



PHILANTHROPY  
*Australia*

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**Patrons**

Sir Gustav Nossal AC CBE  
Lady Southey AC

Dear Sir or Madam

**Re: Scoping study for a national not-for-profit regulator.**

Thank you for the opportunity to comment on the Consultation Paper: *A scoping study for a national not-for-profit regulator*.

Philanthropy Australia is the national peak body for philanthropy and is a not-for-profit membership association. Our mission is to represent, grow and inspire an effective and robust philanthropic sector for the community.

Our submission is in five parts:

1. Principles for reform and regarding the nature and culture of a NFP regulator
2. General comments regarding the consultation paper
3. Specific suggestions regarding the regulator's interactions with the philanthropic sector
4. A suggested strategy to implementing the new regime, including measured steps to take initially and proposed key priorities
5. Comments on the question of a statutory definition of charity

In the short timeframes available, it has not been possible to canvass the views of all Members of Philanthropy Australia. The philanthropic sector is diverse and the views expressed in this submission may not be representative of all Members.

**Part one: Principles for reform**

Philanthropy Australia is supportive of the Government's desire to progress substantial long-term change to ensure a simpler, fairer and better system of regulation for the not-for-profit (NFP) sector.

Philanthropy Australia believes that it is vital to establish principles which will underpin the reform process, to ensure that any changes which are made to the existing system strengthen and improve the NFP sector, given its vital role in the economy and society.

- Good regulation is in the interests of government, the NFP sector and the Australian community at large.
- Proposed reforms must be evidence based be targeted appropriately and provide for genuine positive and lasting change.



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- The proposed national regulator must not merely regulate. In accordance with the recommendations of the Productivity Commission it must truly be a “one-stop shop” which assesses the eligibility of NFP entities for charitable endorsement, provides a single reporting portal, maintains a register of endorsed entities and provides an information portal for the NFP sector and the public. Other countries such as England and New Zealand have recognised this need and established specialist charity commissions for this purpose.
- To be effective in this wider role the culture and values of the proposed regulator are critical to ensuring its success and acceptance. The NFP sector is values-based and mission-driven. It is a vital player in ensuring an active civil society. The proposed regulator must share the sector’s culture and values in order to understand, add value to and be accepted by the NFP sector.

The many reviews of the sector carried out over the past decade indicate that reform of the sector will be a lengthy process. Philanthropy Australia believes that the above principles provide a simple and effective framework and that reform will need to be implemented in stages and with the cooperation and trust of the sector. Trust is built through effective collaboration and shared successes and in the words of Treasurer Wayne Swan, “it’s the biggest and hardest reforms that make the greatest difference.”<sup>1</sup>

### **Part two: Comments on the Consultation Paper**

Clause 12 of the Consultation paper argues that “it is vitally important that the sector is regulated so that it remains accountable to the communities it serves”. Philanthropy Australia suggests that the major issue to be overcome is not noncompliance on the part of the NFP sector, but rather the existence of barriers to compliance, namely significant overlapping and complicated regulatory systems. It is imperative that the reform process sets reducing the level of complexity as a primary goal.

The Consultation Paper focuses largely on the considerable Government support provided to the sector via tax concessions and direct funding which the Paper states are “provided by Government because it values the contribution the sector makes to the welfare of the wider Australian community”.

This view needs to be balanced by the recognition that the NFP sector has a major role in delivery of essential Government services such as health care and education and that it delivers those services at what the Productivity Commission into the Contribution of the Not-for-Profit sector estimates at only 70% of their true cost<sup>2</sup>. In fact a major reason Government agencies cite for using NFP organisations to deliver essential services is that they “represent value for money”.

While any new regulations should contribute to the sustained competitiveness of the sector, they should recognise that the sector is in a position of weakness with regards to government, which as the primary (and in some cases the sole) purchaser of services is able to dictate terms and desired outcomes. Part of the role of the NFP Regulator should therefore be to investigate and counteract examples of excessive monopsony power.

Appendix G of the Productivity Commission Report discusses tax incentives for philanthropy using the concept of Treasury Efficiency - meaning it is more cost-effective for the government to subsidise charitable donations than to provide direct grants to non-profit organisations. Philanthropy Australia

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<sup>1</sup> Economic Note, 20 Jun 2010,

<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=economicnotes/2010/024.htm&pageID=012&min=wms&Year=2010&DocType=4>

<sup>2</sup> Productivity Commission 2010, Contribution of the Not-for-Profit Sector, Research Report, Canberra, p.281



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believes this concept should be central to Government considerations of support for the sector and its continued growth and strongly supports the Commission's call for further research into this aspect.

The vast bulk of NFP organisations are small and receive few or no taxation concessions. The Productivity Commission identified only 59,000 "economically significant" NFPs (meaning those that access tax concessions and/or employ staff), less than 10% of the sector, which is estimated at 600,000 total organisations. Taking a "one size fits all" approach to regulation based on the level of Government support (both direct and implicit through tax concessions) may create significant "collateral damage" for the vast majority of NFP organisations, which are small and receive few or no Government tax concessions. Regulation must start at the most simple level and any regulatory regime should probably be proportional to the size, activity level and complexity of the organisation as well as to its level of Government support.

The Productivity Commission report stated that the Commission was "struck by the degree to which the underlying relationship between government and the NFP sector has deteriorated. The relationship has become unnecessarily adversarial and lacking in trust." The Treasury brief prepared for the returned Labor Government in 2010 (known as the Red Book) advised that "The sector will be expecting genuine reform, particularly given the five reviews and lack of significant reforms over the past 15 years".

Given the Productivity Commission's reference to the fact that the relationship between Government and the sector contains a degree of suspicion, the culture of the proposed regulator will be crucial to ensuring its acceptance by the sector and its success. The NFP sector is values-based and the proposed national entity must also be values-based and have a clear view of sector best practice rather than act merely as a policing entity.

The proposed national entity should have a far wider role than just regulation. Its role should be more like that of the Charities Commission in the UK. In line with the recommendations of the Productivity Commission, there should be a role for it to provide services and advice to the sector, including:

- Determination of charitable status
- Advice and guidance to NFPs on financial, taxation and governance matters
- Provision of a single portal for NFP reporting to government
- Provision of an online register of charities and DGRs
- Provision of manuals and fact sheets to ensure that NFPs have clear, accessible information about their obligations and how to meet them
- Provision of relevant data in order to develop an accurate picture of the sector

This is clearly a broader role for the national regulator than envisaged in the Scoping Study, but it would be both achievable and very worthwhile provided that Government:

- Takes a step-wise approach to implementing reform rather than attempting to solve everything simultaneously.
- Outsources some of the work to take advantage of the work already being done by many in the NFP sector itself and reinforces existing reform processes rather than "reinventing the wheel". Examples include existing work on harmonisation of fundraising legislation, current work on the Standard Chart of Accounts for NFP organisations, and the governance manuals produced by Philanthropy Australia.



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### **Part three: The philanthropic sector and the proposed regulator**

Question 5 of the Consultation Paper asks “Should the regulation of charitable trusts be moved from the state Attorney-Generals to a national regulator?”

In response to this question and the section of the Scoping Study on Charitable Trusts, Philanthropy Australia makes the following comments:

1. The Consultation Paper suggests that charitable trusts are under-regulated whilst simultaneously commenting that there is little data available on the sector as a whole. As a result, the last sentence of clause 56 in the Consultation Paper cannot go unchallenged. There is no evidence that the current regulatory regime regarding charitable trusts is causing problems for either Government or the NFP sector at large. Until appropriate data is collected and analysed it is not possible to make judgements on compliance and how efficiently the sector is operating under the current regime.

2. Clause 57 of the Consultation Paper suggests that the recent reforms to Private Ancillary Funds (PAFs) be used as a model to reform the regulation and governance of charitable trusts more generally. Philanthropy Australia disagrees, as the Private Ancillary Funds reforms will be difficult (if not impossible) to replicate on a more general basis. Private Ancillary Funds are not representative of charitable trusts in general. PAFs are small in number (fewer than 900), all set up within the past decade, and remarkably similar in structure and purpose as all were set up with the guidance of a model Trust Deed and Guidelines. The PAF reforms of 2009 were introduced in response to a specific set of issues, identified by both government and by the philanthropic sector, with clear evidence of how the problems were occurring.

Charitable trusts in general are far larger in number (potentially 5,000 or more) and broader in variety than PAFs. They have been established over more than a century rather than in a single decade, and there is huge variety in their governing documents and purposes. There is also no specific issue of misuse around which reform can be developed. It is therefore very unlikely that reform can be achieved as swiftly and efficiently as was done for the PAF subset and, indeed, it is not clear what reforms are necessary or optimal.

Philanthropy Australia therefore suggests that if Government regards the regulation and governance of charitable trusts as in need of reform, it gather data to ascertain whether there are problems with the current regime and, if so, what the problems are.

Since most charitable trusts claim a refund of franking credits, a logical starting point would be to link a simple information return for trusts with the claims process.

It should also be noted that the short timeframe for response to this paper, which unfortunately coincided with several other major Government submissions, has not allowed for sector-wide consultation or for a proper consultation on potential legal barriers to this reform. Once this is done, other complicating factors may come to light.

In summary, Philanthropy Australia suggests that the process and merits of bringing charitable trusts under the supervision of the national regulator have not been clearly established and that there must be a further period of detailed consultation specifically with the philanthropic sector before this agenda is moved forward. Philanthropy Australia would be happy to facilitate or assist in any way with this process.



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**Part four: a road map for implementation.**

Given the size and complexity of the sector, and the nature of the reforms needed, it is vital that the reform process be implemented in stages.

Philanthropy Australia is of the opinion that the most logical way to proceed would be to follow the example set by the introduction of national companies and securities legislation in the 1990s. That is, a staged implementation of national legislation, in conjunction with the creation of a national regulator.

The Treasury brief prepared for the returned Labor Government in 2010 (known as the Red Book) advised that “Scope exists for immediate action at the federal level... while the Government progresses a national regulator”. Philanthropy Australia agrees that there is scope for streamlining and simplification to occur immediately, prior to establishment of the national regulator and at the same time as the consultation and development process around the national regulator takes place. In fact, it is vital that the significant reforms which are already underway by the COAG Reform Council are not put on hold, and indeed are reinforced, while the national regulator is planned and developed. Philanthropy Australia suggests the following as a stepwise approach:

1. **Development of national fundraising legislation, followed by development of corresponding legislation by State and Territories to effectively apply provisions of the Commonwealth law nationally.**  
This is in accordance with the recommendations of the Productivity Commission and can build on the development of a nationally consistent approach to fundraising regulation which is currently being undertaken by the COAG Reform Council<sup>3</sup>.
2. **Implementation of the Standard Chart of Accounts (SCOA)** developed at the Australian Centre for Philanthropy and Nonprofit Studies, QUT.  
This is also part of the regulatory reform of the NFP sector being undertaken by the COAG Reform Council.
3. **Creation and distribution of a standard acquittal form**  
This should be based on the SCOA and be implemented for use by all levels of Government and ideally also available for use by philanthropic trusts, enabling a “report once, use often” approach to NFP reporting.
4. **Gathering of data on philanthropic trusts** using a simple survey linked to the refund of franking credits.
5. **Creation of national regulator to administer the national legislation.**  
The question of the form of the regulator and whether it should be an independent national body or should be established within an existing Commonwealth entity should be considered in the light of the regulator’s primary purpose. From the suggestions which have been made in the Consultation Paper:
  - A new regulator established under Commonwealth law only, to administer streamlined and simplified Commonwealth regulation and taxation arrangements, is not desirable as a significant proportion of existing regulatory duplication would be retained.
  - A body within ASIC is undesirable. ASIC is clearly identified as a business regulator and while it already registers and regulates a small number of NFP entities it is Philanthropy Australia’s opinion that it would not have the appropriate systems or cultural understanding to regulate the sector as a whole or to determine charitable status.

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<sup>3</sup> <http://www.coagreformcouncil.gov.au/agenda/competition.cfm>



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- The ATO is also undesirable, because as acknowledged by the Scoping Study, the ATO's primary role is as a revenue collector. There is therefore a conflict of interest, as well as a cultural and values mismatch, in the ATO having primary responsibility as the national regulator.
- An independent entity similar to the Charities Commission in the UK is the most likely to be accepted and embraced by the NFP sector as a significant step forward and a "one-stop-shop" in accordance with proposals by the Productivity Commission.

The first four items listed above should be undertaken simultaneously with further discussions on the role, scope and culture of the new NFP regulator, so that the trust and consensus between government and the not-for-profit sector, which is essential for successful NFP reform and is missing today, as evidenced by the findings of the Productivity Commission, can be built.

**Part five: statutory definition of charity**

With regards to the question of whether Australia should adopt a statutory definition of charity Philanthropy Australia makes the following comments:

1. Redefining what constitutes charity, and how this definition fits with the overall not-for-profit sector, is a complex issue which over the past decade has been the subject of much debate and two lengthy and complex Government inquiries; the Inquiry into the Definition of Charities and Related Organisations (2001) and more recently the Productivity Commission Report into the Contribution of the Not-for-Profit Sector (2010). This is proof that the redefinition of charity is an issue which needs to be addressed as a whole, rather than piecemeal. Accordingly, this decision should be made separately rather than as part of regulatory reform.
2. The most recent High Court decision regarding the definition of charity, *Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42* (1 December 2010), has provided a workable definition which has been welcomed by the NFP sector and which demonstrates that the courts are able to demonstrate flexibility to changing community needs and expectations.
3. Philanthropy Australia believes that it is necessary to gather a strong evidence base that the current definition needs further improvement before undertaking the complicated process of re-defining charity.
4. Philanthropy Australia therefore recommends that the national regulator, once established, should take a primary role in researching the question of whether a statutory definition of charity is needed, and in developing appropriate legislation, if necessary.

Yours sincerely

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Chief Executive Officer