NFPs in Australia in the last few years. After many reviews and recommendations for a national regulator and 'one stop shop' so that charities and NFPs can reduce compliance costs through a system that allows them to 'report once and use often' this regulator has finally come into being as the ACNC. The ACNC has also introduced a light touch regulatory approach and a charity portal so that potential donors can easily access helpful information about charities at no cost. Less than two years later, however, its existence is in jeopardy. This is despite the fact that there is overwhelming praise for the Commission not just from Australian NFPs but from the international community, academics⁸⁴ and legal and business advisers.⁸⁵ A change in Federal Government has meant a move away from the ACNC and back to an alternative Federal Government agency, perhaps the ATO, but the situation is not clear. What is clear is that there has been a groundswell of support from all areas of the NFP sector for the ACNC and that this together with the uncertainty of the views of the independent Senators in the Australian Senate may mean that there is a reprieve.

82 As reported in Pro Bono News Australia, 'International Praise for Australia's Charity Regulator' 10 April 2014.

83 *ibid.*

84 Professor Ann O'Connell, Melbourne Law School, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act; Professor David Gilchrist, Director, Curtin Not-for-profit Initiative, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 2 May 2014.

85 See Price Waterhouse Coopers, submission the Senate Economics Legislation Committee review of the repeal of the ACNC Act; Law Institute Victoria, submission to the Senate Economics Legislation Committee review of the repeal of the ACNC Act, 1 May 2014.

The introduction of a statutory definition of ‘charity’ is also a major legal reform that many view as an important improvement.⁸⁶ It comes after the *Aid/Watch Case* which developed Australian charity law in a significantly different direction to the English common law. If the statutory definition of charity is repealed then the *Aid/Watch* decision will operate to allow charities to engage in political activity without losing their charitable status. The advantage of the definition is that the boundaries of this activity are more clearly articulated in the statute than in the High Court decision.

If the Coalition Government does not proceed with a tax on unrelated commercial activities of charities, as seems likely, then *Word Investments* will stand and it will be possible for charities to raise funds through operating businesses that are not related to their core charitable purposes. This is perhaps the only one of the Coalition Government’s policies relating to the NFP sector that has universal appeal within the sector.