



24 November 2009

Contribution of the Not for Profit Sector
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: nfp@pc.gov.au

Office of the Chief Executive
Alex Malley, FCPA

CPA Australia Ltd
ABN 64 008 392 452

Level 20, 28 Freshwater Place
Southbank VIC 3006 Australia
GPO Box 2820
Melbourne VIC 3001 Australia

T +61 3 9606 9689

W www.cpaaustralia.com.au

E alex.malley@cpaustralia.com.au

Dear Sir/Madam

Productivity Commission Discussion Draft on the Contribution of the Not for Profit Sector

Thank you for the opportunity to comment on the Productivity Commission Discussion Draft on the Contribution of the Not for Profit Sector (Discussion Draft). CPA Australia has considered the above Paper and our comments follow.

CPA Australia represents the diverse interests of more than 122,000 members in finance, accounting and business in 100 countries throughout the world. Our mission is to make CPA Australia the global professional accountancy designation for strategic business leaders. We make this submission not only on behalf of our members and in the broader public interest.

CPA Australia's response is limited to comments about regulation and funding. We will leave it to other respondents to the Discussion Draft to identify any shortcomings or potential for unintended consequence of the other recommendations. Our detailed comments and recommendations on the above issues are included in the Appendix.

If you require further information on any of our views, please contact Dr Mark Shying, CPA Australia's Senior Policy Adviser Financial Reporting and Governance, via email at mark.shying@cpaustralia.com.au

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of loops and a trailing line ending in a period.

Alex Malley FCPA
Chief Executive Officer

cc: M. Shying

Draft Recommendation 5.3

Improving comparability and usefulness of information collected

To minimise compliance costs and maximise the value of data collected, Australian governments should agree to implement a reform agenda for reporting and evaluation requirements for not-for-profit organisations involved in the delivery of government funded services. This should:

- **commit to basing reporting and evaluation requirements in service delivery contracts on a common measurement framework (appropriately adapted to the specific circumstances of service delivery)**
- **require expenditure (input) measures to be based on the Standard Chart of Accounts**
- **ensure that information generated through performance evaluations are returned to service providers to enable appropriate learning to take place and for organisations to benchmark their performance**
- **embody, where practicable, the principle of ‘report once, use often’.**

CPA Australia is a strong supporter of the principle of ‘report once, use often’. Standard Business Reporting (SBR) is a multi-agency initiative to simplify business-to-government reporting by:

- **making forms easier to understand;**
- **using accounting/record keeping software to automatically pre-fill government forms; and**
- **introducing a single secure way to interact on-line with participating agencies.**

SBR should reduce duplication. CPA Australia believes that the XBRL technology that is fundamental to SBR can deliver the same benefits to the entities of the not-for-profit sector, particularly when used with the Standard Chart of Accounts.

Draft Recommendation 6.1

Providing for appropriate legal forms

The Australian Government should establish a Commonwealth incorporated associations legal structure for not-for-profits. The new legal structure would assist not-for-profits, in particular those operating across state and territory boundaries, that do not wish to be companies limited by guarantee but wish to be incorporated at the Commonwealth level.

Australian governments should ensure that incorporation legislation is amended to allow not-for-profits to migrate from one form of legal entity to another and to migrate between jurisdictions.

State and territory governments should continue to reduce unnecessary compliance requirements for incorporated associations.

The Commission seeks comments on:

- **whether there is a need for a new legal form for small unincorporated associations, similar to the Australian Business Name registration, providing limited legal rights**
- **whether state/territory based incorporation of associations should be restricted to not-for-profits with income less than \$150 000 per annum**
- **how governments can free up the ability of organisations to migrate between legal forms and jurisdictions, while guarding against any undesirable consequences from forum shopping.**

CPA Australia considers the disadvantages of unincorporated not-for-profit entities significantly exceed the advantages. We do not consider it is in the public interest to continue to allow not-for-profit entities not to have a distinct legal status from their members. We acknowledge that incorporation gives rise to obligations – there are initial and on-going costs. However, we believe the Australian Government is well positioned to keep such costs to a minimum.

CPA Australia notes the Commission’s call for comment on a mechanism similar to the Business Name Registration that would provide small unincorporated associations with limited legal rights. CPA Australia understands the registration of a business name does not create a new legal entity - the registered business name is simply a name under which an existing person (or partnership, company or trust) trades. Accordingly, we do not think of Business Name Registration as a means to resolving the disadvantages of unincorporated not-for-profit entities.

Draft Recommendation 6.2
Reducing unnecessary compliance burdens

To promote confidence in the not-for-profit sector and reduce regulatory burden, Australian governments, initially through the COAG Business Regulation and Competition Working Group, should:

- agree to and implement harmonised fundraising regulation and mutual recognition across Australia
- support the development of a fundraising register for cross jurisdictional fundraising organisations, to be administered by the proposed national Registrar
- endorse the adoption by all governments of the Standard Chart of Accounts for reporting by not-for-profits in receipt of government grants or service contracts
- ensure that the Standard Business Reporting initiative be expanded to include reporting requirements by not-for-profits.

CPA Australia supports the proposals.

Draft Recommendation 6.3
Reducing unnecessary compliance burdens

The Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 Inquiry into the definition of charities and other organisations.

CPA Australia notes that entities with charitable purposes are a sub-set of the not-for-profit sector. The Commission has observed that the not-for-profit sector is comprised of entities that deliver services to clients or the community; entities that engage in political or advocacy activities; and/or the delivery of services to their members. We consider a common statutory definition of not-for-profit to be a higher priority. The Australian Accounting Standards Board (AASB) defines a not-for-profit entity as “an entity whose principal objective is not the generation of profit. A not-for-profit entity can be a single entity or a group of entities comprising the parent and each of the entities that it controls.” A 2006 CPA Australia commissioned survey of CPA Australia members (see Attachment) suggests that the AASB definition could be made more robust and therefore better able to achieve the objective of differentiating not-for-profit and for-profit entities. The proposed definition is:

An entity shall be classified as not for profit when:

- (a) the entity has operating purposes other than to provide goods and services at a profit;
- (b) no member/owner has the right to surpluses of the entity;
- (c) the entity does not have the right to transfer ownership to members/owners; and
- (d) that entity does not have:
 - i. the objective of generating profit outlined in the entity’s legislation, associated regulation, or other founding document; or
 - ii. as its practical objective the generation of profit.

Draft Recommendation 6.4
Consolidating Commonwealth regulation and improving transparency

The Australian Government should establish a one-stop shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations with the following key functions to promote confidence in the not-for-profit sector:

- register and regulate Commonwealth incorporated associations, companies limited by guarantee and Indigenous corporations
- register and endorse not-for-profits for commonwealth tax concession status
- registration of cross-jurisdictional fundraising by not-for-profit organisations
- a single reporting portal for public record corporate and financial information, proportionate to the size and scope of functions of not-for-profit organisations
- provision of appropriate governance education
- complaints handling.

The Commission seeks comments on:

- **whether the proposed national Registrar be a separate agency under the Financial Management and Accountability Act 1997, or whether it should be an additional function and separate division of the Australian Securities and Investments Commission**
- **the appropriate reporting thresholds and requirements under the Registrar's proposed functions.**
- **whether the Office of the Registrar for Indigenous corporations should be transferred to the new regulatory organisation.**

CPA Australia believes there would be benefit in a single Commonwealth statutory regime for all unincorporated associations, incorporated associations and companies limited by guarantee. We suggest it would be appropriate that an appropriately funded and resourced ASIC be tasked with being responsible for the regulation of the not-for-profit sector. However, we are not opposed to the use of a separate regulator as long as it is appropriately funded and resourced.

In the absence of a single piece of Commonwealth legislation, CPA Australia considers that the same outcome can be achieved through uniform legislation enacted by the parliaments of the Commonwealth, the states and territories. Such an approach has ramifications for regulation.

CPA Australia's earlier submission to the Commission's Inquiry articulated our views on reporting thresholds. In summary, we consider that:

- **a Tier 1 not-for-profit entity with annual gross turnover of \$500,000 or more be required to lodge an audited financial report that complies with the financial reporting standards of the AASB;**
- **a Tier 2 not-for-profit entity with annual gross turnover between \$100,000 and \$500,000 be required to lodge a financial report that complies with the AASB's accounting standards and has been the subject of a review; and**
- **a Tier 3 not-for-profit entity with annual gross turnover of less than \$100,000 would lodge basic financial information accompanied by a declaration by management and those charged with governance about the entity's governance structures and internal controls.**

CPA Australia understands that the Australian Government is about to release a draft bill and regulations that would propose a number of amendments to the Corporations Act, including the possible introduction of reporting thresholds for public companies limited by guarantee. In the absence of a single piece of Commonwealth legislation applying to the not-for-profit sector, CPA Australia considers it most important that there is uniformity across jurisdictions re the different reporting thresholds.

Draft Recommendation 7.1

Simplifying processes for and improving effectiveness of tax endorsement

Australian governments should recognise the tax concession status endorsement of not-for-profits at the Commonwealth level, and explore the scope for a single national application process for organisations for tax status endorsement, or mutual recognition of endorsement, across all jurisdictions.

Draft Recommendation 7.2

Simplifying processes for and improving effectiveness of tax endorsement

Subject to considerations of affordability, the Australian Government should widen the scope for gift deductibility to include all charitable institutions and charitable funds as endorsed by the proposed national Registrar.

Gift deductibility should continue to be available to other eligible categories which fall outside this scope, such as cultural and environmental organisations endorsed by the proposed national Registrar and entities that are specifically named in the Income Tax Assessment Act 1997 or its Regulations.

The Commission seeks comments on whether the range of not-for-profits requiring formal endorsement for Commonwealth tax concessions (as distinct from self assessment) should be expanded.

Draft Recommendation 7.3

Improving the environment to support sector access to funding

To encourage cost-effective giving, the Australian Government should explore options to promote and support planned giving, especially payroll giving and bequests. Options include increasing the awareness of the tax benefits of giving, and financial assistance and advice to smaller organisations to establish planned giving programs.

Draft Recommendation 7.4

Improving the environment to support sector access to funding

The Australian Government should establish a joint working party made up of representatives of the not-for-profit sector, business, philanthropic and other government to explore obstacles to not-for-profits raising capital and evaluate appropriate options to enhance access to capital by the sector.

The Commission seeks views on:

- **the role of different types of intermediaries in facilitating NFPs access to capital**
- **whether there is a need for a new legal form of incorporation for not-for-profits allowing equity investment similar to the UK Community Interest Companies.**

CPA Australia supports the classification of not-for-profit tax concessions as tax expenditures for the reasons given in the Commission's draft report, that is, to facilitate analysis of the various types of policy options available including tax concessions vis-à-vis other approaches such as direct financial assistance, loan guarantees and interest rate subsidies, etc.

As with most tax concessions, such concessions for not-profit-entities introduce greater complexity into the tax laws than would otherwise be the case and this needs to be considered against the background that the tax laws are already very complex

This complexity is exacerbated via concessions being provided via different Commonwealth taxes (e.g., income tax, GST and FBT) as well as via state/territory taxes such as payroll tax (PRT) and land tax, particularly where such concessions vary between the different (8) jurisdictions. While the recent move by the states/territories to harmonise their PRT arrangements should ameliorate this problem to some extent, we agree with the Commission that the introduction of a single application process to determine eligibility for all relevant tax concessions would be a further important step forward in minimising compliance costs for not-for-profit entities. CPA Australia notes also that the Henry Tax Review is likely to consider broader measures to obtain increased harmonisation of the various existing state taxes in the future.

Some rationalisation of the existing categories of not-for-profit entities would also seem to be desirable to reduce complexity in this area. For example, we note that there are two broad classifications of not-for-profit entities in the draft report, being PBIs, charitable and religious institutions and thirdly, other non-charitable organisations. This classification is then followed by a more detailed one comprising PBI, charitable institution or fund, income tax exempt fund, community service organisation and other income tax exempt organisations, without any clear link between the two.

It should be noted that the exclusion of 'mutual receipts' from the assessable income of clubs, associations and other like bodies arises from the application of the mutuality principle which is a long-standing common law rule which simply recognises that a person's income consists only of moneys derived from external sources. The application of this rule in practice is subject to certain long-standing ATO guidelines to prevent abuse. It is arguable, therefore, that this approach is an inherent feature of the income tax law and thus not a concession or tax expenditure.

A Federal Court decision that stipulated that the mutuality principle couldn't apply where an organisation is precluded from distributing to members on winding up was overturned by specific legislation applicable from 1 July 2000. It could be argued that the extension of the mutuality principle in these circumstances was a concession.

CPA Australia notes that deductible gift recipients (DGRs) are required to be specifically endorsed in order to qualify for this special concessional treatment and this seems to be appropriate for compliance purposes. However, we do not see a need for other not-for-profit bodies to be specifically endorsed as such an approach, in our view, would simply give rise to undue administrative costs for the ATO and compliance costs for the relevant taxpayers. In other words, we believe that continuation of the existing self-assessment approach for other relevant organisations (including those subject to the mutuality principle) should be retained.

CPA Australia considers that further support from the Commonwealth (including an information campaign to ensure increase public awareness) and employers (including SMEs) for payroll giving programs as noted in the report could be a useful way to enhance philanthropic support in Australia.

Further consideration should be given to the role of other existing planned giving vehicles (and possible new ones) and/or possible new vehicles to facilitate giving by wealthy donors having regard to the costs associated with such vehicles (including appropriate regulation to prevent abuse) and their overall efficacy, including the absence of death or estate duties in Australia.

The thrust of the report's draft recommendation 7.2 regarding the proposed widening of the scope for gift deductibility to include all charitable institutions and funds as endorsed by the proposed new national registrar. We also agree that the types of deductible gifts currently available is adequate/appropriate and that any widening of the current schedule could give rise to additional complexity and compliance costs with little commensurate benefits to not-for-profit entities.

We note that there are pros and cons associated with the three main mechanisms that can be used to provide tax incentives for philanthropy and that the impact of any change in the current system for providing deductible gifts would be affected by the structure of the future individual income tax system and that the most efficient and effective system can only be considered in this light.

Consideration should also be given to addressing the complexity of the current FBT exemptions for relevant charities, perhaps via a major rewrite of the current FBT legislation.

It may be appropriate for the Productivity Commission's report on the issue of improving the environment to support sector access to funding to be deferred pending the outcome of the Henry Tax Review.

Draft Recommendation 10.4
Building governance capabilities

Australian governments should provide support to develop and promote training for not-for-profit management and boards in governance and related areas. They should explore the options for improving access to and quality of such training in these areas with peak bodies and appropriate training providers.

CPA Australia is supportive of such initiatives.