



Charitable choices

What fate awaits the Australian Charities and Not-for-profits Commission?

With the continuance of the Australian Charities and Not-for-profits Commission (ACNC) in doubt, Dr Matthew Turnour examines the commission's background and purpose, and the debate on its future.

In 1995, the Industry Commission Inquiry Report titled 'Charitable Organisations in Australia' recommended "an independent administrative body for charities and related entities".¹

A persuasive case for such a body was developed from 2001 to 2010. The following six reports all recommended the establishment of some similar 'administrative body', although the form, role and purpose varied:

- The 2001 'Report of the Inquiry into the Definition of Charities and Related Organisations' commissioned by the Howard Coalition Government
- The 2008 Senate Economics Committee Inquiry into Disclosure Regimes for Charities and Not-for-profit Organisations



- The 2010 Review into Australia's Future Tax System (the Henry Review)
- The 2010 Productivity Commission 'Report on the Contribution of the Not-for-profit Sector'
- The 2010 Senate Economic Legislation Committee in its Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010
- The 'Final Report on the Scoping Study for a National Notforprofit Regulator' conducted by the Federal Treasury.

By the close of the first decade of the new millennium, there was a clear mandate for some administrative body focused on the not-for-profit sector. There was not, however, clarity about what that body might look like. Further, there are characteristics of the not-for-profit sector which make regulating it conceptually problematic.

Throughout the debates about the setting up of the ACNC, draft legislation setting out the reporting requirements or powers of the proposed new commission was not available.

There was a general positive sentiment toward a body other than the Australian Taxation Office (ATO) determining charity status for tax and other Commonwealth Government purposes. I do not recall a vocal opposition to the establishment of the ACNC – so where did the voice of discontent come from? Here, it becomes important to understand the unique nature of the sector.

Charities are essentially privately controlled entities that exist for public benefit. They are privately controlled like any business corporation and yet, like government, they serve the common good. The ACNC legislation focuses on the second dimension, namely the public dimension of being accountable for the common good. Accountability, transparency, and other attributes expected of government and public institutions are emphasised.

The registering, reporting and regulatory functions of the ACNC are essential to the discharge of its role under the *present* legislation.

The Explanatory Memorandum to the Australian Charities and Not-for-profits Commission Bill 2012 explains that the public nature of charities is at the forefront of why the ACNC was established:

"1.8 ... NFP entities also need to be accountable to the public, including donors, members and volunteers.

"1.9 Maintaining, protecting and enhancing public trust and confidence in the sector is essential to its ongoing sustainability, including the ability to provide the services that it delivers to the public.

"1.10 A national regulatory system that promotes good governance, accountability and transparency for NFP entities will help to maintain, protect and enhance the public trust and confidence that underpins the sector.

"1.11 The ACNC will play a key role in providing information and education to the public about the NFP sector."

Conversely, the Coalition's intention to repeal the legislation focuses on the private right of citizens to pursue the common good as they see fit without such accountability to government. The outline to the repeal Bill before the House of Representatives is illustrative. It provides:

"The establishment of the Commission has introduced new powers in information collection, monitoring and compliance that are not available to Commonwealth bodies with comparable roles, such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority.

"Repealing the Commission will remove unnecessary regulatory control over the civil sector, and move instead towards Commonwealth support for the sector to self-manage. The repeal is consistent with the broader deregulation agenda to boost productivity by removing any excessive, unnecessary and overly complex red tape imposed on business, community organisations and individuals.

"This Bill will repeal the *Australian Charities and Not-for-profits Commission Act 2012*, thereby abolishing the Commission."

The worldview contest is immediately apparent. One side (associated with the left of politics) emphasises the public dimension; the other (associated with the right) emphasises the private freedom dimension. The current federal Minister for Social Services, Kevin Andrews, summarised the latter view in a National Press Club address on 17 March 2014. He said:

"Ladies and Gentlemen our governing philosophy is informed by a few humble truths: first that Government is NOT the fount of all wisdom; secondly that a vibrant, dynamic economy and business community are essential to fund the social services we need, expect and deserve; and thirdly that voluntary mutual co-operation is [a] crucial force to building a responsive and vibrant civil society.

"...

"In general we'll be looking to make your lives easier by lightening the compliance burden inflicted by duplication and regulation."²

He justified the abolition of the ACNC on the grounds that it is "a body that simply generates precisely the sort of useless red tape that this Government is trying to eliminate". He expressed the view that organisations "like the Australian Institute of Company Directors already do a superb job of supporting directors and boards in both the profit and the not-for-profit sectors" and consequently that the government could "see no reason ... to reinvent an already smoothly turning wheel". The function of government is "to facilitate – not to duplicate"³

The Minister continued: "It's a fundamental tenet of the Coalition worldview that civil society should be neither an instrument nor an agent of the state." He also said: "The abolition of the ACNC and establishment of the [proposed National] Centre [of Excellence] will move the focus from the stick to the carrot. ... We want to transfer the focus from coercive regulation to collaborative education, training and development."⁴

The stark contrast between these two approaches makes sense in the context of a worldview clash between the left and right of politics. The first focuses on the public accountability, and the second on the freedom of private bodies to go about their purposes as undisturbed as possible.

In such a context, we should not be surprised at the struggle for control of the definition of civil society by the left and the right of politics. We should also not be surprised that the existence of the ACNC itself is the battlefield for this struggle. Both sides would regulate or deregulate the sector for ideological reasons drawn from political or philosophic premises. Both are seeking to define what the sector will look like in Australia according to their respective worldviews. The battlefield is over the extent to which those in charge of charities must be publicly accountable and transparent, and the extent to which they are accorded the freedoms usual to private individuals in the governance of their charities.

While the Coalition has announced that it will abolish the ACNC and has introduced legislation to the House of Representatives to that effect, at present it is not possible to know with any certainty how the legislation will be received by the Senate. So what does the future hold?

In my view there does not need to be either complete abolition of the ACNC nor for it to continue in its present form without any change. There may well be grounds for compromises which could accommodate the primary concerns of various sectors of the community by carefully considering the three principal functions of the ACNC.

The three principal functions of the ACNC are: first, recognition and registration of income tax exempt and deductible gift recipient status for charities and related entities; second, the maintenance of a register of such entities; and, third, regulation and where necessary prosecution of non-compliant entities.

Taking each of these three areas in turn; first, it is clear that there must be a body to undertake the assessment of entitlement to charity status and the tax concessions associated with this. The ACNC is presently performing that task and the case for now shifting this function somewhere else is arguably weak.

In relation to the second area of maintaining a register of charities and related entities, again, the register must be maintained somewhere. There has to be some public information and there is ample room for debate and discussion about how much information must be provided and how much must be in the public domain.

Again, though, there is no reason why the ACNC should not continue to maintain that register. It has brought the extant public register into reasonable order in the less than two years it has existed, which is something the ATO had not achieved in all the years it ran the register.

A significant amount of the anxiety of those in favour of abolition of the ACNC relates to the extent of the reporting requirements and the extent to which those reports are public. I suggest that a middle ground can be navigated which accommodates both the need for some public records and perhaps the need for some non-public reporting. Some reporting requirements might also be abandoned in some cases.

Finally, there is also significant concern centred on the investigative and punitive powers of the ACNC. Some are concerned they are excessive and some suggest they are duplicating powers of the ATO, ASIC or the Federal Police. Many, if not most, of the investigative and punitive powers of the ACNC could be curtailed or removed. Arguably, its most significant power is the capacity to deregister.

In conclusion, there is a legitimate and understandable contest taking place in Australia over how the voluntary sector is to be understood and consequently regulated. Australians have a capacity to find a middle ground but at the time of this article there is no public evidence of compromises to be explored.

It is, therefore, impossible to know in the foreseeable future whether the ACNC will continue in its current form, be abolished, or have some of its reporting requirements and regulatory powers curtailed.

This article appears courtesy of the Queensland Law Society Not-for-profit Law Committee. Dr Matthew Turnour is chair of Neumann & Turnour Lawyers and also chairs the committee.

Notes

¹ Industry Commission, 'Charitable Organisations in Australia', Report No.45 (1995).

² Kevin Andrews, 'National Press Club Address' (speech delivered at the BCCM Make it Mutual Workshop, 17 March 2014), kevinandrews.dss.gov.au/speeches/64.

³ Ibid.

⁴ Ibid.