

NOT-FOR-PROFITS SECTOR UPDATE

Here is a further update on some of the issues we touched on in our Not-For-Profit January 2012 Newsletter.

Australian Charities and Not-for-Profits Commission

The ACNC will commence on 1 October 2012. Its main aims are to promote good governance, transparency, accountability to donors, to governments and the public generally, and to minimise regulatory duplication.

The ACNC will provide:

- a one stop shop for reporting: ie it will be the sole determiner of charitable, public benevolent institution, and other not-for-profit status for all Australian Government purposes
- a register of charities in lieu of ATO endorsement,
- a searchable portal with information on entities including financial reports (not to operate until 1 July 2013),
- an independent commissioner,
- an advisory board, and
- obligatory annual reporting statements.

Registration

Registration is voluntary but necessary if an entity seeks Australian government grants, contracts or tax concessions.

Each organisation has the choice of which of its operating "entities" it chooses to register, and some small charities, which make losses, and do not receive grants or government contracts, may choose to remain outside the regime, and not register.

From 1 October, 2012, all existing charities endorsed by the ATO will automatically be transferred to the ACNC register. Over time, the ACNC will "audit" the organisations which were automatically transferred to ensure they satisfy the criteria of a registered entity as identified under the new Act.

For an entity seeking charitable status from 1 July 2013 onward, the following tests must be met:

1. It must be a "not-for-profit entity";
2. It must meet the governance requirements in the legislation;
3. It must have an ABN;

NOT-FOR-PROFITS SECTOR UPDATE

4. It must not have previously been a registered entity;
5. It must not be a terrorist, criminal, outlaw or similar entity;
6. It must have “charitable” or “not-for-profit” purposes, namely:
 - (a) charitable purpose as defined by the common law definition of charity (which definition will be replaced by a statutory definition from 1 July 2013); or the purpose of
 - (b) promotion of Australian industry;
 - (c) encouragement of community entertainment;
 - (d) scientific purposes;
 - (e) advancement and furthering the interest of employees or employers; or
 - (f) community service purposes (except political or lobbying purposes).

The annual statement

Reporting commences from 1 July 2013 based on activities of the entity in the period 1 July 2012 to 30 June 2013, reports to be lodged with ACNC by the 31 October following. The Commissioner has a discretionary power to vary the accounting period, if “the entity demonstrates a genuine need to adopt an alternative accounting period”. There is some indication, that notwithstanding this test, entities will initially be able to retain their existing reporting periods

Depending upon size, the level of reporting will be more or less detailed and in addition to financial activity reports, will need to include evidence that governance standards have been met, with explanation of how the entity has fulfilled its purposes. Any entity with a turnover above \$250,000 per annum, (and less, if a DGR) must either have their financial accounts reviewed or audited, by a registered company auditor, or in the case of a review, by a member of a professional body set out in the Corporations Act 2001. Due to extensive push back by the sector, it is now likely that initially the ACNC will accept reports in the form already being used by the entity (eg often special purpose accounts), and not require entities to immediately convert to general purpose accounting standards. The Commission can also request special purpose reports where information beyond that contained in general purpose reports is required, but these cannot be required for events more than six years earlier.

NOT-FOR-PROFITS SECTOR UPDATE

Can any information be withheld?

The Register will be searchable and available to the public, but the Commissioner may withhold information if for example it is commercially sensitive, has the potential to cause detriment to the registered entity or an individual, if it is of a personal nature or if it is not in the public's interest if the information appears. The Register can also post warnings if fines have been issued against an organisation by a court for breaches of the ACNC Act.

It remains to be seen if a distinction will be made between reporting by entities that receive public donations and other entities that do not.

ACNC as a compliance reviewer and enforcer

The Commissioner is empowered to investigate, inspect (premises and documents), require entities to give enforceable undertakings, make directions, seek injunctions and remove trustees. Overall, the regime is reflective of that applied by ASIC and ATO and allows extensive discretion in the Commissioner and broad scope in application of the listed powers. ACNC have advised initially its focus will be on educating rather than enforcing.

The Commissioner



Commissioner

The Commissioner is a statutory office appointed for 5 years and will report to Parliament through the Assistant Treasurer.

The Commissioner must disclose any conflict of interest and must provide an annual report to the Minister. There is capacity for the Commissioner to delegate to a suitably qualified senior public servant. The Commission will comprise staff from the ATO.

Left: Susan Pascoe, AM Interim Commissioner and Head of ACNC Implementation Taskforce

NOT-FOR-PROFITS SECTOR UPDATE

The Advisory Board



Chairperson

A board of advisers will make recommendations to the Commissioner, who is not obliged to take that advice. The Board will comprise between 2 and 8 people with expertise in charity and not-for-profit entities, and qualifications in law, accounting, or taxation. The Advisory Board will be chaired by Robert Fitzgerald AM and will meet four times each financial year.

Left: Robert Fitzgerald AM Chairperson Advisory Board

UPDATE ON THE “IN AUSTRALIA” TEST

A new draft Bill has now issued following the withdrawal late in 2011 of the first drafting.

For Income Tax Exempt Entities

The new definition of “In Australia” states that if an entity pursues its objectives by conducting activities that directly advance those purposes – the entity is not entitled to be income tax exempt unless it **operates principally** in Australia.

If, as part of its operations, an entity gives money or property (to further its purpose) to other entities that are not income tax exempt, the use of those funds by the other entity will be taken into account when determining whether or not the donor entity has met the “In Australia” special condition (ie a look through test). One of the conditions of the “In Australia” test for all income tax exempt entities is that the entity must comply with its substantive governing rules, ie continue to pursue the purposes that are expressed.

How will the test affect a religious order which sends funds to their overseas branches?

There has been a change from an expenditure test to an activity based test.

The new test would require that:

- The local order undertakes its activities in Australia.
- Has property in Australia.
- Is managed from Australia.
- Is resident in Australia.

NOT-FOR-PROFITS SECTOR UPDATE

- Has employees in Australia and
- Incurs its expenditure principally in Australia.

The regulator will look to these indicators to determine if the “In Australia” test has been met and the entity can send funds overseas without any risk to its local income tax exemption.

For those religious orders whose central administration is overseas and whose main presence in Australia may be for the purpose of remitting funds back to their “mother house”, income tax exemption may not be available: it may be necessary for such local groups, as a minimum, to incorporate an Australian body and otherwise have a clear presence in Australia, to prevent being taxed.

The new test, however, does not apply to any distributions overseas, made by local charities, of funds received as government grants, bequests or money gifted from donors where a tax deduction has not been provided. To benefit from that exemption, the local charity must:

- have strong governance arrangements in place for the proper monitoring of how the money is used overseas;
- establish that this is an effective use for the local entity’s purposes; and
- establish there has been full compliance with Australian and foreign laws, international treaties and the high reputation of Australia’s not for profit sector

The new “In Australia” test modifies the concept of a not for profit entity by now allowing that entity to distribute any surpluses to members provided those members’ purposes are **similar**. A distribution from one charity to another charity is considered “similar”: For example, a charitable entity involved in the work of “provision of support services eg insurance or human resources” is not precluded from making a distribution to an entity involved in the “advancement of education”.

For Deductible Gift Recipients (DGR)

The test is stricter than for income tax exempt entities because the DGR must:

- *operate solely* in Australia; and
- pursue its purposes *solely in* Australia.

Overseas aid funds and developed country relief funds are exempt from this test.

Fund entities on the Register of Environmental Organisations are also exempt.

There is also a look through test for a DGR which gives property or benefits to a non-DGR to further its purposes: how the non-DGR spends those funds will be taken into account to determine whether the DGR meets the “**operates solely in Australia**” special condition.

NOT-FOR-PROFITS SECTOR UPDATE

Franking Credits

Eligibility for franking credits will need to satisfy the new “In Australia” test, ie an activities based test with the organisation needing to prove it operates and pursues its purposes, (rather than simply its expenditure) principally in Australia.

FBT Rebate

Eligibility for Fringe Benefits Tax rebates or exemption must also now satisfy the new “In Australia” test. It will be necessary for FBT concession recipient charities to establish that their objectives must be pursued principally in Australia.

Glossary Terms

ABN: Australian Business Number

ACNC: Australian Charities and Not-For-Profit Commission

ASIC: Australian Securities and Investments Commission

ATO: Australian Tax Office

DGR: Deductible Gift Recipient