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Where not-for-profits go for help



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Li Luo
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Dear Ms Luo

Thank you for the opportunity to comment on the exposure draft of the Commissioner's Interpretation Statement on withholding or removing commercially sensitive information from the ACNC Register.

All not-for-profits should be fully accountable to their members and to the public. Our Community would thus have preferred that no such provision for exemption appeared in the ACNC Act; that horse having bolted, we would prefer to see the provision interpreted as requiring a very high degree of evidence indeed to override the presumption of disclosure.

We are encouraged by the Commission's clear statement that its interpretation of this provision will be rigorous.

A fuller statement is attached.

Kind regards



DENIS MORIARTY
Group Managing Director

Our Community: Comment on the exposure draft of the Commissioner's Interpretation Statement on withholding or removing commercially sensitive information from the ACNC Register

Not-for-profits have a favourable position in Australian tax law and reap the benefit of a widespread public bias in their favour. This is as it should be (and, indeed, both those elements should be extended). For these advantages to be justified, Australian not-for-profits must be able to show both to their members and to the general public that their governance, their finance, and their commitment to their stated objects are all satisfactory. For this reason, Our Community believes that a high degree of public disclosure is appropriate for all not-for-profits, and should be mandatory.

The Australian Charities and Not-for-profits Commission (ACNC) Act takes a more indulgent view of the operations of Australian charities, and provides the possibility of exemptions from otherwise mandatory disclosures where, among other things, these disclosures involve commercially sensitive operations.

Our Community notes with approval that

- the Commissioner may decide to publish the information if she considers that the public interest in publishing the information outweighs the likely adverse effect
- Where the information, which is the subject of a charity's application for withholding or removal from the Register, is already in the public domain, the ACNC will generally not hold that the information is commercially sensitive

And, in particular, that

- The starting presumption of the ACNC is therefore that publication is in the public interest, with limited exceptions.

We would also make the following observations.

Examples of information that might be considered sensitive includes, as a matter of form, items (patents, for example) that are highly unlikely to have found their way into Information Statements in any detail. The

Commissioner is correct to focus on a small number of these (1 – see below) – tenders, contracts, mergers, and in particular solvency issues and administration costs.

The Commission should take into account that any information contained in a charity's Information Statement is already available to the members of that organisation. While such information is not fully in the public domain, it has generally already been released to a large enough group of people for confidentiality already to have been compromised.

Only in those anomalous instances where an organisation's membership is not open to public subscriptions should the Commission assume that confidentiality would otherwise be assured.

As the Commission appreciates, information about solvency is key to an organisation's relationship with its members, its clients, and the public. Any situation where the mere knowledge of the situation of the charity would result in its collapse is prima facie a situation where the Board is placing itself at extreme risk of trading while insolvent, knowing that funds were not available from other sources, a matter that could very well provoke the intervention of the Commission under other provisions of the Act.

The opposite situation, where an organisation is so wealthy that it believes its donors would if they knew the true situation give instead to other groups, is equally clearly one where the public has a right to be informed. If money goes instead to organisations that need it more, or if alternatively such organisations were moved by apprehended reputational damage to disburse a higher proportion of their assets, both of these outcomes would in general be beneficial to society and should not be discouraged.

Although "charities may believe disclosure of information contained in financial reports may create an undesirable perception of the charity and lead to accusations of money not being used for a proper purpose. This concern is particularly associated with spending on items such as administration...." it must be appreciated that public misapprehensions of the significance of administration costs feed on the lack of general disclosure across the sector. If all charities are obliged to provide such information, public prejudice against administration expenditure will surely be diminished.

In considering whether to grant any organisation exemption from disclosure requirements, the Commission should appreciate that any organisation seeking such exemption will then automatically in the eyes of the public be taken to have admitted to being verging on the

insolvent, or being unable to spend its funds productively, or being offensively overstaffed. An organisation seeking exemption will have pre-emptively damaged its own brand and may suffer little additional harm from actual disclosure.

Our Community does take issue with the Commissioner on one point; where:

“... the ACNC acknowledges that sometimes a charity’s main external stakeholders (such as its beneficiaries) may not have the resources to access information directly from regulators. Therefore, when considering whether to publish such information, the ACNC may consider the overall accessibility of the information, even when it is already in the public domain..... Where the claimed detriment is in relation to ... beneficiaries, the detriment may be higher, especially where these groups may not have the resources to obtain the information from ASIC themselves.”

There are already a quite sufficient number of downsides attached to poverty in this country. It would be unwise to add to these an inability for a person on low income to discover that a charity on which they depend is seriously compromised. Information asymmetry between the poor and the rich is one of the evils the ACNC was instituted to remove, and should not be reintroduced as a right protected by special consideration.

Our Community believes that the interests of the Australian community sector are best served by maximum transparency. Given the terms of the legislation, Our Community considers that the proposed guidelines largely minimise the worst risks inherent in the withholding of important information from the public. If the Commission takes a realistic and balanced view of the public interest, few organisations should be able to seek such exemptions successfully.

In the interests of such transparency, however, Our Community believes that the ACNC should share the maximum amount of information about any instances of information being withheld, reporting at the very least the number of times this occurs and preferably detailing the names of the organisations granted exemptions.

¹ The Commission will doubtless be alert to the possibility that some very few charities that wish to avoid public visibility for improper reasons may think they can avoid this by deliberately inserting (say) the salary of the administrative officer or what they plan to pay for a new property into the Information Statement in the hope of obtaining an exemption.