

Review of not-for-profit governance arrangements – Treasury Consultation

Introduction

The National Roundtable of Nonprofit Organisations Ltd (NRNO) is an independent, non-partisan with a diverse membership of peak bodies and national NFP organisations. Based on the active engagement of member agencies representing more than 20,000 NFP organisations across Australia, the NRNO facilitates consideration of regulatory, taxation and sustainable financing issues and coordinates member engagement with the Australian community and public policy processes. Together with many other NFP organisations, the NRNO has contributed actively to government Inquiries and Reviews. This submission reflects consultation with organisations represented by NRNO members.

This submission has been prepared on the basis of the concerns and experience of the member organisations of the NRNO on the issues and proposed and possible approaches set out in the Treasury Consultation Paper.

The NRNO welcomes the opportunity to comment in this submission. We note and acknowledge that the government responded to serious concerns expressed by many organisations about the compressed timing of the consultation process by extending the closing date for submissions for a further three weeks until 27 January 2012. It is also appreciated that the timing of the legislative processes for the establishment of the Australian Charities and Not-for-profits Commission by the proposed 1 July 2012 start date necessarily limits the ability of Treasury and the government to provide more time for consultation and engagement with the sector.

The Roundtable agrees that good governance of the sector is of fundamental importance to the future of the sector and its ability to secure and retain public trust and confidence and the financial and other support that not-for-profit organisations depend upon. We are not convinced, however, that there is any crisis or identified serious shortcomings in current governance practices or the oversight of governance practices which warrants or justifies the speed or scope of proposed action which the Consultation Paper contemplates.

Moreover, the Roundtable strongly believes that the future shaping and development of good governance practices and a regulatory framework to support them must take account of the huge scale and significant diversity of the NFP sector in Australia. It must also be done in a way that actively engages with the many hundreds of thousands of citizens who are involved in and responsible for the governance of NFP organisations. (The current consultation process, which has unfortunately taken place over the national holiday period necessarily means that most people in the sector will not have had the opportunity to be engaged and informed.) It must also take account of the work and approaches already taken in different parts of the sector to pursue good governance and be developed on the basis of a thorough understanding of current practices and approaches. None of that is achievable within the time-frames contemplated in the Consultation Paper.

The Consultation Paper describes a proposed scope of governance regulation for the ACNC which would have eventual application very substantially beyond the initial scope and powers of the Commission and before negotiations can take place and agreements can be reached with other regulators at Commonwealth level and with the States and Territories. The Roundtable therefore contends that the approach taken to governance requirements in the Bill to establish the ACNC should only be very general and high level and that the ACNC should iteratively develop more comprehensive and detailed guidance and education materials on governance arrangements and requirements over time and in collaboration and consultation with other regulators and with the sector itself.

The Roundtable is also concerned and mindful of the need to ensure that moves to secure best practice governance in Australia do not result in unintended increases in the red-tape burden on organisations. This will only be possible with iterative, collaborative and consultative development and introduction of high level governance principles and accompanying useful and practical guidance and education materials. Regulators in other jurisdictions such as England and Wales and Singapore, amongst other, serve as positive exemplars of this kind of approach.

Development of best practice governance in Australia's not-for-profit sector will inevitably only be achieved with significant buy-in, acceptance and engagement of the sector and not through legislative and top-down imposition of requirements which don't take account of the diversity of sector organisations and the concomitant diversity of means by which good governance can be achieved. Ultimately, good governance will be best supported and facilitated by a framework which supports and encourages the best and most appropriate internal practices and reviews within organisations and which provides useful guidance and education resources rather than very detailed and prescriptive external regulation.

The Roundtable is keen to work with governments to achieve this important goal and sees the initial establishment of the ACNC as an important and positive but limited first step in this process.

We look forward to further dialogue with the government on these important issues.

Gerard Menses
Chair
27 January 2012

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Responses to Consultation Questions:

RESPONSIBLE INDIVIDUALS' DUTIES

1. Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to?

The primary duty will always be to the entity itself. It would be neither practicable nor useful for the legislation to describe and define the different stakeholders different NFPs might need to take account of. This would be better dealt with in guidance material.

2. Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity, or mission and purpose of the entity?

As for (1) above, these are complex considerations which will vary enormously between different NFPs and over time for Individual NFPs –and could not be accurately or usefully defined in legislation. This would be better dealt with in guidance material.

3. What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?

As for (1) above, these cannot be exhaustively be defined in the legislation to cover all circumstances and if included at all – be along the lines set out in paragraph 91 of the Paper:

- a duty of care and diligence;
- a duty to act in good faith in the best interests of the entity;
- a duty to not misuse their position;
- a duty to not misuse information; and
- a duty to disclose material personal interests.

4. What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?

Again, the diversity of different circumstances means it would be neither practicable nor useful to attempt to codify and define minimum standards. This would be better dealt with in guidance materials issued by the ACNC.

5. Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?

The provisions of the ACNC legislation should be no more prescriptive than the Corporations Act – which doesn't require company directors to have any particular skills. Many NFPs have difficulty recruiting and retaining Board or Committee members and this should not be exacerbated with the imposition of new and onerous requirements. The government should certainly not contemplate the current requirement for Private Ancillary Funds to have a "responsible person". Many citizens

who do not meet the relevant quite narrow definition are perfectly capable of performing their duties to very high standards.

6. Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?

There should be no minimum standards, other than perhaps prohibitions along the lines of those in the Corporations Act setting out those people who cannot act as company directors.

7. Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?

There are great difficulties with this proposition. Attempting to standardise significantly different duties of responsible individuals would neither be useful, possible or practicable - especially given the variation of different current requirements. Lowest common denominator standardisation would serve no useful purpose and highest common denominator would inevitably impose new, unnecessary and unwelcome requirements.

8. Are there any other responsible individuals' obligations or considerations or other issues (for example, should there be requirements on volunteers?) that need to be covered which are specific to NFPs?

No. It would not be appropriate to attempt to identify and codify varying and different requirements or obligations of volunteers.

9. Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?

This is a matter more properly addressed in guidance on risk management – not by attempting to identify high risk NFPs and seeking to codify higher standards of care or minimum standards in the ACNC legislation.

10. Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?

See 3 above.

DISCLOSURE REQUIREMENTS AND MANAGING CONFLICTS OF INTEREST

11. What information should registered entities be required to disclose to ensure good governance procedures are in place?

Suggest the approach adopted by the Singapore Charity Council with tiered reporting of internal reviews against tiered requirements be considered.

12. Should the remuneration (if any) of responsible individuals be required to be disclosed? Some disclosure will be appropriate but for whom and at what levels might be contentious – this might be better dealt with in accounting and financial reporting standards.

13. Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?

Existing legal requirements in the general law and in the Corporations Act, the CATSI Act and in various State and Territory Associations Incorporations Acts impose similar but slightly different requirements and obligations. It might therefore be more appropriate for the ACNC legislation to provide for a consistent minimum requirement and for the ACNC to issue more detailed guidance to deal with regulatory problems and issues.

14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?

The particular situation in the example is already dealt with in the CATSI Act. Other unknown but possibly relevant or similar circumstances would be best covered in general or specific guidance which the ACNC might issue.

15. Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?

See 13 above.

RISK MANAGEMENT

16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?

Not all NFPs control funds from the public and the hugely varying circumstances which apply to different NFPs would make it impossible to codify useful and practical risk management strategies. Requiring organisations to have proportionate internal risk management strategies which could be the subject of guidance from the ACNC would be more effective and appropriate.

17. Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?

As for 16 above – guidance not legislation.

18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?

No – some organisations will have no insurance requirements and others which do minimum requirements will have widely varying needs. This is best left for inclusion in guidance.

19. Should responsible individuals generally be required to have indemnity insurance

Again this is best left to guidance. Indemnity insurance can be extremely expensive and may have exclusions which don't provide protection individuals might be lead to believe it does. This is best left to guidance and external insurance experts.

INTERNAL AND EXTERNAL REVIEWS

20. What internal (and external) review procedures should be mandated?

See response to 11. above re reporting on internal governance reviews. The Roundtable agrees that external financial review and auditing which is proportionate to the financial turnover of the entity is appropriate. However, given the wide disparity in financial review and reporting requirements in current State and Territory Associations Incorporations Acts, organisations coming into the ACNC's jurisdiction might need transitional arrangements and time to adapt to new and presumably more demanding requirements.

MINIMUM REQUIREMENTS FOR AN ENTITY'S GOVERNING RULES

21. What are the core minimum requirements that registered entities should be required to include in their governing rules?

Core minimum requirements are already established in parallel legal regimes for all but trusts (Corporations Act, CATSI Act and State and Territory Associations Incorporation Acts). These will continue to operate when the ACNC commences and it would be difficult to distill a common minimum which applies to all. This might better be done when a co-operative arrangement with the States and Territories has been finalised and hopefully after requirements are harmonised.

22. Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?

In the absence of a co-operative arrangement with the States and Territories it is difficult to see how the ACNC could have a useful role, other than by co-operating with existing regulators to help ensure that existing requirements are enforced.

23. Who should be able to enforce the rules?

See 21 and 22 above – existing regulators for the time being at least. The ACNC should co-operate with other regulators in this context.

24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind-up or deregistration?

The ACNC may in future need a role in alteration of governing rules on wind-up or deregistration, after a co-operative regulatory regime is implemented.

25. Should model rules be used?

See 21. above

RELATIONSHIPS WITH MEMBERS

26. What governance rules should be mandated relating to an entity's relationship with its members?

These are already mandated in existing requirements in some considerable detail. Once again, additional rules are neither necessary or desirable.

27. Do any of the requirements for relationships with members need to apply to non-membership based entities?

No because they are fundamentally different structures and associated governance arrangements

28. Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?

Existing rules should continue to apply.

SUMMARY

29. Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?

The guidance approaches and associated education programs adopted by regulators in other countries (such as England and Wales, New Zealand and Singapore) can be adapted and adopted for Australian circumstances. The grant program like that operated by the Singapore Charity Council to support governance development could be very usefully be adopted in Australia. The ACNC should also work closely with those peak organisations which already play a significant and positive role in governance development and improvement in Australia NFPs.

30. How can we ensure that these standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red tape for NFPs?

By rigorously and continually monitoring regulatory impact and by effective collaboration and engagement with the sector as changes are implemented – again through peak organisations where possible and appropriate. Appointment of a red-tape reduction advocate or champion who would report to the Assistant Treasurer might be useful – or the Advisory Council Board could be given this role.

31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?

The Roundtable's general preference is for principles on governance matters to be developed in iterative and ongoing consultation and collaboration with the sector and for them generally, except perhaps at the highest level, to be incorporated in guidance which can be regularly reviewed and refined.

32. Are there any particular governance requirements which would be useful for Indigenous NFP entities?

The Roundtable is unaware of any such requirements but suggests that ORIC and Indigenous organisations be consulted.

33. Do you have any recommendations for NFP governance reform that have not been covered through previous questions that you would like the Government to consider?

No