

# Bulletin

**Friday 21 January 2011**



## **The First Step in the Development of a National Not-For-Profit Regulator**

The Treasury has today released a

Consultation Paper entitled *Scoping Studies for a National Not-For-Profit Regulator*.

Submissions are invited from stakeholders between today and 25 February 2011. This marks the commencement of what is likely to be a three year period of consultation with the not-for-profit sector and other interested stakeholders about the regulation of the third sector and the streamlining of processes geared towards making compliance easier for a sector dedicated to being an active and responsive community.

### **Background**

The Paper begins with acknowledgments of the significant contribution of the third sector to the Australian community and summarises the of previous reviews and enquiries, concluding that the recurrent theme of such reviews over the last 15 years has been that a

National regulator is required as is the harmonisation and simplification of regulatory and taxation arrangements.

The Paper reviews the regulatory regimes that exist in England and Wales, Northern Ireland, Scotland, New Zealand, Ireland, the United States and Canada and posits that countries which are federations (like Australia) have tended to set up regulators within their tax authorities, whilst in non-federal countries a separate regulator has generally been formed.

A further acknowledgment is offered by Treasury that the regulatory framework for the not-for-profit sector is complex, duplicative and unnecessarily burdensome, while for donors and member of such organisations the framework lacks the requisite governance, transparency and accountability. None of this will be news to the not-for-profit sector, who are well aware of the cries of their critics that they spend too much of their finances on administrative requirements.

There should also be no dispute by the not-for-profit sector that the goals of a new regulatory regime should be as listed by the Paper:

- to place minimal costs on these organisations in order to allow better

**MAKINSON & d'APICE**  
LAWYERS

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 • www.makdap.com.au**

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direction of their resources to philanthropic objectives;

- avoid the current situation of regulatory duplications;
- provide a more consistent and less burdensome reporting system;
- provide a 'one-stop shop' for these organisations to help them understand their compliance obligations and to provide them with necessary information;
- be simple, transparent and flexible;
- provide not-for-profit entities with certainty within the legal framework; and
- be responsive to the size and complexity of not-for-profit entities and to the level of public monies managed by them and the risks posed to them.

## **Functions of the New Proposed Regulator**

There is no doubt that the sector would agree that the new regulator should cover taxation issues, as *"the ATO has effectively become, by default, the NFP regulator at the Commonwealth level"*. An educator would also be overwhelmingly supported. The Paper also suggests that due to the ad-hoc and complex nature of grant acquittal, and the varying

requirements between Commonwealth, State and Territory Governments, the streamlining of reporting would be appropriate for the sector. It suggests that a tiered reporting process may assist the sector such that larger not-for-profit organisations would be required to provide more information than smaller not-for-profit organisations and that also larger reporting requirements will be required of deductible gift recipients. The Paper envisions a not-for-profit information portal providing transparency for the public, the not-for-profit sector and governments alike. No doubt these will be welcomed by the sector.

The Paper announces that the Ministerial Counsel on consumer affairs is now undertaking a project to harmonise fundraising legislation under the guidance of COAG and will later issue a Paper exploring the options for streamlining fundraising laws during 2011, which not-for-profit clients should look out for.

## **Governance**

It is our view that the proposed governance function of the regulator maybe more controversial with the sector. Absent from the Paper are often voiced concerns of the third sector that they wish to maintain their independence from Government, despite requiring funding from the Government. The Paper suggests that Australia is not keeping up with International trends in relation to Governments and accountability arrangements for the not-for-profit sector, whilst striding

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ahead in other sectors. The Paper also suggests that we need the development of core rules formulating duties of responsible individuals, the development of a 'fit and proper person' test and a general duty of care to enforce best practice requirements. It says that a framework would be tailored to an entity size so that the more complex the organisation, the more involved the decision making framework would become.

The Paper suggests that the nature of powers given to a regulator in this regard could involve the following:

- the protection of a not-for-profit's assets on malfeasance;
- suspension or replacement of individuals who breach core duties;
- powers to register and deregister not-for-profits;
- powers to enforce governance rules;
- the power to conduct investigations;
- the power to issue warnings and penalties to not-for-profits; and
- the power to undertake dispute resolution processes enabling the regulator to intervene disputes of which the not-for-profit is a party.

No doubt third sector parties will undertake some individual review of whether the long wait for a national regulator may be followed by excessive interference by Government in what remains a community controlled sector.

## Form of the Regulator

The Paper explores four options for the form of the new regulator, namely:

- a new National regulator;
- a new regulator designed for regulation under Commonwealth Law only;
- a division within the Australian Securities and Investments Commission; or
- a division within the Australian Taxation Office.



The Paper acknowledges that currently there are moves to regulate different parts of the third sector separately. It names the Office of the Registrar of Indigenous Corporations and the recent communiqué of the Housing Ministers' conference in which it was agreed to implement a National regulatory system for not-for-profit housing providers, as recent examples of divisions within the third sector seeking individual regulation. Any new regulator will need to answer the needs of these divisions within the third sector and their recent cries for individual regulation on the basis that their needs are client-specific.

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## Definition of Charity

The Paper underscores that if Parliament undertook the crafting of a legislative definition of charity it could undertake greater investigation and review than the Courts could to consider contemporary Australian societal needs and expectations. It suggests that litigation would be reduced by more carefully designing the definition of charity - no doubt not-for-profits would agree with this goal but it is doubtful whether defining what a charity is will be the means by which we achieve it.

## Issues to be Explored by Not-For-Profits Preparing Submission

Not-For-Profits may like to consider the following issues in drafting a submission:

- Whether the Attorney General should remain having a regulatory role in the charity sector.
- Any adverse impact on the obligations for reporting to a charity regulator.
- Whether compliance issues will place an undue administrative burden on charities and distract them from their good works.



- Whether issues of confidentiality could be impacted.
- Whether the sector sees that there would be any significant benefit to the community in this proposed further regulation.
- Whether there are any uncertainties around the definition of a charity which impact on the day-to-day activities of not-for-profits.
- Whether compliance costs are likely to be significant
- How a regulator may be funded
- Whether the concept of a 'one-stop-shop' for charities is achievable or desirable

Should you require any assistance or advice in relation to any proposed submission please do not hesitate to contact Bill d'Apice on [wdapice@makdap.com.au](mailto:wdapice@makdap.com.au) or Kylie Maxwell on [kmaxwell@makdap.com.au](mailto:kmaxwell@makdap.com.au) of our office.

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