

## ACNC moves the Not-For-Profit Sector into the 21st Century



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# ACNC moves the Not-For-Profit Sector into the 21st Century

By Bill d'Apice and Kylie Maxwell

**“Ms Pascoe confirmed that the ACNC will not have a heavy compliance monitoring and investigating agenda”**

On Friday 23 September 2011 Kylie Maxwell of our team attended the Australian Charity Law Association (ACLA) Annual Conference in Melbourne. During this conference, Susan Pascoe AM, Chair of the implementation task force of the Australian Charities and Not-For-Profit Commission (ACNC) provided further details about issues currently being discussed and items on the agenda for the development of the ACNC by 1 July 2012.

It became clear from the presentation that the ACNC would be moving the sector into faster, more efficient modern-day processes that should help charities and Not-For-Profit organisations interact better with the public. The ACNC will have its head office in Melbourne, with a small office in Canberra, and most of its \$53.6 million budget will be devoted to the IT rollout between 2011 and 2014. Applications for endorsements will be made on “smart forms” which will be used for all types of endorsements. Consultation with the sector will occur through the ACNC’s website and on YouTube.

By 1 July 2012 the ACNC will be ready to accept new applications for registration as a charitable entity and by 1 July 2013 the statutory definition of charity will be activated and applied. On the same date an information portal will be fully operational through ACNC’s website and applications for charitable status will be able to be made online. The database of charitable endorsements will also be accessible online.

Ms Pascoe confirmed that the role of the ACNC as a regulator will involve:

- The ACNC registering charities (while the ATO continue to apply tax concessions);
- The ACNC maintaining an up-to-date, publicly accessible and searchable register of charities;
- The ACNC developing a one-stop-shop for charities which would enable them to apply for their ABNs, access commonwealth tax concessions, access state and territory tax concessions and potentially other services;
- The ACNC developing a “report once, use often” service for charities to allow them to avoid the red tape;
- The ACNC in providing information and guidance for the sector;
- The resulting promotion of trust and confidence in the charity sector; and
- Importantly for maintaining such trust and confidence in the sector, the ACNC in monitoring compliance and investigating regulatory breaches.

Ms Pascoe confirmed that the ACNC will not have a heavy compliance monitoring and investigating agenda. It will focus on areas of greatest risk when deciding who to investigate.

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**“The ACNC is developing a “report once, use often” service for charities to allow them to avoid the red tape”**

# ACNC moves the Not-For-Profit Sector into the 21st Century

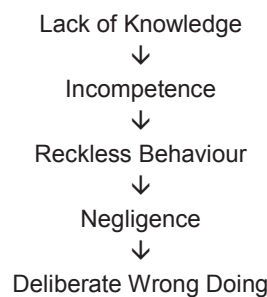
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Relevance, proportionality, consistency, transparency and timeliness are the ACNC's key priorities in this area.



To assist it with its monitoring and investigative role, the ACNC have been given access to the ATO's guidelines for monitoring compliance. In this way, the ACNC are not completely reinventing the wheel when it

comes to its regulatory role. It recognises that customers of the ACNC definitely move along a spectrum which looks something like the following:



One of the members of ACLA correctly pointed out that there is a conflict between the intended roles of the ACNC as an educator and as a regulator. Ms Pascoe confirmed that the ACNC would not be taking as proactive a role as the New Zealand Charities Commission had (prior to the recent decision to disband that Commission) in developing a myriad of fact sheets. Rather, it would aim to assist charities who fell into the categories at the beginning of the spectrum toward improvement, while undertaking investigative procedures in relation to clients at the other end of the spectrum.

Approximately 60 jobs at the ACNC will be advertised toward the end of this year and it is expected that, due to its intended head office location, many of the roles will be filled by specialists from the ATO. It is hoped that the adoption of ATO staff will not discourage the fresh approach that the sector needs.

***“One of the members of the ACLA correctly pointed out that there is a conflict between the intended roles of the ACNC as an educator and as a regulator”***

# Productivity Commission Report on Aged Care



**Richard Gray**  
+61 2 6203 2777  
richardg@cha.org.au

The Productivity Commission Inquiry into *Caring for Older Australians* released early August is recommending a fundamental redesign of the aged care system, the central feature of which is an entitlement to care and support based on assessed need, supplemented by greater individual choice of care setting and service provider. The major elements for the proposed system, which would be implemented over time, are as follows:

- Removal of the current restrictions on the number of residential places and community packages, and removal of the residential high/low and extra service distinctions.



- Creation of a single integrated system of care entitlements for residential and community aged care.

***“The reforms have the potential to underpin the viability of the sector”***

- Individual choice whether the care entitlement is used at home or in an aged care home, and choice of service provider.
- Regional Gateway Centres to simplify access by providing information and initial care coordination, undertaking assessments of need, approving entitlements to approved services, and arranging assessments by Centrelink of financial capacity to make co-contributions.
- Modest co-contributions for personal care and nursing costs based on overall wealth (with a maximum limit on co-contributions), and individual responsibility for accommodation costs and everyday living expenses, with safety nets for those with limited means and special needs groups.
- Market based accommodation prices for non supported residents, with flexibility to pay by daily rent or accommodation bond lump sum.
- Flexibility to purchase additional services and higher quality accommodation.
- A Government-backed equity release scheme, the Aged Care Home Credit Scheme for payment of care co-contributions and accommodation and living expenses for those who do not wish to sell their principal residence.

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# Productivity Commission Report on Aged Care

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- An Australian Age Pensioners Savings Account for those who have sold their principal residence to pay care co-contributions and accommodation and living expenses, while keeping the proceeds of sale exempt from the age pension income and assets test.
- An independent regulatory body, the Australian Aged Care Commission (AACC) to transparently recommend to Government the regional price of care entitlements and a basic standard of accommodation for supported residents, and the price of care for certain special needs groups. The same body would also be responsible for the regulation of the quality of age care services, including accreditation and complaints review.



The reforms have the potential to underpin the viability of the sector and support the expansion of services that will be needed. A care entitlement system and the removal of regulatory restrictions on the number of community care packages and residential bed licences will enable greater individual choice of care services and accommodation, and give service providers greater flexibility to be more responsive to individual preferences.

An approved provider would be able to choose whether they provide care packages or residential care or both and the number of packages and beds they will provide.

Providers would also be able to diversify in response to this greater flexibility, including the capacity to provide certain sub-acute and restorative care/reablement services. There would be greater opportunities for service integration across residential and community care, including respite, and greater opportunities for innovation in seniors housing as a result of the portability of care entitlements and the impetus given to age appropriate housing through the Pensioners Savings Account.

There are some industry concerns that removal of rationing and allowing greater consumer choice may lead to increased financial risks for some residential providers (especially low care) due to increased competition from community care and between residential care providers, and may result in a potential fall in business valuations and a dilution of balance sheet strength for those providers who have booked a value for their licences.

Cash flows will not be affected, and bank support for a project will hinge, not on the value of bed licences, but the business plan, projected cash flows and balance sheet strength.

Enabling residential providers to set market based daily rentals and equivalent accommodation bond lump sums across all their accommodation options will expand the capacity to attract bond capital and better meet borrowing commitments. Whether the Government backed Aged Care Home Credit Scheme and Australian Age Pensioners Savings Account influences consumers away from bonds to daily rental remains to be seen.

The rental option may be more attractive to residents who choose not to sell their home and for some self funded retirees. Initial modelling on the cost comparison of rental and bonds indicates the bond lump sum is a more attractive option.

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## Productivity Commission Report on Aged Care



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The reform changes will herald a new era for aged care, with a range of different services and residential aged care facilities flourishing. Smaller residential aged care facilities may emerge, thus enabling smaller land footprint home size styles. The removal of restrictions on the rationing of aged care places and choices for consumers to a more open aged care system may challenge some smaller providers.

Rather than posing greater difficulties for Parish based aged care services and for Congregations the proposed reforms should create opportunities not possible under the current regulatory and rationed system.

The establishment of a proper basis for the setting of care subsidies will be of benefit to providers instead of the current financially constrained system that has no basis in cost. In addition, the Commission's recommendation that the accommodation subsidy for Supported Residents be set at the average regional cost of providing a basic standard of accommodation based on the Building Certification standard of 1.5 beds per room will improve the accommodation income for Dioceses and Congregations.

The Federal Budget 2012 will likely be the first time we know what the Government will plan to do in terms of adopting the reforms and the implementation timetable for them.

## Trade Marks update: New Generic Top-Level Domains provide opportunities and potential threats

By Bill d'Apice and Kylie Maxwell

**A**t the beginning of 2012 the Internet Corporation for Assigned Names and Numbers (**ICANN**) will open up an opportunity for organisations to register as registered operators of new generic top level domains (**gTLDs**).

This will be an exciting time for those organisations that can afford the application fee of \$USD185,000.00 and the annual registration fees of \$USD25,000.00, but it will affect most Not-For-Profit organisations in quite a different way. At the very least, it presents the possibility that Not-For-Profit organisations may register domains in the future such as:

[www.assembliesofgod.governance.assemblies](http://www.assembliesofgod.governance.assemblies)

(for those Not-For-Profit and religious organisations that can afford the fees and the ongoing maintenance of running a gTLD). If religious organisations did not have the resources or wish to expend considerable amount in registering and running a gTLD, they may be able to obtain permission from a gTLD operator to use a gTLD such as "church".

We suspect that the main interest for Not-For-Profit organisations and religious organisations in this process will be to undertake two significant tasks:

1. reviewing applications for gTLDs on the ICANN website enabling them to lodge an objection to the acceptance of the application for the gTLD on the basis that it would infringe registered trade marks owned by the Not-For-Profit or religious organisation; and

2. during the sunrise period (which is the period shortly after the application for a gTLD has been accepted, but before it has been formally launched on the internet), reserving new domain names or preventing others from registering domain names in such a way that may harm the reputation of the organisation, or infringe its trade marks.

In relation to the first task, it will be possible to object to such applications if it can be demonstrated that the application takes an unfair advantage of the distinctive character or the reputation of a trade mark, or it impairs the distinctive character or reputation of a trade mark,

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***“It presents the possibility that Not-For-Profit organisations may register domains in the future such as [www.assembliesofgod.governance.assemblies](http://www.assembliesofgod.governance.assemblies)”***



## Trade Marks update: New Generic Top-Level Domains provide opportunities and potential threats

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or, if it generates an impermissible likelihood of confusion between the trade mark of the organisation and the proposed gTLD.

In relation to the second task, organisations will have two options:

1. they can actively review applications for domain names as they appear on the website of ICANN; or
2. they can participate in a trade mark claim service, whereby the organisations would submit their registered trade marks to a trade mark clearing house. In that situation, the gTLD registered operator can notify them when an existing or proposed domain name resembles an existing registered trade mark.

The *post-delegation dispute resolution procedure* will be triggered for anyone who wishes to object to a successful application to be a gTLD registered operator. During this process, written submissions need to be prepared and an expert will be appointed to determine the matter between

***“Monitor the website of ICANN or instruct a lawyer to monitor the applications for any potentially infringing or reputation/harming applications”***

the parties. It is possible through this process to secure outcomes whereby the gTLD operator's registry agreement is terminated.

Those who are interested in registering as a gTLD operator need to think immediately about preparing the lengthy application required to be lodged between 12 January 2012 and 12 April 2012. We expect that this will affect only a few Not-For-Profit organisations.

For those that wish to review the applications received by ICANN – these organisations should monitor the website of ICANN (<http://www.icann.org/>) or instruct a lawyer to monitor the applications for any potentially infringing or reputation/harming applications.

Those wishing to participate in the trade mark clearing house should keep in touch with the news bulletins on the ICANN website so as to be informed immediately of the process once it is implemented. It will also allow organisations to be fully apprised of the intended sunrise period if they wish to reserve relevant domain names.



# Church leaders cleared of defamation in Supreme Court of NSW proceedings

By Bill d'Apice and Joanne Irvine

In a recent decision handed down by the Supreme Court of New South Wales, certain senior members and clergy of the Church of England were absolved in a defamation action brought against them by a parishioner.

The case of *Haddon v Forsyth* related to email correspondence sent to members of a parish leadership group, a Bishop and diocesan officials in which allegations of sexual improprieties were made against an active Church member.

The plaintiff, Mr Haddon, sued the Anglican Bishop of South Sydney (who was later removed as a party to the proceeding), a senior minister and a parish councillor, claiming that the emails conveyed imputations that defamed him.

The allegedly defamatory emails concerned Mr Haddon's behaviour and his breach of an agreement to change his behaviour following complaints from female members of the Church.

Mr Haddon claimed that the email correspondence contained five defamatory imputations, namely:

1. That he sexually harassed female members of the congregation by introducing inappropriate sexual topics into conversation with them.
2. That he sexually harassed female members of the congregation by inappropriately touching and kissing them.
3. That he conducted himself towards female members of the congregation in a manner warranting complaints being made against him that he had made unwanted sexual advances to them.
4. That he is a sexual predator who preys upon female members of the congregation.
5. That he is unfit to be a member of his Church.

Mr Haddon further argued that the emails were motivated by malice and were sent to drive him out of the congregation as his theological views were evolving from the "strict" diocesan beliefs.

The defendants denied that the emails contained the asserted imputations and that they were defamatory.

In addition, the defendants pleaded a number of specific defences to the claim, including truth, fair comment, honest opinion and privilege.

The key question in the proceedings was whether any or all of the imputations of which Mr Haddon complained were conveyed and, if so, whether they were defamatory of him.

Justice Simpson held that the emails did in fact convey three of the imputations asserted by Mr Haddon and that those imputations were defamatory.

However, Her Honour upheld the Church's defence of truth, finding that the first three imputations were substantially true. Mr Haddon's conduct did amount to sexual harassment and was conduct that warranted complaints of unwanted sexual advances.

Her Honour also upheld the privilege defence, finding that the recipients of the emails were covered by qualified privilege and that the emails were limited in their circulation to those who were integrally involved in the implementation of any decision regarding Mr Haddon.

Her Honour disagreed with Mr Haddon's argument that the emails were published in malice in order to exclude Mr Haddon from the parish due to his theology differing from that of the defendants.

The judgment was in favour of the defendants and costs were awarded against the plaintiff.

The Right Reverend Robert Forsyth, Bishop of South Sydney, issued a statement welcoming the decision and conveying his pleasure that the actions of the minister and church officers were completely vindicated.

# Fundraising activities and the importance of internal control

By Joe Shannon

For many Charities and Church entities fundraising activities are a significant source of income, ranging from cash donations to donated materials, bequests and contributions from grants. Fundraising can be undertaken in many ways but often includes various forms of cash collections, postal appeals, special events, telemarketing or other fundraising methods. Income from these activities can be geographically dispersed, and may, in some instances be directed to a charity from professional third party or voluntary fundraisers.

However, unlike other sources of income such as the sale of goods, provision of services and investment income, the collection of donation income is often not supported by invoices, contracts or equivalent documentation. Consequently, it is up to the governing body of a charity to maintain an effective internal control structure over its fundraising activities.

The governing body needs to ensure that all fundraising income to which a charity gains control is accounted for properly. This involves establishing controls to ensure that cash donations are recorded correctly in the financial records and that the revenue recognised in the financial report is calculated in accordance with Australian Accounting Standards and the entity's accounting policies adopted for revenue recognition.

***“The governing body needs to ensure that all fundraising income to which a charity gains control is accounted for properly”***

Guidance Statement GS 019 *Auditing Fundraising Revenue of Not-for-Profit Entities* recently released by the Auditing and Assurance Standards Board provides valuable guidance for possible internal controls for key sources of fundraising revenue. A few examples include:

#### Cash donations

- Establishing numerical control over collection boxes
- Maintaining regular collection and recording of proceeds from collection boxes
- Establishing dual control over counting and recording of proceeds independent of collectors
- Issuing receipts, where appropriate
- Requiring collectors to operate in pairs so that one collector is able to observe the actions of the other

#### Monthly subscription or mailing list donations

- Monthly bank reconciliations that are reviewed and signed off
- Independent reconciliation against subscriber lists
- Maintaining appropriate IT and privacy controls over data

#### Fundraising campaigns and other special events

- Ensuring persons responsible for handling collections from ticket sales account for each pre numbered ticket sold, and provide reconciliation to tickets issued for sale.
- Independent person to reconcile tickets issued against tickets sold or returned unsold, with the person being segregated from the person responsible for counting and depositing monies received



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# Fundraising activities and the importance of internal control

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## Donated materials

- Develop policies to ensure immediate recording of donated materials, with periodic review of policies by the appropriate level of management
- Supervise collections to prevent collusion or theft
- Bequests and Legacies
- Maintain comprehensive correspondence files for each bequest or legacy received or receivable of funds.

subject to factors including materiality, resource capacity, regulatory or other third-party requirements, entity structure and nature of income. With respect to fundraising income, internal controls that are designed, implemented and operated effectively will mitigate the risk of inadvertent misplacement and loss through fraud or theft as well as prevent, detect or correct misstatements in accounting records for financial reporting purposes.

**“Maintain comprehensive correspondence files for each bequest for legacy received or receivable of funds”**

## Pledges

- Establish a method of recording and maintaining control over pledges when obtained, including procedures to ensure detection of, and compliance with, restrictions or conditions (if any)
- Establish a collections policy for pledges, for the purposes of providing for uncollectible pledges

## Contributions from grants or restricted income

- Maintain comprehensive records of applications made and implement follow-up procedures for grant applications not discharged

A full list of internal controls suggested by GS 019 is found in Appendix 1 of GS 019, which can be located through the Auditing and Assurance Standards Board website.

We suggest Church bodies and other charities consider the controls relevant to their operating environment,



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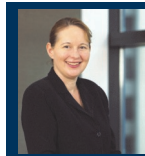
**Richard d'Apice AM**  
+61 2 9233 9011  
rdapice@makdap.com.au



**Bill d'Apice**  
+61 2 9233 9013  
wdapice@makdap.com.au



**Alex Kohn**  
+61 2 9233 9036  
akohn@makdap.com.au



**Nancy Bramley-Moore**  
+61 2 9233 9009  
nbramleymoore@makdap.com.au



**Kylie Maxwell**  
+61 2 9233 9031  
kmaxwell@makdap.com.au



**Craig Munter**  
+61 2 9233 9035  
cmunter@makdap.com.au



**Joanne Irvine**  
+61 2 9233 9021  
jirvine@makdap.com.au



**Belinda Huang**  
+61 2 9233 9083  
bhuang@makdap.com.au



**Joe Shannon**  
+61 2 8236 7700  
jshannon@moorestephens.com.au



**Alan Mortel**  
+61 2 8236 7700  
amortel@moorestephens.com.au

**Back issues**

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**Issue 11, July 2011**

- Federal Budget Initiatives - A change in the landscape for Churches
- Licence to Worship
- Parish Committee
- Added Concession Complexities for Accountants from Proposed Tax Changes

**Issue 10, April 2011**

- Clarification of Discrimination Exemption for Religious Organisations
- Children's Corner
- Important Reminders with Impending FBT Return Lodgements
- PJP Inc

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Disclaimer: This publication is a non-comprehensive general outline of the law as at 31 October 2011. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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Level 12 135 King Street Sydney NSW 2000 • GPO Box 495 Sydney 2001 • DX 296 Sydney  
Telephone 02 9233 7788 • Facsimile 02 9233 1550 • Email [mail@makdap.com.au](mailto:mail@makdap.com.au) • [www.makdap.com.au](http://www.makdap.com.au)