AISSA

Not-for-profit Reform - Information for South Australian Independent Schools

DRAFT – Current at 5 October 2012
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Executive Summary

The Australian Government is implementing widespread reform of the not-for-profit sector. The reform is centred around the following three areas:

- Establishing a national ‘one-stop-shop’ regulator for the not-for-profit sector (the Australian Charities and Not-for-profits Commission) which is intended to remove the complex regulatory arrangements currently in place and streamline reporting arrangements;
- greater harmonisation and simplification between Commonwealth, State and Territory Governments on not-for-profit issues, including regulation; and
- reducing red-tape for government funded not-for-profit organisations, including through streamlining contracting and funding arrangements.

The majority of the reforms are outlined in the Australian Charities and Not-for-profits Commission (ACNC) Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012. The Bills have been re-introduced to parliament incorporating recommendations made by the House of Representatives Standing Committee on Economics. They are currently before the Senate. The Federal Opposition has indicated that it will not support the legislation.

The Government is also introducing reforms in the area of Personal Liability for Corporate fault and a new statutory definition of charity.

Key elements of the Government’s reform agenda, such as increased reporting requirements, a new definition of charity and Personal Liability for Corporate Fault legislation, are likely to have implications on the operations of Independent schools and the responsibilities of school governors. Further information on the reforms is contained in the body of this paper.

This paper provides a summary of the key elements of the reform as they now stand. However, member schools are advised to make use of the Treasury and ACNC websites to keep updated about the progress of the reforms.

AISSA Advice

The AISSA has kept member schools updated about the reforms including the legislative delays which have impacted on the implementation timetable.

The AISSA advises schools to monitor the reforms and consider the implications for their school, particularly as this relates to the reporting requirements and the liability of directors. Further information is available at:


The AISSA will continue to inform member schools about developments in this area. Further information is available from Garry Le Duff, Chief Executive (E: leduffg@ais.sa.edu.au).
Key Dates

1 July 2012

- Better targeting of NFP tax concessions apply to new unrelated commercial activities that commenced after 7:30 pm (AEST) on 10 May 2011.

October/ November 2012

- Australian Charities and Not-for-profits Commission (ACNC) is anticipated to commence operations once legislation is passed by parliament. Parliament is next sitting on selected days in October and November 2012. The ACNC will initially be responsible for:
  
  - determining charitable and public benevolent institution status for all Commonwealth purposes;
  - providing education and support to the sector;
  - beginning the implementation of a ‘report-once use-often’ general reporting framework for charities.

1 July 2013

- Governance Standards commence.

  The governance standards will be prescribed in the Regulations accompanying the Australian Charities and Not-for-profits legislation. It is expected that the standards will be ‘principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards in its particular situation.’

- Application of statutory definition of charity will apply.

  The definition is still to be determined. In the interim ‘the registration of charities will continue to be based on the current common law definition of charity (as affected by a number of statutory adjustments).’

31 December 2013

- Non-financial reporting will start on 1 July 2013, with respect to the 2012/13 financial year, with the first information statements due by 31 December 2013 unless a substituted accounting period* applies. Information to be collected will include:

  - who benefits from the charity;
  - how it has pursued its main purpose in the last 12 months;
  - how it proposes to pursue its main purpose in the next 12 months; and
  - information on staff and volunteer numbers.
31 December 2014

- Registered charities will have to start financial reporting to the ACNC after the financial year ending 30 June 2014. The first financial reports due by 31 December 2014, unless a substituted accounting period* applies.

Different requirements will be in place dependent on entity size.

* As a response to submissions to the ACNC Exposure Draft, the ACNC the legislation has been revised to allow charities that operate on the basis of different reporting periods to continue on that basis unless the ACNC provides otherwise.
1.0 Introduction

The Australian Charities and Not-for-profits Commission (ACNC) Bill 2012 enables the implementation of a range of Australian Government reforms in the Not-For-profit sector, including the establishment of the Australian Charities and Not-for-profits Commission (ACNC) which will regulate charities.

In introducing the reforms the Government has stated that its aim is ‘to ensure the integrity, viability and reputation of the sector’. Reducing red-tape, improving transparency, accountability and fairness, and providing ‘a sustainable and modern framework in which the sector can continue to grow’ are further goals (Bill Shorten, Treasury’s Not-for-profit Reform Newsletter, Issue 1).

The legislation is currently before parliament in the Senate, having been sent to the House Standing Committee on Economics, the Parliamentary Joint Committee on Corporations and Financial Services, and the Senate Standing Committees on Community Affairs and passed by the House of Representatives. A number of changes were made to the Bill as a result of the report from the House Standing Committee on Economics. It is not clear as yet whether the legislation will pass the parliament without further amendment.

The Australian Government is also implementing a range of other changes that may impact on the responsibilities for school governors and the operations of schools including legislation in the area of personal liability for corporate fault and a new statutory definition of charity.

This paper provides information on the proposed changes arising from the Australian Charities and Not-for-profits Commission (ACNC) Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, the introduction of a statutory definition of charity, the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 and the personal liability legislation as they stand at 5 October 2012. This information has been drawn from the following documents:

- Australian Charities and Not-for-profits Bill 2012
- Australian Charities and Not-for-profits Bill 2012 Explanatory Memorandum
- Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012
- Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 Explanatory Memorandum
Australian Charities and Not-for-profits Commission Implementation Taskforce Implementation Report
Australian Charities and Not-for-profits Commission Implementation Taskforce Newsletters
Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012
Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 Explanatory Memorandum
Information Alerts from Minter Ellison

Links to these information sources are provided at the end of this document.

### 2.0 Australian Charities and Not-for-profits Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012

### 2.1 Overview

The majority of changes outlined in this paper will come into effect following the passing of the Australian Charities and Not-for-profits Commission (ACNC) Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012. These changes include:

- The establishment of the Australian Charities and Not-for-profits Commission which will be responsible for the registration and regulation of registered charities.
- The development of a charity passport
- The establishment of an Australian Charities and Not-for-profits Register
- Introduction of governance standards
- New Reporting Requirements
2.2 | Australian Charities and Not-for-profits Commission (ACNC)

2.2.1 | Overview

The Australian Charities and Not-for-profits Commission (ACNC) was scheduled to commence operations on 1 October 2012 after the Australian Government deferred the original commencement date of 1 July 2012. However, this date has again been deferred as a result of the legislation still being before Parliament. The ACNC is expected to commence operations once the legislation is passed.

Ms Susan Pascoe, formerly Chief Executive of the Catholic Education Commission of Victoria, currently interim Commissioner, has been nominated as Inaugural Commissioner of the ACNC. Since July 2011, she has been the Head of the ACNC Implementation Taskforce.

The stated aim is that the Commission will ‘be a one-stop shop for charities to streamline their regulatory and reporting interactions with government agencies.’ The ACNC will initially be responsible for:

- determining charitable and public benevolent institution status for all Commonwealth purposes;
- providing education and support to the sector;
- beginning the implementation of a ‘report-once use-often’ general reporting framework for charities.

2.2.2 | Registration

Existing charities endorsed by the Tax Office as having tax exemptions will automatically move to the new regime and will not need to re-register to become a registered charity. Registration with the ACNC is, however, is voluntary and it is possible to ‘opt out’ of registration by notifying the ACNC. It should be noted though that this is likely to lead to ineligibility for Commonwealth tax concessions.

Once the ACNC is operating, the Tax Office will accept the ACNC’s registration of charitable status, but retain responsibility for determining eligibility to access Commonwealth tax concessions which are subject to special conditions.
2.2.3 | ACNC Powers

The ACNC Commissioner will have a number of significant regulatory powers under the Bill. For example, the Commissioner will have the power to ‘gather information necessary to monitor registered entities’ compliance with certain provisions and to assess registered entities’ ongoing entitlement to registration.’ The Commissioner will also be able to obtain information and documents in order to ‘determine whether information given in compliance with certain provisions is correct.’ In addition, a registered entity can be required to ‘attend and give evidence before the Commissioner, or an individual authorised by the Commissioner’ to provide the information.

ACNC officers have the power to monitor compliance in regard to ‘certain provisions’. Officers are able to enter premises for this purpose. However, this must either be with the consent of the occupier or ‘under a monitoring warrant’. Monitoring powers include searching of the premises, observation and examination of activities on the premises, operation of electrical equipment on the premises and a range of inspection provisions.

The Commissioner also has the power to give warnings and issue directions in cases where enforcement action is required and a range of enforcement powers including ‘the power to suspend or remove a responsible entity of a registered entity’ in some circumstances.

2.3 | Charity Passport

A key element to the reform is the development of a charity passport. The Passport is intended to contain ‘a set of standardised data that charities have reported once to the ACNC (through registration and annual information statements) which will meet the baseline corporate and financial requirements of Commonwealth Government agencies.’ The Charity Passport is seen to be a key part of reducing the regulatory burden and simplifying the interaction of charities with the ACNC and the Government.

The Charity Passport will:
- contain data from a variety of sources including registration details and annual reporting;
- be confidential and provided only to authorised government agencies; and
passed electronically to Commonwealth Government Agencies via the ACNC information portal.

The ACNC will work with agencies towards national adoption of the charity passport at the Commonwealth level (through the Reducing Regulatory Duplication Working Group) and at the State level (through the Council of Australian Governments (COAG) NFP Reform Working Group).

2.4 Australian Charities and Not-for-profits Register

The Act provides for the establishment of the Australian Charities and Not-for-profits Register which will be maintained by the ACNC. The Register is to be published on the internet ‘but may, subject to the public interest, withhold certain information from such publication’ in certain circumstances, for example, where ‘the public release of the information may cause detriment to the entity because it is sensitive commercial information.’

Information which may be published on the internet in relation to an entity includes name, contact and identifying details for each entity, the type and subtype of registration, governing rules, responsible entities, information from financial and information statements, details of any enforcement action taken specific sections of the Act and any resolution or response to such a matter and any other information which is prescribed in regulations.

2.5 Governance Standards

The new governance standards element of the ACNC’s regulatory framework will now come into force on 1 July 2013 and will be implemented by way of statutory implements. This extension is to allow for further consultation and transition time. Compliance with the governance standards will be a condition of registration.

The governance standards will be prescribed under the Regulations. The Explanatory Memorandum, accompanying the Bill, states that it is expected to make the standards ‘principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards in its particular situation.’ In addition ‘the implications of the governance standards and external conduct standards’ are expected to ‘vary according to the circumstances of a particular registered entity. What a large entity must do to satisfy the requirements will be different from what a small entity must do to satisfy the same requirements.’
2.6 Reporting Framework

Reporting requirements are proportional to the size of the entity – small, medium and large – defined as follows.

- Small entities – revenue of the registered entity for the financial year is less than $250,000, or any other amount prescribed by the regulations
- Medium – revenue of the registered entity for the financial year is greater than $250,000 but less than $1,000,000, or any other amount prescribed by the regulations
- Large – above $1,000,000.

Revenue is calculated in accordance with accounting standards.

2.6.1 Annual Information Statement

All registered entities will be required to provide an annual information statement. The first information statements for the 2012-2013 year will be due by 31 December 2013 unless a substituted accounting period applies. Non-financial information to be reported is expected to include:

- who benefits from the charity;
- how it has pursued its main purpose in the last 12 months;
- how it proposes to pursue its main purpose in the next 12 months; and
- information on staff and volunteer numbers.

The Interim Commissioner has stated that ‘work has been occurring to finalise the 2013 transitional Annual Information Statement (AIS) form’ which ‘is being developed to meet the requirements of the proposed ACNC legislation and with the principles of simplicity, utility and timeliness in mind. Following targeted sector consultation ACNC Taskforce staff have considered each question thoroughly to ensure the details we collect are necessary and provide a general understanding of the charity’s situation. The transitional form has been designed to collect basic information that we expect charities will have readily available.’

2.6.2 Financial Reporting

Medium and large registered charities will also have to start financial reporting to the ACNC after the financial year ending 30 June 2014 (previously 30 June 2013), although the ACNC will allow voluntarily lodgement of the 2012-2013 year annual financial report.
To ensure consistency and comparability, it is proposed that financial reporting data will be collected according to the Standard Chart of Accounts (SCOA).

Medium entities must provide either a reviewed or audited financial report, unless directed by the Commissioner to provide an audited report, whereas large entities must provide an audited financial report. According to the Explanatory Memorandum 'a review consists of making enquiries, primarily of individuals responsible for financial and accounting matters, and applying analytical and other review procedures. In contrast, an audit requires undertaking audit procedures, in order to detect material misstatements and carry out specific procedures to reduce fraud risk.'

As a result of a recommendation in the report from the Parliamentary Joint Committee on Corporations and Financial Services, the Australian Government introduced amendments to the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 schools will be able to provide the Financial Questionnaire to fulfil the financial reporting requirements. These amendments were accepted by the House of Representatives.

2.6.3 Additional Reporting Requirements

Under the Bill the ACNC Commissioner can require 'a registered entity, or a class of registered entities, to provide additional information in the financial report or information statement, and to lodge additional reports, by making a written determination.'

2.6.4 Substituted Accounting Periods

As a response to submissions to the ACNC Exposure Draft, the ACNC has recognised that Independent schools typically operate on a calendar year. Consequently, the exposure draft has been revised to allow charities that operate on the basis of different reporting periods to continue on that basis unless the ACNC provides otherwise. It appears that entities may have to notify the ACNC that they currently report under Australian law for a period other than a financial year.

2.7 Director Liability

If an entity is subject to an obligation or liability, or commits an offence, certain entities that are responsible for managing the entity may also be subject to the obligation or liability, or commit the offence, in specific situations.
However, given that a body corporate has separate legal personality, and therefore can be sued or penalised, ‘the Bill sets out a more streamlined and targeted framework for attaching personal liability to directors of a body corporate. The directors of the body corporate will not be made personally liable for any offences contained in the Bill.’ In addition, ‘the directors will only be personally liable for the liabilities of the body corporate in certain limited cases, for example, if there is a deliberate act involving dishonesty on their part.’

### 3.0 Personal Liability For Corporate Fault

The Personal Liability for Corporate Fault Reform Bill 2012 has been introduced into parliament. The Bill forms the Government’s response to the Directors’ Liability reform project (the reform project), which forms part of the Council of Australian Governments’ (COAG) National Partnership Agreement to Deliver a Seamless National Economy (SNENP). The ‘project aims to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions.’

The Government released three tranches of the Personal Liability for Corporate Fault Reform Bill for consultation. The Bill incorporates feedback from this process.

Minter Ellison has provided the following information on the Bill:

The Bill proposes to repeal the following provisions:

- section 444-15 of Schedule 1 to the Taxation Administration Act 1953 (Cth)
- paragraph 252(1)(j) of the Income Tax Assessment Act 1936 (Cth), and
- subsection 57(7) of the Superannuation Guarantee (Administration) Act 1992 (Cth).

Each of these provisions provides that where any notice, process or proceeding may be given to, served on or taken against a company under a relevant tax law, the Commissioner may give to, serve on or take against a company director the same notice, process or proceeding. That is, the Commissioner may, if the Commissioner thinks fit, hold a director of a company personally liable for a liability of the company. In the explanatory document accompanying the Liability Reform Bill, the Government notes the decision of the Full Federal Court in Reynolds v Deputy Commissioner of Taxation (1984) 3 FCR 329, which found that liability of a company director
under paragraph 252(1)(j) of the Income Tax Assessment Act 1936 (Cth) may only arise as a result of the director’s own action and not absolutely whenever there is company liability. Given the similarity in wording between the provisions for which amendment is proposed under the Liability Reform Bill, the decision of the Full Federal Court may arguably apply to section 444-15 of Schedule 1 to the Taxation Administration Act 1953 (Cth) and subsection 57(7) of the Superannuation Guarantee (Administration) Act 1992 (Cth). Notwithstanding this judicial limitation on the liability of company directors for taxation offences, the Liability Reform Bill proposes to repeal these provisions. (http://www.minterellison.com/publications/Third-and-final-step-in-reforming-director-liability-for-corporate-fault).

4.0 Statutory Definition of Charity

In the 2011-12 Budget the Government announced that it would consult on and introduce a statutory definition of ‘charity’. It is argued that a statutory definition of charity ‘will provide greater certainty and clarity as to what is considered to be charitable; and can be altered by Parliament over time, ensuring it remains appropriate, and reflects community needs and expectations.’

A consultation paper, A Definition of Charity, was released on 28 October 2011. Treasury received over 200 submissions in response to the paper.

Treasury has indicated that issues being considered in the determination of the definition include:

- the definition of charity as having an ‘only’ or ‘exclusively’ charitable purpose, but with allowance for activities in aid of the charitable purpose;
- provision for peak bodies to be included as charities;
- the need to clarify the meaning of public benefit and provision for a level of advocacy in the activities of a charity.

It is still anticipated that the statutory definition of charity will apply from 1 July 2013.

The definition is expected to ‘be based on the 2001 Report of the Inquiry into the Definition of Charities and Related Organisations, the definition in the Charities Bill 2003’ and to also take account of the findings of recent judicial decisions such as Aid/Watch Incorporated v Commissioner of Taxation (Treasury’s Not-for-profit Reform Fact Sheet, Introducing a Statutory Definition of ‘Charity’).
5.0 | Better Targeting Tax Measure

On 30 March 2012, the Assistant Treasurer and the Minister for Social Inclusion announced the Government’s decision to extend the start date for the 2011-12 Budget measure to better target NFP tax concessions from 1 July 2011 to 1 July 2012.

The 1 July 2012 start date will apply only to new unrelated commercial activities that commenced after 7:30 pm (AEST) on 10 May 2011. Existing unrelated commercial activities that commenced prior to that date will continue to be covered by transitional arrangements as announced in the 2011-12 Budget.

6.0 | Access to Not-for-profit Tax Concessions

6.1 | Overview

The Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 has been introduced into parliament. The Bill:

- re-states the ‘in Australia’ special conditions for income tax exempt entities, ensuring that they generally must be operated principally in Australia and for the broad benefit of the Australian community (with some exceptions);
- standardises the other special conditions entities must meet to be income tax exempt, such as complying with all the substantive requirements in their governing rules and being a ‘not-for-profit’ entity (with some exceptions);
- standardises the term ‘not-for-profit’, replacing the defined and undefined uses of ‘non-profit’ throughout the tax laws; and
- codifies the ‘in Australia’ special conditions for DGRs (deductible gift recipient status) ensuring that they must generally operate solely in Australia, and pursue their purposes solely in Australia (with some exceptions, such as overseas aid funds and some environmental organisations). (Explanatory Memorandum)

6.2 | Income Tax Exemptions and Deductible Gift Recipients

In order to become income tax exempt, an entity must usually:
operate principally in Australia;
- pursue its purposes principally in Australia;
- comply with all the substantive requirements in its governing rules;
- apply income and assets solely to pursue the purposes for which it was established; and
- be a not-for-profit entity.

Deductible gift recipients must:

- operate solely in Australia; and
- pursue their purposes solely in Australia.

6.3 Not-for-profit Definition

To be a Not-for-profit entity, an entity must:

- be an entity that is not carried on for the profit or gain of its owners or members, neither while it is operate nor upon winding up; and
- under an Australian law, foreign law or the entity’s governing rules, it is prohibited from distributing, and does not distribute, its profits or assets to its owners or members (whether money, property or other benefits), neither while it is operating nor upon winding up, unless the distribution is made to another not-for-profit entity with a similar purpose, or it is genuine compensation for services provided to, or reasonable expenses incurred on behalf of, the entity. (Explanatory Memorandum)

The proposed changes to the 'in Australia' special conditions are intended to apply to affected entities for income years beginning after the date Royal Assent is granted. Entities will have 12 months from the date Royal Assent is given to the Bill to amend their constitutions or governing rules to comply with the new not-for-profit rule.

Minter Ellison has advised that 'all entities accessing or seeking ITE and/or DGR status that have any overseas operations need to carefully review those operations in the context of their overall activities to ensure compliance against the requirements under the Bill.' In addition, ‘entities will need to ensure that appropriate governance procedures (such as working policies and record keeping) are put in place to be able to demonstrate that the 'in Australia' requirements are satisfied. All entities should review their constituent documents and make amendments if they do not reflect the not-for-profit requirements.'
7.0 Not-for-profit Sector Tax Concession Working Group

Membership and terms of reference for the Not-for-profit Sector Working Group were announced on 12 February 2012. The Working Group is charged with considering whether there are better ways of delivering the current envelope of support provided through tax concessions to the NFP sector by the Australian Government. It is expected that a discussion paper will be released later in the year.

8.0 Further Information

The AISSA Governance Program website has a range of information available on the Not-for-profit Reform agenda. It can be accessed at: https://sites.google.com/a/ais.sa.edu.au/school-board-governance-program-2012/.

Further information is also available from:

- The Treasury website at: http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/NFP-reform/Newsletters
- The ACNC Taskforce website at: http://acnctaskforce.treasury.gov.au
- Australian Charities and Not-for-profits Bill 2012 accessible via http://www.aph.gov.au
- Australian Charities and Not-for-profits Bill 2012 Explanatory Memorandum accessible via http://www.aph.gov.au
- Australian Charities and Not-for-profits Commission Implementation Taskforce Newsletters accessible via http://acnctaskforce.treasury.gov.au
- Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 accessible via http://www.aph.gov.au
- Information Alerts from Minter Ellison