



National Roundtable of Nonprofit
Organisations

Scoping study for a national not-for-profit regulator

Submission by the National Roundtable of
Nonprofit Organisations (NRNO)

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1. Summary

After five major Inquiries into regulatory reform for the Not for Profit (NFP) sector since 1995, including a substantial investment of written and oral advice to government from the NFP sector, there is now a large measure of agreement about the main reform outcomes needed in relation to:

- the incorporation and tax treatment of NFP organisations
- accounting and reporting standards to match the circumstance of different types of NFP organisations and;
- removing unduly onerous contractual arrangements between government agencies and NFP organisations.

A primary purpose of any NFP reform process is to enable the NFP sector to more effectively facilitate citizen participation in a healthy and vibrant civil society.¹ To achieve this goal, the federal government needs to set out its vision, overall plan and principles for a substantial reform agenda. Steady progress in reforming government processes is achievable if:

- the Federal government articulates its NFP regulatory principles and expectations as part of an overall plan
- the key reforms which require significant legislation are developed through COAG processes and;
- close and ongoing consultation is put into practice with a cross-section of NFP sector leaders, consistent with the government's National Compact commitment in 2010

Quick or easy wins of a substantial kind cannot be achieved on these issues. This is borne out by the history of previous Australian industry reform processes, the experience of other federations such as Canada and the USA in their NFP reform processes and the inherent complexity of regulation in this field, involving as it does 15 Federal Acts, 162 State and Territory Acts and 19 Federal, State and Territory departments.

However, rapid progress is achievable through collaboration with the NFP sector on the basis of an overall plan and proposed set of regulatory principles. In particular, early agreement can be reached about the categories of NFP organisation to be regulated and the types and level of proportionate risk for those categories. Building on this and the large body of material available from the five Inquiries and responses to the Scoping Study, the National Roundtable of Nonprofit Organisations (NRNO) believes that joint government/sector work could produce a framework for reporting standards and contracting terms to match the circumstances of a diverse range of NFP organisations. These "nuts and bolts" steps would also make it more likely to obtain support from State and Territory governments to pass major legislation.

The NRNO believes that an independent, adequately resourced, national regulator has the potential to directly enhance the capacity of the NFP sector to promote social cohesion and facilitate citizen participation in a healthy and vibrant civil society. To achieve this objective, the regulator would need to be sufficiently resourced to effectively deliver a complex mix of functions, including NFP registration, compliance, advice, support and mediation functions. The Scoping Study's reference to the ATO as an interim or long term institutional setting for this purpose is not supported by the NRNO.

¹ NRNO submission to the Review of the Contribution of the Nonprofit sector, June 2009 p12

2. The National Roundtable of Nonprofit Organisations (NRNO)

The NRNO is an independent, non-partisan with a diverse membership of peak bodies and national NFP organisations. Based on the active engagement of member agencies representing more than 20,000 NFP organisations across Australia, the NRNO facilitates consideration of regulatory, taxation and sustainable financing issues and coordinates member engagement with the Australian community and public policy processes. Together with many other NFP organisations, the NRNO has contributed actively to government Inquiries and Reviews. This submission reflects consultation with organisations represented by NRNO members. A list of members is attached.

3. Introduction

The sector plays a pivotal role in promoting social cohesion and democratic habits in Australia. It also provides a voice to vulnerable and marginalised Australians. By facilitating community participation in the service of others, it contributes significantly to the wellbeing of the Australian community.

NFP organisations provide opportunities for Australians to contribute to civil society through their active participation in support of others, to develop skills, social networks, to engage in recreation and in the provision of services. They promote a fair and inclusive Australia in which all people can participate. In assessing the purpose and contribution of NFP organisations, the Productivity Commission noted that:

“the defining characteristics of NFP organisations enable them to make contributions which are distinct from those of the business and government sectors. Indeed, this ability to make contributions in a distinct, and sometimes unique, way provides a rationale for the sector’s existence.”²

In addition to those who benefit from services provided by NFP organisations, the large majority of Australians are members of an NFP organization. Australia has a high level of citizen participation with NFPs. Around 87% of adults belong to at least one NFP organisation and most belong to at least two; over 5 million Australians volunteer their services (34% of the population) and 70% donate to an NFP organisation³.

The NRNO welcomes the Scoping Study’s focus on regulator options. In light of the major role performed by the sector in Australian society, the NRNO regards the litmus test of a future regulator to be whether it genuinely facilitates and supports the sector’s role in promoting social cohesion and citizen participation in a vibrant civil society. An effective regulator must add demonstrably to the quality of Australia’s civil society through efficient regulation of, and collaboration with, the NFP sector. If it is not have the mandate or resource capacity to achieve such an impact, other mechanisms would be more appropriate to address the systemic flaws in the current regulatory environment.

² Productivity Commission: Discussion paper on the Contribution of the Not-for-Profit Sector 2009

³ Volunteering Australia Annual Report 2009-10 and Lyons M: Submission to Productivity Commission in response to its Discussion Paper “Contribution of the Not for Profit Sector’ 2009.

The NRNO welcomed the National Compact commitment made by the federal government last year to a shared vision and commitment to collaborate actively with the NFP sector. By applying this approach to consultation on its NFP reform plan over coming years, there is every chance that progress will be achieved towards substantial change.⁴

The NRNO acknowledges the challenge in developing a viable plan for national NFP regulation. In this regard, it welcomed the creation of an Office of the Not-for-Profit Sector and an NFP Reform Council. Together with other channels of government/sector dialogue, the Council can be expected to contribute to developing a national plan for substantial regulatory reform. Drawing on the experience of its more than 20,000 NFP affiliated organisations, the NRNO is committed to assisting this work, including for the design of a national not-for-profit regulator.

4. Necessary steps for substantial reform

COAG processes need to be a central feature of the government's NFP reform planning, not least because the large majority of incorporated NFP organisations operate under State and Territory legislation. Passage of substantive national NFP regulatory legislation inevitably requires State and Territory support. The process which led to COAG's 2009 decision to introduce a national standard chart of accounts offers an example of what can be achieved on a modest scale. However, the far more challenging legislative changes needed for a statutory definition of charitable purposes, the harmonisation of conflicting regulations across jurisdictions, streamlining of reporting and improvement in accounting standards⁵, working through COAG processes will be essential.

The NRNO believes that government first needs to articulate its overall plan and expectations for NFP regulatory reform and identify proposed steps to achieve COAG support. This is consistent with the recommendation of the Senate Economics Legislation Committee in 2010 that the incoming government should work through COAG to establish a single independent national commission⁶. Specifically, the Committee recommended that:

*“ the incoming government establishes a working group or uses the COAG Business regulation and Competition Working Group . The Working Group should consult extensively with the sector in a timely manner to address issues arising from the establishment of a commission which applies a public benefits test. The Australian model should draw on the Charity Commissions in the UK and New Zealand”.*⁷

In a review of NFP regulatory reform across many countries, Professor Susan Phillips identified precisely this issue in the Canadian experience. Phillips argues that, to achieve any significant sector reform change, Canada requires the NFP regulatory reform agenda to become part of the institutionalised meetings of federal and provincial ministers, as has been the case for

⁴ National Compact: Working Together (Commonwealth Govt. March 2010) – statement of shared principles

⁵ Of the kind recommended by Australia's Future tax System Review (2009), the Senate Standing Committee on Economics Inquiry, the disclosure regimes for charities and not-for-profit s (2008) and Productivity Commission Inquiry in to the Contribution of the Nonprofit Sector (2010), .

⁶ The Senate Economics Legislation Committee Tax Law Amendments (Public Benefit Test) Bill 2010 Report p42

⁷ Ibid

reforms of all other industries⁸. In relation to NFP reform processes in other countries, Phillips argues that:

“in every case of substantial reform, there has been a political vision for civil society and its relationship with government, accompanied by leadership from civil society”⁹

Given the significant challenge involved in obtaining support to pass even limited regulatory Bills through the Senate, this is especially relevant to Australia.

5. Principles for regulatory reform

Australia already has very substantial regulation of NFP incorporated associations and companies limited by guarantee. For organisations operating in more than one jurisdiction, this is multi-layered regulation and provides accountability for the use of public funds. As identified in recent Inquiries, the overlapping and cumbersome nature of existing accountability requirements causes NFP organisations to divert significant resources for these tasks and away from their core functions.

NFP organisations in receipt of public funds must be subject to effective and efficient reporting and accounting measures. At the same time, those measures should match the proportionate risk presented by different NFP categories or organisation. In this way, public confidence in the sector's use of public funds will be maintained.

In addition to the significant reports by the Productivity Commission on the Contribution of the Not-for Profit Sector (2010) and the Senate Committee Inquiry (2008), the report by Victorian Commissioner Pascoe on Regulating the Not for Profit Sector (2008) provides a useful reference point. In 2009 Commissioner Pascoe identified a steady increase in the burden of Australian regulation *“as a result of a range of pressures, including hyper-sensitivity to risk and high levels of risk mitigation”*.¹⁰ Pascoe concluded that a three pronged approach was needed to *“overcome inappropriate regulatory expansion”* in Australia:

1. Making regulation more effective and responsive
2. Reducing the cost of regulation and;
3. Improving regulatory processes so that new regulation is only introduced when its benefits outweigh its cost.

To achieve a sustainable improvement in streamlining and simplification of compliance arrangements for NFPs, new legislation should be based on the concept of proportionate risk. This is important in light of distortions resulting from the application of inappropriate or conflicting regulatory principles across jurisdictions in the past. For example, Professor McGregor-Lowndes found evidence that:

“many unincorporated associations have been driven into incorporated association regimes partly by the power of government funding departments for their own administrative convenience and because of their fear of liability. The increasing level of

⁸ Phillips S.D: Policy Initiatives Towards the Third Sector in International Perspective , Nonprofit and Civil Society Studies; Gidron B. and Bar M (editors) Springer 2010, p 228

⁹ Phillips S. D: Canada – Civic society under neglect; The Philanthropist 2010 Vol 23.1 p65

¹⁰ Pascoe S; State Services Authority of Victoria: Regulating the Not-for-Profit Sector (2008), p2

*complexity of such legislation over recent years has been the final straw for such small bodies being caught in a regressive regulatory cost environment”.*¹¹

For the 59,000 NFP organisations which employ staff or access tax concessions, legislative reform needs to address the great diversity of NFP purpose, legal structure, size and type of activity, as well as the type and probability of risk associated with relevant categories of organisation. These risk considerations should focus principally on the use of public funds. The significant role of existing and emerging self-regulatory frameworks also needs to be considered.¹²

In the aid and development sector, for example, a self-regulatory Code has set standards for the last 14 years in every area of organisational activity, including human resources, financial reporting, fundraising and marketing, governance and child protection. It requires all signatories to undergo an annual self- assessment and reviews all annual reports to ensure adherence to the financial reporting requirements.

In addition to ensuring that regulation is proportionate to the risk associated with different types of NFP legal structure, size, purpose and scale of public funding, the NRNO proposes the following principles for an independent, national regulator:

- simplicity, including the principle of ‘report once, use often’
- removal of duplicative processes
- that all government agencies accept and apply the reporting and compliance requirements put in place with respect to corporate and financial matters
- clarity and certainty for NFP organisations about their obligations and rights
- that costs associated with reporting and other requirements do not lead to NFP funds being diverted away from their primary purpose
- transparency

6. Functions of a national NFP regulator

The NRNO recommends that regulatory design principles along the lines of those mentioned above are applied to the mandate of an independent, national regulator. Application of these principles provides a sound basis to achieve increased certainty about regulatory requirements by NFP organisations, streamlined reporting, harmonisation of conflicting regulations across jurisdictions, a lower proportion of NFP compliance costs and improved cross-government coordination.

The NRNO endorses the recommendations for a single, independent, national regulator by the Review of Australia’s Future Tax System Review (recommendation 41) and the Senate Economics Inquiry on the disclosure regimes for charities and not-for-profit organisations (recommendation 3). Both reviews found existing NFP tax concessions and regulatory arrangements to be unnecessarily complex and not appropriately reflective of community values

¹¹ McGregor-Lowndes M. and Hannah F: Unincorporated associations as entities: a matter of balance between regulation and facilitation?(Queensland University of Technology 2010)

¹² Pascoe S: op cit pp2-3 and NRNO submission in response to the Productivity Commission, Contribution of the Not for Profit Sector Discussion Paper (June 2009)

about the merit and social worth of NFP activities. They recommended that a new regulator provide both a mix of regulatory and advisory/support functions.

The NRNO believes that, to achieve the necessary reform impact, an independent national regulator must be able to:

- determine charitable status
- provide corporate registration and financial regulation for the different category of NFPs, including for fundraising activities
- provide a single portal for corporate and financial reporting
- collect relevant statistics and information, including impact reporting by NFP organisations in order to assist the sector build public awareness of its work
- provide guidance on governance matters where appropriate
- provide mediation and advisory support
- provide a complaints handling mechanism

The last four of these functions require a regulator to achieve mutual trust and bona fide partnership with the NFP sector. A core part of its business would be educative and supportive, fostering the development of charitable purposes, as well as assisting the promotion of public awareness of the sector. In this way, the regulator would have the functional mandate, capacity and mission to use reporting by NFP organisations to inform the wider community about the sector, thereby enhancing sector transparency and accountability and public confidence. Such a regulator would also identify emerging areas of regulatory risk and warn the sector about them, as well as providing resource materials for the sector to address them.

The Charities Commission for England and Wales and its counterpart in New Zealand demonstrate that it is possible to combine such a mix of functions. Despite the particular challenges of Australia's federal structure, Australia has the capacity to design and implement a sustainable institutional framework with such a mixed set of functions.

7. Institutional setting for a national regulator

The Scoping Study refers to the benefits of establishing an independent national regulator, as recommended by the Review of the Australian Tax System (2009) and the Senate Economics Committee report (2008). The Study then points to possible benefits of the ATO becoming the national regulator on an interim basis, referring to:

- the ATO's knowledge of NFP organisations
- the US and Canadian experience in using their tax-collecting agencies as a regulator
- cost effectiveness compared to creating a separate entity

The NRNO recognises the practical challenges and costs involved in establishing an independent regulator in the short term and notes the Productivity Commission view that, while an independent entity would be preferable, *"initially it should be established as a statutory body or an organ in the Australian Securities and Investments Commission"*¹³

¹³ Productivity Commission, Contribution of the Not for Profit Sector, Research report Canberra 2010 p 152

The NRNO also believes that current efforts to achieve substantial reform will only succeed if it is based on the foundation of sound NFP regulatory principles and is tailored from the start to deliver the mix of functions identified above. In this regard, it endorses the ATO/Treasury position to the Charities Definition Inquiry (2001)¹⁴ that:

“Administration would be better served by a single, independent common point of decision making on definitions leading to conclusions about whether s are charitable or non-profit, such as occurs with the Charities Commission in the UK for example”.

This assessment mirrors that of Marcus Owens, a former Director of the US Internal Revenue Service’s Exempt Organisations (i.e. Charities) Division, who argues that the IRS is structurally ill-suited for the task of providing vigorous oversight of the US nonprofit sector¹⁵. Owens points to the absence of any “institutional champion” of the sector within the US government to address broader issues and concerns that other types of economic entities have and argues that provisions of the IRS Code actually hamper efficient and effective administration involving tax-exempt organisations, in comparison to the opposite effect they have on tax administration’.¹⁶ For the USA, Owens concludes that:

‘simply increasing resources available to the IRS will likely not result in a significantly more sophisticated system of oversight, certainly not one that is capable of addressing the sorts of issues and financial structures present in the charitable sector’¹⁷

Neither the Canadian or US tax collecting agencies have demonstrated a capacity to develop the kind of support, advisory and mediation functions identified as necessary by successive Inquiries and the NFP sector for an effective Australian regulator. This may explain why there are regular calls from the US and Canadian NFP sectors for an independent regulator. Moreover, in Australia’s federal system, the ATO has little capacity to coordinate the roles of other State regulatory agencies.

In considering international comparisons, the Scoping Study points to commonalities with the USA and Canada. While both are federal systems, neither has developed an equivalent of the Australian Securities and Investment Commission. Nor do their regulatory arrangements reflect collaborative engagement with the respective NFP sectors in their design. One point of international comparison not mentioned in the Scoping Study but which also warrants consideration is the way in which important support and advisory functions to NFP organisations have been incorporated into Singapore’s regulatory structure.

To become an effective national NFP regulator requires an organisational culture of openness, a readiness to disseminate information widely and a commitment to support and foster the NFP sector. As in the USA, an injection of additional funding to the ATO as a short term venture cannot be expected to deliver an adequate outcome. Therefore, the NRNO does not support using the ATO as an interim or long term institutional setting for a national NFP regulator.

¹⁴ The Australian Taxation Office 2001: Submission to the Inquiry into Charities and Related s p9

¹⁵ Owens M.S: Charity Oversight: an alternative approach; Working Paper No 33.4, Hauser Centre for Nonprofits, Harvard University 2006 p2

¹⁶ Ibid p9

¹⁷ Ibid p10

NRNO MEMBER ORGANISATIONS

Aged and Community Services Australia
Association of Neighbourhood Houses and Community Learning Centres
Australian Conservation Foundation
Australian Council for International Development
Australian Council of Social Services
Australian Healthcare and Hospitals Association
Australian Society of Association Executives Inc.
Australian Youth Affairs Coalition
Catholic Social Services Australia
Centre for Social Impact
Christian Schools Association
Community First Step
Clubs Australia
Family Relationship Services Australia
Federation of Ethnic Communities Council of Australia
Fundraising Institute of Australia
Independent Schools Council of Australia
Jobs Australia
Lifeline Australia
Music Council of Australia
National Association for the Visual Arts
National Council of Churches of Australia
National Disability Services
Philanthropy Australia
Queensland Regional Natural Resource Management Groups Collective
Refugees Council of Australia
Secretariat of National Aboriginal and Islander Child Care Inc.
Vision Australia
Volunteering Australia
Wilderness Society Inc
YMCA Australia