

29 June 2009

Robert Fitzgerald AM
Commissioner
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Via email: nfp@pc.gov.au

Dear Robert

Submission: Contribution of the Not for Profit Sector

Thank you for agreeing to accept a late submission.

The Whitlam Institute within the University of Western Sydney, the Social Justice & Social Change Research Centre, University of Western Sydney and the Public Interest Advocacy Centre have been researching contracts between government and not-for-profit organisations for the delivery of services. Enclosed is a copy of the final draft of the research findings, *A Question of Balance. Principles, contracts and the government-not-for-profit relationship*.

The conclusion reached is that the contract in effect codifies the government–NFPO relationship in respect of the delivery of services. As such, its importance has been understated; redeveloping the contractual relationship from core principles down will have a significant and positive impact on both the government–NFPO relationship and on the delivery of quality services to those in relying upon them.

The report makes the following recommendations:

- 1. That a set of common principles for government–not-for-profit contracts and government contracted service delivery programs (as outlined in Part 7 of the report) be adopted.**

The proposed principles can be summarised as follows:

A. Foundations

- (i) All parties should enter into the contract in *Good Faith*.
- (ii) There is a presumption of *Good Will*.

B. The relationship between the contracting parties

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- (i) The relationship between the contracting parties is one of *Trust*
- (ii) The contracting parties will accord each other *Proper Respect*.
- (iii) The relationship between the contracting parties is *Supportive and Collaborative*.

C. Nature of the contract

- (i) The contract should be *Clear and Readily Understood*.
- (ii) The requirements in the contract should be guided by *Proportionality*.
- (iii) The terms of the contract should be *Responsible and Reasonable*
- (iv) The contract should establish *Meaningful Outcomes*

D. Operation of the contract

- (i) The contract should allow for *Decisions* to be made at the *Appropriate Level*.
- (ii) The contract should operate *Consistent* with the presumption of Good Will and Trust
- (iii) The contract should be based on *Full and Fair Costing*.
- (iv) The contract should allow that *Risk* exists, cannot be eliminated and will be *Shared*.
- (v) The contract should be administered in a *Timely Manner*.

- 2. That the principle that there is no justification for unfair contract terms in standardised contracts be applied to the contracts regulating the arrangements between government and the not-for-profit sector in the area of service provision.**
- 3. That the contractual principles (set out in detail in Part 7 of the report) be reflected in enforceable contractual provisions in terms of obligations on both parties and effective remedies for breach.**
- 4. That governments give priority to developing shorter-form framework agreements that are not unduly legally complex to better reflect the range in size, risk and complexity of government-not-for-profit service delivery programs and funding arrangements.**
- 5. That governments remove from all funding and service delivery contracts any interpretive or other provisions that exclude the operation of the *contra proferentum rule*.**
- 6: That all funding and service delivery contracts between government and the not-for-profit sector include preliminary clauses that clearly:**
 - (a) set out the purpose and objectives of the contract so that performance can be measured primarily against achievement of that purpose and those objectives; and**
 - (b) set out the basis of selection of the not-for-profit party for the contact, including listing its particular expertise and skills relevant to the government program.**
- 7. That Australian governments adopt standard form provisions (as set out in Part 7 of the report) to improve fairness and transparency and the overall contractual relationships. Such provisions should deal with the following matters in all funding and service delivery contracts between government and the not-for-profit sector:**
 - a. Intellectual property and moral rights**
 - b. Employment issues: Removal and Replacement of Specified Personnel**
 - c. Use of income generated**
 - d. Acknowledgment of funding**
 - e. Freedom of speech: no limit on public statements**
 - f. Prevention of fraud**
 - g. Reporting obligations: keeping of records, independent audits and access**

8. That all Australian governments collaborate to adopt a standard chart of accounts for funding and reporting for not-for-profit organisations in receipt of government funds.

We commend the report for your consideration. We hope that it will assist and inform the Commission as it considers the contribution of the not-for-profit sector. We would be pleased to provide further information, or to discuss the research in more detail with the Commission.

Yours sincerely

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