

## **DEFINING, TAXING AND REGULATING NOT-FOR-PROFITS WORKSHOP**

### Meeting Outcomes

*18 August 2010*

**The following document synthesises and summarises the discussion at the workshop. The discussion is summarised more closely in the accompanying Meeting Notes.**

#### **I. Definitions**

*Should a statutory definition of 'charity' be introduced?*

There was a degree of consensus that a statutory definition would have the advantages of accessibility, modernization and clarification of key issues, but that any definition would need to be inclusive rather than in the form of a codification. There would, however, continue to be a need for decisions about individual cases, since ultimately it was a question of judgment when applied to particular facts, and also so the definition could be updated as times changed. There were suggestions that an administrative regulator would be a better decision-making body, with the advantages of also more rapid reform. There was some debate about the desirable extent of continued judicial discretion and interpretation.

Issues remained about how to ensure national agreement on the definition, and the additional legislative requirements for tax concessions in other legislation. The policy justifications behind those additional legislative requirements was questioned, although there was recognition that different taxes reflected different policies.

*How should the question of public benefit be addressed?*

The opening remarks noted there was no real dispute over the need for a public benefit requirement, but there was a policy question as to how to prove public benefit, which reflected different degrees of skepticism and was in reality a political process about negotiating a community view about values, ideas of the public good and readiness to accept the idea of public benefit without proof. The group discussion, however, did not really engage with this issue.

*How should the law respond to advocacy and other 'political' activities?*

The point was made that the current law distinguishes between purposes and activities and attempted to weigh the purposes and activities. An alternative approach was to conceive of political engagement itself as a public benefit.

There was in general consensus that advocacy was an important aspect of modern charitable practice, which focused on prevention as well as relief and systematic issues. There was a sympathetic response to the idea of political engagement as being of public benefit, and it was noted that business were not under similar restrictions although they benefited from tax concessions. Several participants noted that the distinction between purposes and activities was a question of degree which was difficult to determine in practice, and had a chilling effect on the sector's political contribution.

*The nexus between definition and taxation*

There was clear agreement that many of the definitional problems arose from the desire to receive taxation benefits, and suggestions that decoupling the two would change both what was at stake and the capacity to generate a satisfactory definition. It was suggested by several that one option would be to restrict the definition of charity (which would have the advantage of being more in line with

ordinary conceptions of charity), but to link the tax concessions to a wider notion of community or public benefit.

## **II. Taxation**

### *Simplification*

There was strong agreement about the need for simplification, extending beyond tax law but to all legislation dealing with charitable status. Anomalies, such as between states and territories in their treatment of religious institutions, were noted.

### *Fringe benefits tax*

There was general consensus that the fringe benefits tax concession had many limitations, including: the potential to undermine trust in the sector; inequitable distribution of the concession; the issue of competitive neutrality; the lack of transparency and simplicity; administrative cost and inefficiency; and its unsustainability and declining value. The issue of meal cards and entertainment were raised as neglected issues.

It was proposed that the need for tax law simplification and FBT reform is a real challenge for the sector. The general view of those working in the sector was that some concessional framework was necessary to support the sector, and that a more appealing and workable alternative than direct government subsidy was required before the sector would agree to its abolition. The support of the sector was justified in part because the sector did what the market would not do.

Several participants considered the possibility of lowering marginal tax rates for individuals working exclusively in the charitable sector (a test used in payroll tax legislation), although a policy question would arise in relation to those working in the businesses of charities and the transparency of such a measure. It was suggested, however, that transparency could be dealt with through legislated requirements for disclosure.

One participant put forward the Henry Review recommendation, in the form of a fixed outlay program in terms determined by Parliament, to avoid the discretion of individual governments. It was observed that the same debate was not evident overseas, although it was suggested that this was because the tax was levied on employers rather than employees as was usual elsewhere. Some suggested that the sector needed to play a greater role in demonstrating its value to government and the public to justify its case for public support, and also to recognise its own role in undervaluing its staff and undercutting each other. A number agreed that there needed to be more self-regulation in this area.

### *Gift deductions*

There was discussion about whether a model which provided the tax benefit for gifts directly to charities rather than donors was workable. It was noted that the obstacle was the lack of evidence about the impact on charitable giving such a transition would have, although some research indicated that tax deductions were not a major driver except at a certain level of donation.

It was also observed that Deductible Gift Recipient status was highly sought after less because of the ability to obtain the tax deduction, but rather partly because of the desire for credibility and partly because of desire to receive the FBT exemption.

There was strong agreement that there needed to be a streamlining of the process of obtaining DGR status, and in particular removal of the requirement of ministerial involvement in the process.

Few participants thought the issue of the minimum threshold for gift deductions was an issue, except so far as it related to workplace giving of small amounts.

#### *Business income*

There was support by some for the approach taken in *Word Investments*, but a number of issues were raised concerning its application to, for example, entities that never transferred its earnings while retaining the tax benefit (gaining a competitive advantage), or where entities paid excessive executive remuneration. It was also observed that this position did not sit well with overseas tax regimes, although such regimes also had difficulty in administering the distinction between business and other income. It was also noted that the test relied on a difficult judgment about the interpretation of purposes and activities.

### **III. Regulation**

#### *Single national regulator*

There was general consensus on the need for a national regulator, and a strong preference for an independent regulator, with most participants noting the conflict of interest in the ATO's de facto role of regulator. There was also general consensus that such a regulator should not duplicate existing regulation, and that the form and function of the regulator should be carefully considered in consultation with the sector. There was also strong expressions of the desire for adequate regulation before a scandal erupted and resulted in bad regulation.

Some concern was expressed that the model should not include an 'advice and guidance' or 'advocate' role, as in the UK Charity Commission model, because of the potential for a conflict of interest.

There was discussion of the role of state regulation if a national regulator was adopted. Joint administration; radical reform of taxation concessions; and the re-allocation of the regulation away from diminishing territory consumer agencies were mentioned as possibilities.

#### *Government contracting*

There was strong agreement between those working in the sector that government regulation through contracts continued to be unduly onerous, intrusive, unequal and complex, and that for the sector this symbolised the lack of respect and understanding shown by government towards the sector and its contribution. Specific issues raised included: the short-term nature of contracts; failure to provide the full cost of the services; and gag clauses. Another issue was raised about the lack of transparency in government contracting.

In relation to the proposal for a 'master agreement', participants noted there had been some progress towards this in FaCHsia and the Department of Indigenous Affairs in Victoria. While there were obviously benefits to this (subject to the fact that agreements would have to be modified for individual cases), the real issue however for the sector were the terms and conditions, and the ability of the sector to influence these prior to agreement and subsequently after the contract was signed.

#### *Regulatory principles*

There was strong agreement about the need for simplification of regulation. There was also strong commitment to principles of accountability to the public, and transparency, and endorsement of the overriding need to ensure the confidence of the public.

#### *Harmonisation of associations legislation*

Participants remarked on the importance of the need for harmonisation in this field.

#### *Harmonisation of fundraising legislation*

There was discussion of the COAG project. Issues that were likely to come up included the fundamental principles of fundraising; how 'minimal' the harmonization could be; and the political sensitivity of exemptions.

#### *Development of an NFP-specific accounting standard*

There was universal agreement about the need for such a standard, especially to support developments in disclosure obligations, including in fundraising legislation.

#### *Reporting obligations*

There was strong agreement that the principle 'report once, use often' should be implemented more widely. This could be done by, for example, submission of other reports in satisfaction of legislative requirements; through a single national regulator; or a 'gold card' system that certified compliance.

It was strongly put that a current problem was the focus on financial disclosure, rather than focusing on the objectives and impact of the organisation. It was noted that there were moves to rectify this overseas and in Australia. It was also noted that audit requirements also served other purposes, such as protecting against financial risks of insolvency and fraud.

There was general agreement that there remained undesirable inconsistency between different forms of regulation (especially government contracts) and legislation, such as audit requirements.

There was discussion of the desirability of encouraging even very small organisations to provide basic information in return for the benefits of incorporation. Some suggested there was a public interest in this, while others argued for proportionate regulation and noted that it may not be proportionate where the organisation did not serve the public, or take public money or benefit from tax concessions.

There was strong agreement, particularly from those working in the sector, that the debate about the disclosure of overheads was unhelpful and not valuable, especially in the absence of an NFP-specific accounting standard.

An issue was raised about the disclosure of executive remuneration. It was noted that in some sectors there were already requirements of disclosure in this regard.

Another issue was the comparative neglect of internal governance in auditing procedures, although there were counter-examples such as AusAID's accreditation process.

#### *Self-regulation*

There was general agreement that the sector could do more to develop self-regulation, by way of Codes of Conduct or other measures. However, other concerns arose about the need to ensure such regulation was proportionate and

that coverage was either comprehensive or that those not covered were still required to meet public standards of accountability and transparency.

#### **IV. Priorities and strategies for reform**

There was strong consensus on the need for action, given the consensus in the sector and the number of past inquiries. Implementation of past inquiries would be a very good starting point. Other nominated priorities included a reduction of the compliance burden through simplification; an adoption of a single regulator; reconsideration of a statutory definition; development of an NFP-specific accounting standard; and ensuring that the status of charity unlocked 'all doors'.

Although there was less discussion of the strategies for reform, there was general agreement on the need for greater advocacy and coordination by the sector, and the development of self-regulation.