

Attention: Principal Adviser (Murray Crowe)
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

9 March 2018

Email: ACNCReview@treasury.gov.au

Dear Colleagues,

REVIEW OF THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION (the ACNC)

Introduction

The charities and not-for-profit sector makes an enormous social contribution enriching our community, generating significant income and employing (as assessed in 2013) 9.3% of the workforce.¹ Therefore, the success and effective operation of charities and other not-for-profit organisations, including Queensland's many incorporated associations, is critically important.

Caxton Legal Centre Inc. (Caxton) is Queensland's oldest community legal centre and is an incorporated association with charitable status. Our centre currently reports to both the ACNC and Queensland's Office of Fair Trading (OFT). Accordingly, we have a vested interest in these bodies operating in the most efficient and appropriate way possible.

We are pleased to have the opportunity to contribute to this review and our response is set out below.

Caxton Legal Centre Inc. and our work with non-profit organisations and their members

Caxton Legal Centre Inc. (Caxton) has been operating for over 40 years. We target our services to members of the community who are marginalised, disadvantaged and isolated. Because so many non-profit associations provide support to these same client groups, we consider it appropriate to provide free legal assistance to other not-for-profit organisations, especially when they are poorly funded or completely un-funded. (The larger organisations often have their own legal advisors.)

Importantly, because of Caxton's long history as a free legal service and our previous association as publisher of the *Incorporated Associations Manual* (edited by Professor Myles McGregor-Lowndes from the Centre for Philanthropy and Non-Profit Studies in QUT's Business School), our organisation is well-known within Queensland's not-for-profit sector as a first contact point for

¹ QUT (2014). *The Not For Profit Sector in Australia: Fact Sheet*
[http://eprints.qut.edu.au/75397/4/75397\(updated\).pdf](http://eprints.qut.edu.au/75397/4/75397(updated).pdf)

non-profit organisations needing legal advice. We quite regularly provide legal advice to relevant individual members and committees/boards of such associations. Some of our clients contact us in the very early stages of planning the establishment of a not-for-profit community organisation, while other committees and members from well-established organisations contact us because they need assistance regarding complex decision-making processes or current disputes. Legal advice typically is provided by our volunteer lawyers at our free evening advice sessions, although some advice is also provided by solicitors from our daytime legal advice program.

We have dealt with an extraordinary range of legal problems in this field of endeavour and are regularly consulted about related governance concerns, aspects of contract and tort law, employment law, privacy law, internal disputes, risk management, insurance claims and defamation.

Through our work, we have observed that membership and management/governance disputes, in particular, often involve very high levels of conflict and can be traumatic experiences for the affected individuals. When poorly managed, such disputes can destroy a previously valuable and otherwise functional organisation. When individuals have worked tirelessly to establish, run and grow a particular non-profit organisation, it can be acutely stressful for them when an organisation experiences internal conflict of any sort. We encourage clients caught up in such disputes to use alternative dispute resolution services. (Our centre's generalist social worker also is able to provide some short-term counselling and other advocacy in appropriate cases.)

Over the last decade, as employment laws have become increasingly complex, we have noted an increase in initial requests for advice relating to employment in the non-profit sector. Relevant issues include bullying, defamation, underpayment/overpayment disputes, conflicts of interest, entitlement disputes, unfair dismissal and discrimination matters.

When individual association members contact us to complain about a not-for-profit organisation, relevant legal issues often concern non-compliance with legal obligations relating to the holding/running of meetings and elections, reporting, concerns about insurance or governance processes, employment matters, defamation disputes and termination of membership processes.

We advise organisations that are diverse in nature, from small unfunded associations through to more complex centres running multiple programs. (Examples of such programs include: housing provision, migrant support programmes, crisis services, childcare, and cultural/arts and sporting activities.) We increasingly advise services run by multi-cultural organisations.

As part of our commitment to preventative community legal education (CLE), we also regularly provide training about governance and related matters to management committee members and relevant organisations. Typically, this training covers good governance, management committee obligations, risk management, confidentiality/privacy and record keeping. Last year we ran some targeted training for management committees largely comprised of migrants and we expect that this will be an increasing feature of our CLE in the future. We have observed that language barriers pose particular problems for committee members trying to learn about their legal obligations. This is something that needs to be factored into how support is provided to particular charities/organisations in the not-for-profit sector.

Background to the Review

As the ACNC has now been operating for 5 years, the government is required to conduct a review of the *Australian Charities and Not-for-profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*. The goal of the review is to ensure that “the regulatory environment established by the ACNC Acts continues to remain contemporary, that the ACNC deliver(s) on their policy objectives and that the ACNC Acts do not impair the work of the ACNC Commissioner to deliver against the objects of the principal Act; being:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.”

Caxton’s Responses to Key Questions

Our response is limited to questions 1, 3, 4 and 8.

Question 1: Are the objects of the ACNC Act still contemporary?

Caxton agrees that the Objects of the ACNC Act set out in Part 1-2 Division 15-5, as noted above, are still relevant and appropriate.

Question 3: Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?

State Regulation in Queensland

From our perspective, it is difficult to know whether it would be a positive step for the ACNC to take over the regulation of all other not-for-profits as well, particularly in relation to all the various incorporated associations in Queensland. In principle, it does sound like a good idea; however, we have concerns that such a change will have an unforeseen negative impact upon the willingness of individuals to volunteer in management committee roles for incorporated associations – at least, in Queensland. (We are not in a position to comment on the situation in other States and Territories.)

It has been our experience that Queensland’s *Associations Incorporation Act 1981 (the AIA)* and the current regulation of incorporated associations by the OFT has generally worked very well, particularly for small, purely volunteer incorporated associations. Indeed, Caxton Legal Centre Inc. itself has operated most efficiently using this model. Reporting to the OFT has always been very straightforward and our experience interacting with the OFT has been a very positive one. Of course, Caxton now also has to report to the ACNC, but because we have a strong team of administrative workers and a functional management committee comprised of skilled professionals (including a number of lawyers, an accountant, a legal academic and individuals

working in related sectors) attending to Caxton's dual reporting duties generally is something that is managed in a very straightforward fashion.

For organisations that currently only have to report to the OFT, a change to reporting to the ACNC may be considered disruptive and more oppressive.

We have observed that when small incorporated associations have had difficulties complying with certain aspects of the AIA, the OFT has worked *with* associations instead of managing them in any punitive way. For example, if an association has been delayed in holding its AGM, finding someone to take over a vacated executive role on the committee, or lodging reports in the timeframe required, open contact with the OFT has enabled associations to catch up with any inadvertent late reporting and minor compliance issues. (Cases involving mismanagement of monies, on the other hand, are subject to much greater and proportionate regulation.)

The website for the OFT also has provided user-friendly information for associations and it is relatively easy for the average person (with average literacy in English) to access necessary forms and relevant information about governing an incorporated association from the OFT's website. At previous points in time when there were some very major amendments to the AIA, the OFT published extremely useful factsheets on its website to help organisations keep abreast of legislative changes, and we observed that these were particularly useful for community organisations and were widely used. The OFT's website does seem still to be relatively easy to read and to navigate. One does not have to search through a vast amount of information to find the key information documents made available for incorporated associations. The *Smart Business Guide for Incorporated Associations*, made available for free on the OFT's website is a particularly useful booklet and many of our CLE clients have indicated that they have found this booklet invaluable.

We recognise that the ACNC website makes a huge amount of information available for people in the charities and not-for-profit sector, and we endorse the use of the engaging videos and factsheets, in particular, in this tranche of materials; however, the amount of material made available via the ACNC's website, arguably, can appear to be almost overwhelming. For busy community-based volunteers, having to sift through a vast amount of informational material to find particular answers to problems can be very off-putting. Time is a critical resource for people who are volunteering and it is important not to overwhelm volunteer management committee members with so much information that they end up not actually using the quality resources that are available.

In our experience, many people balk at the thought of being involved in a volunteer management committee role if they perceive that it will be onerous, particularly in terms of reporting, understanding legislative duties, dealing with complex laws/policies and other liability issues. To be able to quickly access relatively easy-to-understand information is reassuring and helpful for committee members and for people who are considering taking on management committee roles. Given the desirability of involving true community and sector representatives on an association's committee, making the role seem accessible, manageable and low in personal risk, is very important.

When we provide our CLE sessions on governance, it becomes very clear that, when people who might be described as 'ordinary committee members' (who are genuinely representative of their

association's membership) are guided through the information and forms made available by the OFT, these individuals are reassured about their decision to take up a management committee position. (We do, of course, ensure that they understand the general principles of good governance and how important it is to act diligently and in a properly and fully informed way.)

We have observed that many associations established under the AIA do not employ a CEO or other paid worker/s; instead, they are wholly run by their volunteers and only use volunteers to deliver services/activities. Other small organisations may employ one or two workers; however, such organisations are often poorly resourced and achieve quite impressive outcomes with very little funding. Management committees in purely volunteer not-for-profit organisations are typically made up of people with a variety of attributes and abilities, some of whom are accomplished managers in their own right, while others are recruited to join a committee in order to create or support links with stakeholder members. These true 'community management members' bring diversity to a committee but they may require additional support in order to fully understand and be able to carry out their legislative duties and other relevant obligations.

Unfortunately, funding application processes and grant acquittal obligations, risk management, work safety and other reporting/operational requirements appear to have become increasingly complex aspects of running an incorporated association over the last twenty years or so. Despite such changes, we have observed that diversely comprised committees of management, when properly supported and educated about their role, can still properly and effectively represent the associations' membership or focus activity and advance the associations' objects.

Under Queensland's AIA, at least at this point in time, one does not have to have the highest level of corporate 'company director' skills in order to be an effective and appropriate member of a management committee. Indeed, the fact that managers under the AIA are not Directors under the Corporations Law seems to be a determining factor that makes many people more willing to join a volunteer management committee.

Individuals who take the time to investigate what is involved in being a Director of a Company Limited by Guarantee, which attracts sanctions and penalties under Australia's Corporations Law, are likely to be worried (and should be worried) about their personal exposure should the Company fall into difficulties because proper governance processes have been breached. The penalties under the Corporations law and under the ACNC regime are much more significant than the penalties prescribed under Queensland's AIA, and breaching Directors' Duties clearly is a very serious matter. It is our understanding that ASIC does not readily overlook governance failures.

It is important to stress that there are many 'grass-roots' organisations, which have been operating successfully for a long period of time under the AIA model and we consider that the AIA model is an excellent legislative model to use and retain in the non-profit sector.

ACNC Regulation

Given the special tax exemptions provided to charities, Caxton agrees that it is appropriate that these should be strictly regulated by the ACNC. In our estimation, the ACNC has performed and is performing an important function as the regulator of charities.

The introduction of the Charities Passport² as a means to reduce red tape for the charities and not-for-profit sector is something we endorse. We support the idea of the Charities Passport to reduce the need for organisations within our sector having to constantly repeat funding and structural information in every new funding application. We agree that it is preferable for funders instead simply to be able to check the Charities Passport information. This should reduce the duplication and repetition of information otherwise required in every grant application lodged by a charity or relevant non-profit. We know from experience, that making such applications can be a tedious and time-consuming process. At this point, more does need to be done to ensure that funders use the passport information and adjust their funding application and reporting documents accordingly. All workable solutions that reduce this duplication of information provision are welcomed.

There does appear to be a level of formality and complexity with the ACNC's regulation and the relevant legislative framework (including ASIC's regulatory role), which is more demanding than that which is currently operating in Queensland under our AIA - as governed by the OFT. Penalties and offences appear to be much stricter under the ACNC regime. We are concerned that this could be an issue if the ACNC ends up taking over the regulation of all non-profit associations.

In general terms, incorporated association management committee members in Queensland are required to practise good governance, further the objects of their association, make informed decisions, avoid conflicts of interest, not trade whilst insolvent and must comply with the other obligations of the AIA as well as the associated *Associations Incorporation Regulation 1999 (Qld)*. Section 27 of the Act offers an important level of protection to committee members and members generally and states that: "A secretary, member of a management committee or member of an incorporated association as such, is not personally liable, except as provided in the rules of the incorporated association, to contribute towards the payment of the debts and liabilities of the incorporated association or the costs, charges and expenses of a winding-up of the incorporated association, beyond the property of the incorporated association in the person's hands."

There are various penalty provisions throughout Queensland's AIA, which expose committee members and executive members to fines for failure to comply with the Act, particularly in relation to financial accountability, reporting and governance. Importantly, many of these provisions also include 'defence' provisions, providing that it is a defence to a prosecution for a member of a management committee to prove that the member took all reasonable steps to ensure the provision was complied with (Relevant sections with defence provisions include sections 17, 30, 57, 59D, 65, 66, 68, and 70A of the AIA).

In Queensland, penalty units are significantly lower than the penalties applied by the ACNC, where each penalty unit currently is worth \$180.00. Again, the lower potential penalty rate applied in Queensland, while still worrying for committee members, is a more palatable amount and the defence provisions provide a level of reassurance to normal committee members who strive to ensure good governance in their association.

² Pascoe, S. (2017) *ACNC: Five Years On – Reflections of the Inaugural Commissioner*, Susan Pascoe (dated 26.9.2017) Retrieved on 26.2.18 from <http://www.acnc.gov.au/ACNC/Edu/CommissionerSusanPascoeAM.aspx>

While we applaud the ACNC's role in managing rogue charities, the information on the ACNC's webpage about its compliance investigations and actions taken against defaulting and mismanaged charities is the sort of information that could make some people feel that joining a management committee of an incorporated association is 'just too hard'. This is compounded by ASIC's possible interventions and actions relating to directors' breaches. If the ACNC does ultimately take over regulation of the entire non-profit sector, this transition will need to be handled with great care and a dedicated education program for lower level management committees about changes in regulation should be undertaken. Such an education program would need to be properly funded and resourced.

Unforeseen Consequences of law reform

Following the establishment of the ACNC, we observed a marked shift in the incorporated association landscape with a number of incorporated associations changing to become companies limited by guarantee. Based on anecdotal evidence, it seemed that this move was mostly driven by organisations seeking to avoid having to report to two regulatory bodies – i.e. the OFT and the ACNC. Clearly, there would have been financial costs for any organisation taking this step. (For example, an organisation's new name would have needed to be promoted, letterhead and stationary would have needed to be redesigned/printed, and there would probably have been increased fees for auditing etc.) In our view, this change was premature and largely unnecessary for some organisations. The potential liability for directors is a very significant issue, given that it acts as a disincentive to people who are considering taking up a position on a management committee.

Obviously, management committees, like boards of directors running a company limited by guarantee, are required to practice good governance. However, it is our view that an even higher standard of governance is expected of formal company directors. We are not sure that this difference in obligation is fully understood by some community-based boards.

Unless there was a specific benefit to reforming as a company limited by guarantee (for example, the organisation wanted to operate at a national level across states), the move to become a company does seem to have been problematic for some associations. At a public CLE event hosted by a local council for non-profits, a CEO of a mid-sized local community organisation was asked to explain why a particular centre had opted to become a company limited by guarantee and what the benefits were. One of our workers was present at that forum and observed that the CEO was unable to answer that question. It is our view that a CEO should be able to clearly articulate why an organisation would be better off under the company limited by guarantee structure.

Question 4: What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?

We do not collect specific data about such issues; however, as a result of our experience working and advising clients in the not-for-profit sector for over 40 years, we have observed that there are particular behaviours that are likely to bring a charity or non-profit organisation into disrepute. Unfortunately, problems involving one particular organisation can erode public confidence in the not-for-profit sector more widely.

The types of problematic issues that clients have identified or that we have encountered through our work in this field over many years include:

- Perceived or actual conflicts of interest (particularly in terms of an organisation's governance decisions and appointment of decision-makers and/or staff);
- Inadequate record keeping (including an organisation's failure to keep proper minutes of meetings and a failure to maintain transparent and compliant financial reports);
- Misappropriation of an organisation's funds or misuse of financial accounts/assets;
- Poor induction processes and lack of support for committee/board members and poor succession planning resulting in an organisation's inability to maintain a skilled and vibrant management committee/board;
- Inadequate communication between a board/committee and their members and inadequate recognition of members' rights, tending to cause internal disputes, which are often very poorly handled, and
- Poor employment practices.

The last issue may seem to be slightly outside the purview of this review. That said, we have observed that poor employment practices in the not-for-profit sector can have a significant impact upon workers and this typically will be observed and discussed negatively by friends and associates of affected parties. It is our view that this can diminish public confidence in how the not-for-profit sector operates both at a micro and a macro level.

Poor employment practices may involve exploitation of a worker (or workers), but they may also simply reflect poor governance practices and insufficient resources for an organisation's proper functioning. We have observed cases where committed workers (sometimes including the senior worker or administrator of an organisation) do not receive a proper induction, supervision, support, training or backfilling as required with the result that they may work very long hours and feel unable to take holidays. This exacerbates the risk of burnout and associated mental health problems for affected workers. Further to this, we have observed that bullying also occurs in organisations lacking stable and effective management. This can be a particular problem for the non-profit sector where committees, staff and volunteers can rotate very regularly. Bullying may be perpetrated from 'the top down' but it can also be perpetrated by workers against their senior workers. In our view, it would be beneficial for the ACNC to promote best practice in terms of workplace safety and anti-bullying in the workplace. A simple search of the ACNC's website does not immediately identify any materials on point.

Otherwise, the ACNC's and the Queensland OFT's efforts to publish pertinent and extensive education materials, especially in the forms of kits/guides, fact sheets, videos and a well-designed and up-to-date website, have been of inestimable value for relevant organisations and individual management committee/board members. We regularly refer our clients to use such materials and have found them to be of very high quality across both sites.

We endorse the ongoing publication of such community education materials by the ACNC and relevant state regulators, such as the OFT. The plethora of information also published by organisations such as QUT's Centre for Philanthropy and Non-profit Studies, Volunteering Australia, Volunteering Queensland, and QCOSS (via their Community Door Website)

supplements the ACNC's and the OFT's published resources. The vast amount of material available on the ACNC's website can be somewhat daunting and we support the ongoing publication of other discrete community education materials made available elsewhere in the sector. The development of quality educational materials by organisations working in this sector does need to be properly funded.

Question 8: Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?

Our administrator has observed that the personal information that must be provided to the ACNC by associations about committee members, which typically needs to be gathered and provided by our administrator, does seem overly intrusive. In particular, she considers that the ACNC should be the body to undertake the ASIC search of the committee members, rather than requiring it to be done by a worker at an organisation. It may be worth considering some other way for information to be provided by the relevant party concerned. We suggest that management committee members could be responsible for completing a form advising the ACNC of their relevant personal information. This would relieve a paid employee in an association from having to have the awkward conversation with committee members about their personal information.

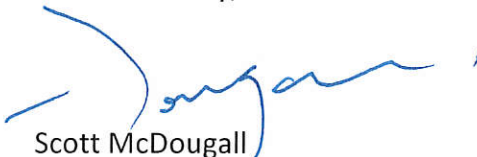
Concluding comments

The current Commonwealth Bill seeking to ban foreign donations has caused concern in the not-for-profit sector because it is seen as an attempt by government to ban charities from engaging in robust political criticism. We have concerns when governments try to stifle comment from community organisations. Comment genuinely made on behalf of members and relevant communities is important. Properly run charities and not-for-profits seek to assist, represent and speak for their members and they use their expertise and experience to frame such commentaries or arguments. Being able to use expertise to raise genuine public concerns is a sign of a healthy democracy and we oppose any laws that threaten closure of genuine charities engaged in robust public debate.

Caxton is committed to the proportionate and effective operation of regulation of the non-profit sector and we would be happy to discuss our submission at any time.

This submission was prepared by solicitor Rosalind Williams.

Yours faithfully,



Scott McDougall
Director
Caxton Legal Centre Inc.