



***Submission to The Treasury
and the Minister for Small Business***

The Competition Policy Review's final recommendations to strengthen Australia's Competition and Consumer Act 2010 (ACCA) and issues concerning small businesses, especially where there have been changes since the draft report.

May 2015

Introduction

This submission briefly outlines some of the key issues for Australia's not-for-profit sector in response to the Competition Policy Review's final recommendations to strengthen Australia's Competition and Consumer Act 2010 (ACCA) and issues concerning small businesses, especially where there have been changes since the draft report.

This Community Council for Australia (CCA) submission has been prepared with CCA members (see listing of CCA members, Attachment A) as well as other key organisations working in the broader not-for-profit sector. It is important to note that this submission does not over-ride any policy positions that may be outlined in any individual submissions from CCA members.

CCA is concerned that this inquiry acknowledges the impact of ACCA on charities and not-for-profits, notes the recent data on the economic activity of the sector, and considers the implications of adopting more effective government procurement and service contracting. CCA is also concerned about how the principle of competitive neutrality is applied. In some areas not-for-profit organisations have the same issue with competition policy as many small businesses, but in other important and fundamental ways, not-for-profits are completely different.

It is also important to note that although this submission makes no formal recommendations, it calls on government to both review and consider implementation of recommendations from reviews and inquiries conducted into the not-for-profit sector over the past six years.

CCA welcomes this opportunity promoted by the Minister for Small Business to provide input into this area of competition policy and its impact on charities and not-for-profits.

The Community Council for Australia

The Community Council for Australia is an independent non-political member based organisation dedicated to building flourishing communities by enhancing the extraordinary work undertaken by the charities and not-for-profit sector in Australia. CCA seeks to change the way governments, communities and not-for-profits relate to one another. It does so by providing a national voice and facilitation for sector leaders to act on common and shared issues affecting the contribution, performance and viability of NFPs in Australia. This includes:

- promoting the values of the sector and the need for reform
- influencing and shaping relevant policy agendas
- improving the way people invest in the sector
- measuring and reporting success in a way that clearly articulates value
- building collaboration and sector efficiency
- informing, educating, and assisting organisations to build sustainable futures
- providing a catalyst and mechanism for the sector to work in partnership with government, business and the broader Australian community to achieve positive change.

Our success will drive a more sustainable and effective charities and not-for-profit sector in Australia making an increased contribution to the well-being and resilience of all our communities.

Current situation – the context

The not-for-profit sector

The charities and not-for-profit sector turns over more than \$105 billion annually, contributes over \$55 billion to GDP per annum, and employs over one million staff (or eight per cent of all employees in Australia). The sector holds over \$175 billion in assets, and across the last decade, sector growth has continued at approximately 7% a year, greater than any other industry group.

These figures tell only a small part of the story. The real value of the sector is that these are the organisations at the heart of our communities; building social connection, nurturing spiritual and cultural expression, and enhancing the productivity of all Australians.

The importance of the sector is now being internationally recognised with many governments putting in place measures to increase NFP productivity. Smaller government and bigger community is a common theme, driven in part by savings, but also by a commitment to greater civic engagement and productivity within the NFP sector. The sector itself is beginning to work on productivity as a core issue.

The recent history of the NFP sector is framed by growth and reform, but there are a number of new issues emerging. The level of individual philanthropic giving has levelled out from the high in 2008. The ongoing increase in revenue available to governments is effectively stalling in real terms against a backdrop of increasing demands and higher community expectations. Competition within the sector is increasing, although not always to the benefit of the community.

There have been no less than 15 major reviews, reports and inquiries into the regulation and contribution of the charities and not-for-profit sector since 1995. There are currently a range of initiatives seeking to promote social enterprise; reduce compliance costs for NFP organisations; encourage a diversification of financing options to build a more sustainable funding base; streamline and refine the regulation of NFPs and charities; establish less bureaucratic reporting requirements while building community transparency; increase philanthropy and improve relationships between government and the NFP sector. CCA supports these activities.

The Australian Charities and Not-for-profits Commission (ACNC) is now an effective national regulator. The establishment of the ACNC is the first time the NFP sector has had an independent regulator dedicated to serving their needs and the needs of the community. It is a positive step towards reducing red tape, supporting transparency, building community trust and enhancing the role of the sector.

The inability of governments to streamline their own regulatory processes, their tendering processes, contract management and programs monitoring has consistently been identified as a major barrier to improving productivity in the not-for-profit sector in Australia. The lack of certainty in the government regulatory environment, funding and contracting processes also undermines performance and ongoing investment in improving outcomes. For the sector to be more effective, these issues must be addressed.

Given the size of the sector and its critical role in our community, the Federal Government can achieve real economic and social benefits if it chooses to strategically invest in strengthening our communities and our NFPs by improving the way it regulates the sector and measures performance, and by relying less on superficial analysis of activities including ill-conceived assumptions about income producing activities and competitive neutrality.

Overview of key issues

1. The public benefit test

The fundamental difference between a commercial and a not-for-profit organisation is purpose. All charities and not-for-profits are driven by a purpose that has to be about providing a real public benefit. Most commercial entities are primarily about making money.

The fact that a charitable organisation engages in commercial activities does not make them commercial. A local charity in a rural city may run a car wash or car park for the weekend football game as a way of underwriting their charitable purpose. If the organisation engages in promotion of their car park it does not make them an advertising agency, nor does running a car park make them a for-profit business if all the money they raise is directed to their charitable purpose.

This small scale, local commercial activity for a charitable purpose is typical of the vast majority of commercial activities by charities and not-for-profits. These activities may in some instances have an impact on local businesses operating in the same area, but there are real benefits for the community if the profits from these activities are applied to public benefit rather than individual wealth. Even when such activities are larger, more sustained commercial operations, the same fundamental distinction applies. Charities must use profits for their purpose rather than individual wealth. Their success means there is a public benefit.

2. Competitive neutrality

The issue of competitive neutrality has been the subject of various sector reviews and inquiries since 1995. The Inquiry into the Definition of Charity (2000) made the point very clearly that commercial activities should not be used to deny charitable status (recommendation 18). One of the most telling reasons for making this recommendation was that a commercial organisation and charity involved in the same activity are doing so for two very distinct purposes. The charity is seeking to provide a public benefit and the commercial organisation is seeking to increase the wealth of individual owners. Perhaps even more importantly from a purely commercial perspective, the Inquiry found that the advantages enjoyed by the charity in terms of tax and other concessions are more than offset by the difficulty most charities experience in attracting capital and investment (see below). The Henry Tax Review in 2008 made the same findings – the commercial benefits of tax and other concessions are negated by public benefit and uneven access to capital.

CCA understand the push within the Competition Policy Review to create a level playing field while not seeking to crowd-out charities and not-for-profits. It is important to note that most charities have come into being to meet a form of market failure and better serve their community, not to cash in on an existing market. Not-for-profit commercial activities usually involve expanding markets. Government support for charities involved in these activities is about providing public benefit, not individual wealth.

While there may be a very small number of examples where the commercial activities of charities have impacted negatively on for profit businesses that have no access to income tax exemptions and other benefits, these examples are the exception. It is within this context that the Productivity Commission Inquiry into the Contribution of the Not-for-Profit sector found that it was highly unlikely that income tax exemptions are likely to violate competitive neutrality.

3. Advocacy against products, services or companies

A number of CCA members have raised the possibility that ACCA may be used to prevent secondary boycotts of goods and services. For instance, a major children's charity may wish to campaign against people buying products made by child labour operating in unsafe and exploitative workplaces. The same charity may refuse to purchase such products. It is important that any re-statement of competition policy in Australia allows for such free speech actions to continue. It will be up to the public to determine if such boycotts have any impact, but there should not be any doubt that raising concerns about a particular product or service is not only a legitimate expression of free speech, but also a positive act of civil engagement.

4. Access to capital

The lack of access to capital with the charities and not-for-profit sector is critical in analysing what a real competitive neutral market might look like. It is also a critical component to the effective and efficient functioning of our economy and our communities. CCA believes there needs to be a freeing up of capital to support the not-for-profit sector.

Unfortunately many banks and other financial institutions have difficulty engaging with or underwriting the not-for-profit sector as risks are not always as easy to identify and quantify, and these risks are often compounded by uncertainty.

In an ideal world, there might be a 'stock market for good' where investors interesting in achieving various social outcomes and impacts could invest in the broad range of competing social programs, and organisations delivering better outcomes would be able to attract greater capital and deliver a greater social benefit. From CCA's perspective this form of impact investing is one example where competition policy might be better harnessed to achieve better outcomes for the community.

Concepts such as impact investing are in some ways only just beginning in Australia. New approaches in this area include government backed social development investment and social bonds, but we still have a long way to go if increased capital is to be made more readily available to address social needs. CCA is part of Impact Investment Australia, working through the G8 and other local and global initiatives to facilitate greater social impact investment based on a more outcomes driven model. CCA has also argued for an NFP bank underwritten by the dead money accounts (unclaimed Superannuation etc.) that could invest in generating increased social benefit.

CCA has identified four areas our members believe are important in improving the productivity and competitiveness of the Australian not-for-profit sector through diversifying the sources of capital:

- a. **the capacity of the sector** - to both use existing capital and equity, and absorb new capital and investment
- b. **access to capital** - to increase access to long term capital for the sector including capital for construction of social infrastructure and growth of social enterprise
- c. strengthening **the role of intermediaries** and infrastructure to develop and support new markets
- d. reviewing the **structural barriers to appropriate investment** including regulations, legislation and standard definitions that restrict new investment and leveraging of existing capacity within not-for-profit organisations.

5. Competition and uncertainty in government financing

Many organisations in the NFP sector are partly dependent on government policy and funding decisions for their future survival. Changing governments, program reviews and shifting priorities can leave organisations exposed as has been the case in recent times with thousands of charities and not-for-profit organisations across Australia not knowing if they will be receiving government funding for programs that end within six months.

As CCA has pointed out in numerous submissions and public statements, trying to effectively run what are often significant programs and services on three to six months' notice is very challenging. Perhaps more importantly it impacts on preparedness to employ and develop staff, take risks to generate new income streams or more effective programs, or invest in the sector itself. These outcomes are completely at odds with the stated goal of competition policy. Competition policy and increased productivity are better served with longer term contracts that enable providers to focus on outcomes.

This level of uncertainty has been compounded by what some government officials have described as introducing competition or 'testing the market'. This process is often removed from community needs and expectations and result in fractured markets that are much less able to provide the services required. Recent government contracting has been developed in a government bubble, almost completely disconnected from outcomes, with funding decisions based largely on written submissions addressing criteria developed by officials who have very limited understanding of the communities or how the services work in practice. The notion that this form of competition is fair ignores the amount of effort and work required to submit competitive tenders, a very real and practical resourcing issue that often excludes smaller organisations or those who are most responsive to community needs.

Competition policy is best served when the resources of the not-for-profit sector can be leveraged into delivering more effective programs across our communities. Government investment in community services should never be treated as a procurement process equivalent to buying pencils.

6. An uneven playing field within the not-for-profit sector

There is no right or prescribed size for a charity or not-for-profit organisation. As a competitive market seeking to serve their communities, there are clearly advantages and disadvantages associated with size, scale, replicability and responsiveness to local needs that impact on the viability and effectiveness of each organisation.

While individual organisational factors are one issue that creates an uneven playing field, the regulatory environment also provides advantages and disadvantages to different organisations, often without a clear rationale. As the Henry Taxation Review and the Productivity Commission have highlighted, the current taxation and concessions regime applied to charities and not-for-profit organisations is in real need of reform. There are major issues with the inconsistency of concessions across various charities and not-for-profits. Two organisations doing exactly the same work with very similar governance structures and operations can have entirely different tax status. One organisation may have access to Deductible Gift Recipient (DGR) status and substantial Fringe Benefits Tax (FBT) concessions, while the almost identical agency may not enjoy the same concessions.

The inconsistency in application of concessions has substantial implications beyond cost structures as attracting investment from philanthropy and other sources is often dependent upon being able to offer the offsets that come with charitable and DGR status. An experienced and knowledgeable Not-for-Profit Tax Concessions Working Group was established by the Treasurer in late 2012 to consider these issues. After a period of public and private consultations, this Working Group delivered a final report in May including some revenue neutral initiatives that CCA supports – see here:

<http://www.treasury.gov.au/~media/Treasury/Access%20to%20Information/Disclosure%20Log/2014/1447/Downloads/PDF/NFP%20Sector%20WG%20Final%20Report.ashx>

CCA believes this report is another that should be taken off the shelf, dusted off, and used to inform real reform and provide concessions that will benefit civil society and the broader community. In considering competition policy it is important to address some of the inconsistencies that create advantages and disadvantages within the charities and not-for-profit sector. The current tax concessions are not in the interests of many charities and not-for-profit organisations, or the broader community.

7. Mergers, collaboration and brokers

One of the often repeated criticisms of NFPs is that there are too many duplicate organisations and there would be real savings if more organisations merged or were taken to a scale that allowed real efficiencies to be achieved. The lack of competition is often cited as the reason for the number of charities operating in similar ways with similar communities.

While this viewpoint may have merit in some situations, it is not always the case that bigger and more efficient means better services to the community. All NFPs are driven by community need and the desire to provide the best possible services to their community. In practice, the charitable purpose can sometimes best be achieved through small responsive organisations well connected to local communities and services rather than larger organisations.

Where mergers or collaborations could deliver improved services to a specific community, there are often limited incentives and no brokers to drive such mergers. Unlike the business world where intermediaries can make substantial money through developing and brokering deals that increase profit, there are only a handful of intermediaries across the not-for-profit sector supporting mergers and collaborations that enable better services to be provided to a community.

There are also significant issues around scale and replicability. Responsive services are often hard to duplicate across different communities, so being able to scale up programs and drive efficiency does not always produce a better outcome.

Recent positive mergers between organisations seeking to serve the needs of children in communities and other areas has shown that where the purpose of the organisations are best served through creating larger scale and merging existing capacity, mergers can produce very positive outcomes for the community.

In practice, competition between charities and not-for-profits often produces less beneficial outcomes within communities. Instead of working together and leveraging their strength, charities and not-for-profits are often forced to compete for limited funding or support.

Given the issues outlined above, competition policy has a limited role in driving productivity in the charities and not-for-profit sector.

Conclusion

This submission seeks to highlight CCA's concerns with recommendations from the Competition Policy Review report, particularly regarding how the principle of competitive neutrality might be applied across the charities and not-for-profit sector.

In an ideal world many more services currently provided through government funding would be driven by consumers of those services in a more open market place where charities and not-for-profits had enough certainty to be able to offer quality services at competitive prices. We do not operate in this world yet. There is a lot of work to do to increase productivity and drive improvements in effectiveness for the charities and not-for-profit sector.

Mergers, collaborations, increased competition for government funding may all be used to drive productivity in the charities and the not-for-profit sector and deliver better outcomes for the community; but they can equally be used to diminish the quality and range of services available to communities across Australia.

Improving access to capital, creating greater certainty in government funding, streamlining government processes, empowering consumers and ending pointless micro management are all ways to improve the performance of the charities and not-for-profit sector.

If there is to be a role for competition policy in this process, it should be about competing to better serve the needs of communities, not simply to generate private wealth.

Current Membership – Community Council for Australia *Attachment A*

Organisation

CEO/Director

2realise

Rowena Stulajter

Access Australia’s National Infertility Network

Sandra Dill

Australian Charities Fund

Jenny Geddes

Australian Council for International
Development

Marc Purcell

Australian Healthcare and Hospitals
Association

Alison Verhoeven

Australian Indigenous Leadership Centre

Rachelle Towart

Australian Institute of Superannuation
Trustees

Tom Garcia

Australian Major Performing Arts Group

Bethwyn Serow

Australian Women Donors Network

Julie Reilly

Canberra Men’s Centre Inc

Greg Aldridge

beyondblue

Georgie Harman

Charities Aid Foundation

Lisa Grinham

Church Communities Australia

Chris Voll

Churches of Christ Community Care VIC & TAS

Paul Arnott

Community Broadcasting Association of
Australia

Jon Bisset

Community Colleges Australia

Kate Davidson

Compass Housing Co Ltd

Greg Budworth

Connecting Up Australia

Anne Gawen

Drug Arm Australasia

Dr Dennis Young (Director)

e.motion21

Cate Sayers

ethicaljobs.com.au

Michael Cebon (Associate Member)

Family Life Services Australia

Jo Cavanagh

Foresters Community Finance

Ashley Hood

Foundation for Alcohol Research and
Education

Michael Thorn

Foundation for Young Australians

Jan Owen

Fundraising Institute of Australia

Rob Edwards

Good Beginnings Australia

Jayne Meyer-Tucker (Director)

HammondCare

Stephen Judd

Hillsong Church

Justice Connect

Lifeline Australia

Life Without Barriers

Maroba Lodge Ltd

Missions Interlink

Mission Australia

Musica Viva Australia

Opportunity International Australia

Our Community

Philanthropy Australia

Port Phillip Housing Association

PowerHousing Australia

Pro Bono Australia

Relationships Australia

RSPCA Australia

SANE

SARRAH

Save the Children

St John Ambulance Australia

Social Ventures Australia

The Benevolent Society

The Centre for Social Impact

The Reach Foundation

The Smith Family

The Ted Noffs Foundation

Variety Australia

Volunteering Australia

Wesley Mission

World Vision Australia

YMCA Australia

Youth Off The Streets

YWCA Australia

George Aghajanian (Director)

Fiona McLeay

Jane Hayden (Director)

Claire Robbs (Director)

Viv Allanson

Pam Thyer

Catherine Yeomans

Mary Jo Capps (Director)

Robert Dunn

Denis Moriarty (Associate Member)

Chris Wootton

Karen Barnett

Julie Quaass

Karen Mahlab (Associate Member)

Alison Brook

Heather Neil (Director)

Jack Heath

Rod Wellington

Paul Ronalds (Director)

Peter LeCornu

Michael Traill

Joanne Toohey

Andrew Young

Sarah Davies

Lisa O'Brien (Director)

Wesley Noffs

Neil Wykes

Brett Williamson (Director)

Rev Keith Garner (Director)

Rev Tim Costello (Chair)

Ron Mell

Fr Chris Riley

Dr Caroline Lambert