

Manager  
Philanthropy and Exemptions Unit  
Personal and Retirement Income Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Brian Page  
PO Box 157  
Mount Gambier  
SA 5290

January 10<sup>th</sup>, 2012

RE Review of not-for-profit governance arrangements.

Thank you for the opportunity to make a submission and the Consultation Paper, December 2011 which gives a very broad and well presented review of the sector and the issues.

In regard to the **Introduction page viii**, I would like to make some generalised comments which would flow through to my approach to the consultation and consultation questions. It may be that some of this material will be added to or may be duplicated under the many consultation questions.

- a) The general statement of a definition of not for profit, paragraph 2 was excellent, and a good definition that might be placed in Governance Deeds or Documents.
- b) The paragraph 3 about duplicative, burdensome and unclear governance guidance requirements imposed over the various levels of government in this country is taken as important. The States have Charities Laws and corporate regulations applicable for NFP's which are often different, out dated (eg charities definitions based on Elizabethan times), changes made on an ad hoc basis often as a reaction to some State scandal or community pressure, without consistency, different charity collection laws, etc.
- c) It should be the longer term intent to have these State legislations and regulations updated and harmonised thus applicable in a consistent way across the nation. I would also add that local government should also be engaged in the process as local government is nowadays very involved in community works, charitable type activities and in receiving federal and state grants.
- d) It is advised in paragraph 3 that a 'principles-based approach' to governance will be adopted, but also goes onto mention the difficulties of smaller entities especially into developing 'prescriptive governance policies'. It suggests that such policies may not be necessary for smaller entities. There are some important matters of principle here.
  - i) I agree with the concept of 'principles based governance'. But I also suggest that we need to consider or add 'performance based governance'. At the end of the day, the aim is performance and outcomes.
  - ii) Detailed and prescriptive governance principles often seem to be based on 'legal compliance' and might run a risk of mazes of legal mumbo jumbo which are absolutely no guarantee of real performance and real outcomes. This seems to imply or simply hope that that a rigorous administrative process might lead to better performance and outcomes, but the need for good management and leadership is essential and needs to be considered and acknowledged.

- iii) However governance in principle should be careful not to stray into micro-management of the entity and while encouraging good corporate governance, should in principle leave actual management to boards and staff.
  - iv) There are many be not-for-profits which receive substantial financial support from various levels of government, based on the general belief that NFP's and charities do a better job than direct government or departmental control and this sets requirement in these, for measured degrees of micro-management and involvement to assure that tax payer funds are efficiently expended and that strong 'performance based governance' is in place, rather than simple legal and prescriptive governance. This paper does seem to suggest real and serious concerns about the governance of certain NFP's eg indigenous bodies and there are bodies such as the ASIC to whom such problems if they occur, should be referred, and an extension of governance might be clear guidelines for NFP's of matters that will or should be referred to bodies such as the ASIC.
  - v) Paragraph 5 envisages some 'high level principles based mandatory requirements' are envisaged but caution is needed to ensure that such requirements are very clear, eg transparency and accountability and other matters addressed in the paper eg conflict of interest etc. Caution is needed to ensure red tape etc is avoided (often associated with conflicting issues (b) above. The cost of excessive regulation etc must be also considered.
  - vi) The directions of the paper seem to be somewhat dominated by 'legal compliance' and to the input by the legal profession, but there is another important arm of professionals that need to be involved at all stages and this is **the accounting profession**. Their advice can advise on a seamless accounting and audit process, financial management processes to improve or ensure management, finances, investment principles, accrual accounting to cover say depreciation and employee entitlements, cost-centre accounting processes to properly account project and initiative accounting, and other allied but central matters. Strong accounting and auditing is surely a key matter to ensure an effective sector, and should be a priority of the highest. Clear requirements in this regard should be a core component of constitutions, trust deeds and in model governance documents etc.
- e) At the end of this, the ideals of strong philanthropic engagement with the community, of strong charities and NFP's, is totally endorsed.
- f) One matter which I would like to add right up front in my submission to the consultation is my belief that **a national code of accounting for NFP's should be adopted nationally**. The Victorian Government has gone part of the way along this trail and the principle of a national code of accounting for NFP's, Charities and philanthropic bodies is recommended. Words like profit and loss need to be replaced with surplus and deficit on the simple premise that it is a not-for-profit sector. Profits are never made but a surplus might be managed. For philanthropic bodies or trusts based on the invested capital model, current accounting practice in my view, seem to describe donations and income to be placed in the invested capital pool, as income and seems to not be able, in my view, to clarify the issue of what is actually capital. Accounting of superannuation trusts might also give some guidance. A consistent accounting code an approach should then flow through the sector.

- g) This also implies that **a national code for auditing for NFP's is also required**. This flows on from accounting and as one task, would pay attention to matters that might be referred to the ASIC and other legal bodies. NFPs and Charities relying on tax payer funds, and public funds, do need to be seen to be covered appropriately in the accounting and audit process. **One audit requirement could be that audits should be 'unqualified' by auditors**, or that any qualifications are of minor matters easily alleviated. A good example reported in the media is the FSU Union where accounts went missing, allegations of misapplied expenditures were serious and the Auditor's Report was of serious qualification. In such cases bodies such as the ASIC should be mandated to be involved.
- h) A consistent accounting and auditing approach as envisaged would flow through the sector as a seamless and understandable set of financial requirements, an easier path to effective governance and better performance of the sector, and better ability to compare across the sector. And there would be better path to legal enforcement which is a last and serious action, but at times necessary.

The great variety of entities in the NFP' sector is also commented on, is very diverse as outlined in the consultation paper in various places, and the difficulty of a 'one approach serves all'. The next section 1 Context does develop some of the matters that I raise generally in these first comments of mine.

**Consultation Question 1. Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to? Consultation question 2 can be read together with Question 1.**

**As a first general statement, which might be common to questions 1-10, since these are banded together and come from a common theme;** Australian and State Legal systems and accounting practices come from the UK as outlined in appendices. Mention is made of governance in England and Wales and also New Zealand. All our Law has its origins in the UK. There should be overall consistency and harmonization with the laws and principles in each of these jurisdictions. Indeed the appendices do outline excellent material and one should reflect and use this material. It also mentions the USA and Federal Laws but also State Laws and the problem of harmonization and commonality when Federal Governments and State Governments act independently.

Clearly **the first duty** is to the constitution or trust deed or governing rules. Responsible persons must be in tune with these, know these and from these, to govern and manage the functions and purposes of the entity as outlined are outlined. In this context, being a director of a community foundation and trustee of associated trusts is that one does have duties covered by existing laws, regulations according to these and trust deeds. In this matter, I thus refer to 'what' rather than 'who' must individuals consider.

There are so many types of NFP's, some have members eg a sporting or similar club and generally these are for the benefit of the members.

Service Clubs are also NFP's and have trust deeds maybe as part of an international body and where Australian law sits in regard to these is a question and what are the responsibilities under their deeds.

I cannot comment on such entities.

**Where donors are involved**, in donations are usually given for a particular purpose or purposes according to the trust deeds or charitable purpose. The trust deed or similar establishes beneficiaries in a general sense (eg a scholarship fund, aid to the poor etc). In such cases, charities laws and trust laws must be consistent laws in a legally tested way from which clear duties flow eg funds must be used for the purpose that the donor intended for the said donation, or thought was the intention of the entity. There is a clear duty in these cases to honour the intentions of the donor implicitly, and to the intended beneficiaries of the donation, according to the mission and purpose of the entity.

**Consultation question 3. What should be the duties of responsible individuals be, and what should be the core duties outlined in the legislation.**

I guess this asks the questions who are 'responsible persons'. Clearly, this is the board or management committee or whatever is decided by the Trust Deed. A Company limited by guarantee actually appoints board members. Many Clubs or incorporated bodies elect the board from members or the public according to deeds. Clearly the whole board, every one of them has ultimate authority and responsibility. Thus the whole 'board' effectively need to be 'responsible persons'.

Constitutions also set duties of certain officers eg the Chair, Secretary, Treasurer and a Public Officer is usually required. The Constitution usually outlines the duties of these positions to some extent. Setting these duties is a core consideration for model trust and governance deeds etc.

I would tend in legislation; suggest that it should set out general principles followed to by guidelines outside of the legislation but in tune with it. This approach should allow a speedy legislative process yet leave appropriate flexibility. Associated with this process is the need for comprehensive community and sector consultations. One should not under estimate the extent of the tasks in total.

The PuAF Legislation recently passed uses this approach of legislated principles with separate guidelines. The ACNC could use this principle to establish the many guidelines commensurate with the type of entity, and size, with consultation from legal and accounting professionals and from the sectors of the many ranges of entities.

A difficult matter however is deciding what is appropriate for the plethora of different corporate structures and regulations, and also the corporate size of entities

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

This is a pointed question. Obviously the issue of corporate size and structure is central to this question but even more specifically, the core function of the entity..

It depends on the NFP entity.

What if it was a community aged home?

What if it was a church?

What if it was a scout group or sporting club?

What if the activities of the NFP are low risk or high risk?

Many NFP's have volunteers acting where risk, when dealing with the public or community, is at high levels where duty of care of a volunteer may be higher, and where volunteers traditionally and now, are central to real operations. There is of a personal responsibility to accept training and to be diligent in training. A CFS or SES volunteer or others in Emergency Services act where there are personal and public risks. Such volunteers seem to take on extreme responsibilities with possible risk of personal liability.

Volunteers at Lifeline, after training, do phone counselling to mentally unsettled persons. These volunteers are also placed in a situation of a high duty of care. Internal guidelines and training should establish what this duty is eg referrals to professional staff and where the duty of volunteers ends. Paid staff in the above cases might have extensive qualifications and registrations eg a Doctor, a mental health professional, and all would normally have membership of a professional association or as a trained priest and thus have increased duty of care.

Many volunteers assist in aged care.

Many assist in Meals on Wheels, Foodbank, Food Kitchens for the homeless. The list of volunteering duties within NFPs and Charities, is endless.

I am not sure that these standards of care for volunteers can actually be mandated, or relevant corporate governance mandated and might go too far into micro-management of the entity. Organisational and internal management practices should determine minimum training and duties, and determine the real responsibility of the entity and paid professional persons associated in such bodies.

Clearly volunteers and lay persons not receiving income should not be expected to have any substantive or legal duty of care, other than the usual duty of care to act responsibly and within the laws of this country which cover what might be inappropriate or criminal behaviour, and to accept training etc .

**Consultation question 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?)**

Clearly the general answer is **YES**. I have generally addressed this question in previous comments.

It may be that **the definition of a 'responsible person'** varies considerably in corporate or government documentation and needs a comprehensive review, and harmonization within government and states.

I sometimes find these definitions inconsistent, restrictive, sometimes out of date, dominated by a set of descriptions which seem not always appropriate or extensive enough. Descriptions seem dominated by professional descriptions not related or cognisant of business, and that business and other experiences and skills are not adequately recognised or included. Often, professional qualifications and membership of a professional association is suggested which in many cases seems distant from real experience in corporate governance. Retired persons are often the backbone of NFP's and Charities and their past experiences and qualifications also need to be accepted. Often managers and directors of corporate entities are not even mentioned in suggested descriptions of 'responsible persons'. Again, a 'tiered approach' to definitions of 'responsible persons', also seems appropriate.

Qualifications depend on the purpose of the NFP entity. A medical research entity requires persons who are peers in medical fields, but independent, and not likely to be applicants for grants. But such a board needs a broad canvass of skills, not simply medical.

A legal services or legal aid entity needs persons on the board have some legal qualifications may need persons working in the field eg social work with typical clients for legal aid and support.

Where annual financial turnover and employee numbers are high, much higher levels of financial management and control are required. Responsible persons on the board need business, accounting and other skills collectively, as well as similar skills among staff. And along with skills, the matter of EXPERIENCE needs to be incorporated somewhere.

The principle of **'tiered requirements'** is good practice and common sense, and appropriate governance. A small organisation with a small turnover of funds and little or no staff, needs less oversight, and in fact, might not be under the direct jurisdiction of ANCC. A huge charity (such as Salvation Army, Red Cross, which are some of the largest corporate entities in this country) need to be considered at a higher level of governance need.

However, the matter of elected boards or committees might not at this time have any reference to particular qualifications. A good example are sporting clubs ( many sporting clubs might be substantial financial entities even in small communities, they often have large turnovers of funds in licensed premises including alcohol and poker machines, and might employ or reimburse a large number of sports people and staff plus involve many volunteers).

Is it intended to extend NFP and ACNC oversight to such bodies bearing in mind the major economic effect collectively by sporting bodies? In such bodies, corporate governance might be at a minimum level and corporate and other qualifications of the elected board or committee might be very limited as well. In a general context, many elected to boards might not be eligible at all for such office in other NFP entities, being lay people often with little professional qualification, except a desire to help and their unpaid labour and volunteering are all they have to offer.

**Consultation question 6. Should minimum standards only apply to a portion of responsible individuals of a registered entity?**

In answering this, I assume that we are talking about the board or trustees? All individually and severally do have ultimate responsibility. Every board member has the same general duty of care in principle.

My general answer to this question is **NO**.

Most boards do have a board matrix and a desirable mix of skills and competencies of those on the board in professional and senior management as employees.

Obviously chair, secretary, treasurer and public officer's positions obviously take on elevated responsibilities and these are usually spelt out in constitutions or governing rules. It may be that the trust deed sets additional responsibilities or implies a higher duty of care, or a need for a higher level of qualifications, then in these cases, the answer is THAT EVEN HIGHER STANDARDS might be set. But the size of entity is a core matter and the principle of tiered arrangements applies.

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

Clearly many small NFP entities as generally described in sections of the consultation paper will be so small, or with such a limited purpose more like a social club without any really important purpose, will or may not be registered with ACNC. Many may not have any corporate structure of consequence. But clearly whatever the Federal Government and ACNC sets as governance principles and practices will have general effect over the whole sector.

Where entities have some consequence, have economic size, may work with donors and might be DGR's or charitable bodies, or other non charitable NFP entities, the general answer to this question is **NO**, there are no issues but perhaps with some limited qualifications.

All these entities will have an appropriate constitution or trust deed, and all such governing documents are usually remark similar in a general sense but vary in detail depending on purpose and economic size and with general responsibilities. All will work with the public and community and have a community responsibility. All or most will employ people.

All or most have an ABN and have to do regular BAS (GST reconciliations) and Employee Tax etc. Many will have to do a tax return eg PAF's and PuAF's and any entity with investments such as shares and many have imputation credits to receive or withholding tax matters.

(I also note that the consultation discussion only mentions PAF's and not PuAF's and assume that in tis submission, PAF acts for both PAF's and PuAF's.

All governance deeds are similar, first a name, a statement of purposes and mission, and clear methods for board appointment or election, and general duties of the Chair, Secretary and Treasurer and Public Officer, conduct and regularity of meetings of the responsible entity, establishment and dissolution, etc.

I can see a key purpose or task for the ACNC is to generate model constitutions as is mooted in the Consultation document. A general statement could state that this entity is a not for profit entity (according to the general definition in the introduction), and other purposes and general principles common across the sector. Requirements for accounting and audit can be outlined appropriate to the sector, or tiered levels of the sector. Conflict of interest could be generally defined and required governance, and benefits or payments to board members if say doing some consulting work.

I am not inclined to allow employees to be on the board nor to be signatories singly for documents or payments.

Many legal constitutions these days with computers are indeed almost 'off the shelf'. In the Community Foundation area, a leading legal practice in Australia has generated model Foundation constitutions and trust deed for trusts holding invested capital or other funds and all are appropriate for various charitable purposes and DGR or other status. Bringing uniformity and consistency across the sector is a principle to be strongly endorsed.

**Consultation question 8. Are there any other responsible individual's obligations or considerations or other issues (for example, should there be requirements for volunteers?) that need to be covered which are specific to NFP's?**

Volunteers are the life blood of many NFP's, charities and other community organisations particularly in regions. Volunteers need recognition. As mentioned in Q4, this raises issues which are certainly for management or the board or responsible persons to consider, and whether we pass from governance issues and to day to day operational and management issues is a good question. As mentioned, particular NFP's will have particular issues eg emergency organisations where training and their own personal safety is at stake. Organisations like Lifeline and those in the health fields also have specific issues pertinent to them.

In general I would say **NO**, but qualified by specific examples.

My answer to consultation question 4 has relevance to this question and answer.

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

As above, **YES**.

I have generally outlined NFP's where risk may be higher previously and later in this submission. And the size of NFP and the concept of a 'tiered structure' is also discussed.

**Consultation question 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?**

I must confess that I am not conversant with all of these acts to completely answer this question. But core duties of any Director, Board Member or Trustee are quite common according to the constitution or trust deed whatever.

Obviously for bigger organisations, a more rigorous approach might be reasonable. But consistent principles based governance across the sector is to be commended and thus a common approach consistent to general principles of governance. Tiered requirements are essential and common sense.

I have also mentioned commonality across the sector and Australian laws and regulations. ACNC and CATSI regulations for instance should be common in general principle.

Where the Federal Government might have concerns for instance with indigenous corporations, and it seems from the tenor of this consultation, that it has, then additional micro-management measures may be required, and better attention to accounting and auditing principles especially the need for audits to be unqualified, and matters where bodies such as the ASIC are called in.



This might be extending outside the real focus of this consultation, and outside corporate governance, and into micro-managing. But one accepts the reasons why eg the fact that many public NFP and Charitable bodies have been of concern over time, and will or may continue to be so.

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

**As an overall comment, questions 11-15 have commonality and are from a specific section of the consultation and are treated together.**

One cannot ignore the bad press the sector receives. Issues like the percentage of funds spent on administration and marketing concern all donors to charities, who hope that donations get to the beneficiaries and are not be swallowed up in excessive bureaucracy. Federal and State Governments are also criticised vehemently over this same issue eg massive expenditures on indigenous support just being swallowed somewhere.

I also stress and comment later on related matters, that the definitions of, what is administration?, what is income? etc that has to be disclosed needs better definition and **a national code of accounting standards** as recommended constantly, should define terminology in common terms and thus, provide clear accounting guidance to financial matters that are to be reported.

Without clear definitions and common accounting, comparison of reported information might lead to incorrect assumptions about any single organisation or across the sector, may add to uncertainty and lack of clarity, and might defeat the real purpose of effective disclosure.

Modern electronic means eg websites allow an opportunity for NFP's and Charities to provide acceptable disclosures or relevant information. Paragraph 105 lists some matters. Paragraph 106 refers to the desirability of disclosure against mismanagement. Paragraph 108 refers to the issue of financial payments disclosure. Australian Accounting standards provide various disclosure standards (para 109).

I think paragraph 11 seems to provide a good balanced approach to perhaps be added (para 112) in regard to related party transactions. And paragraph 114 in regard to the SA Collections for Charitable Purposes Act adds another issue and raises once again different standards in the various States which should be made uniform across Australia.

**Consultation question 12. Should the remuneration (if any) of responsible individuals be required to be disclosed.**

Disclosure means many things. In the first instance, clear corporate governance guidelines need to at first define this. Within the organisation, the board or governing body needs to have any such matter reported to it, and any decision to do so, is agreed and minuted in official minutes. In this way any responsible person being remunerated is clearly identified and recognised by the board.

The most likely such 'responsible person' that might be involved might be an employee, also allowed to sit on the board or governing body which sets remuneration. It is my general view that employees should not be on the board or governing body because of associated 'conflict of interest' possibilities.

If a board member or responsible person is also a consultant and may compete competitively for tender for consulting or provision of other services, then that organisation needs clear internal guidelines, but there is a risk that any responsible person or board member has a clear competitive advantage, knowing how the organisation works, and intimate knowledge of finances etc. It is clearly preferable that responsible persons might be simply precluded from applying as part of internal rules and practices.

The word 'if any' is usually relevant for charities and most bodies.

There is the question as to whether these are publicly disclosed, or simply disclosed to bodies such as ACNC. There may be government funded bodies of the NFP nature where commissioners or other responsible persons are remunerated (indigenous organisations) where press etc has been critical including related party transactions etc. sector.

In general, I would say **NO** to public disclosure for minor matters, but some minimum recommended amount of money might be indicated as a trigger for public disclosure.

But I am also not averse if remuneration levels to responsible persons, totally or above certain levels, are disclosed and tiered reporting. I would encourage the NCDC to at least require remuneration levels to be reported to it, to be able to monitor if excesses occur but public disclosure needs more consideration.

**Consultation question 13. Are the suggested criteria in regard to conflicts of interest appropriate? If not, why not?**

If you are talking about paragraph 126, these seem a minimum policy position and thus I say, **YES**, or even together or more stringent.

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

Absolutely **YES!**

Bad press seems to indicate wide spread reporting, personal benefits, vehicles and expenses, etc and need strict rules to manage these serious matters. Maybe there needs to be a separation between the responsible individuals, or relatives of, and the treasurer or persons authorised to make payments to individuals based on strict documentation and payment according to strict policies.

In such organisations, the approval of accounts paid might be to stricter oversight and approval practices. At least one signatory, of at least two, might or should be an independent member of the board or responsible person. And accounting and auditing rules should clearly define proper practices, and breaches or short comings that would cause referral to bodies such as ASIC or others.

The Secretary or treasurer duties might be made stricter in guidelines additional to corporate governance principles in general, thus extending into real management and administrative oversight.

I would indicate another type of NFP which, while for the benefit of the members, are public entities, often receiving government grants etc which need to be bought under the NFP banner with strict rules and these are Unions! The current FSU Union issue is a good example. The old Painters and Dockers Union and the BLF were other Unions of great concern in the past. Now this is a serious matter for the Government to resolve where often criminality is or certainly has been concerned in the past. There have been obvious corporate breaches that should have been referred to ASIC. Accounting and auditing standards need to be enforced, and common transparency and accountability standards are accepted as being a minimum requirement.

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

Whether material or minor, may not be the issue.

I would worry about the 'creeping issue', of high standards at first, maybe a slow acceptance of minor matters or suspicion of taking advantage of the situation, and eventually the matter gets out of control. Paragraph 126 is a start.

I would take hard line against any conflict of interest as I would also against the third party or personal benefit issue. Stipulating general definitions and types of conflict of interest, in guidelines, is very desirable.

**Consultation question 16. Given that NFP's control funds from the public, what additional risk management requirements should be required of NFP's.**

**Once again, Consultation questions 16-19 are related and there may be commonality across these questions.**

Risks are many as mentioned in 6.3 Risk Management. Risk management covers much of the daily operation of any entity including NFP's.

NFP's often use volunteers and insurance, training, supervision against accident or other matters need to be considered as mentioned before and requirements to protect volunteers.

I also add another concern or evolvment that needs to be put on the agenda and that is the internet, social media, electronic communications generally and the advantages of this, but more importantly, the real risks.

Governance in this area might be a real priority and some issues are;

- i) All organisations today are basically controlled around their computing assets. Hardware and software might be at risk from cyber crime, hacking, viruses and substantial risks which need to be clearly acknowledged by staff and boards or governing bodies and this considerable risk needs sufficient weight to be applied to this.
- ii) There seems to be a role that ACNC can play which is to provide guidelines and information about the myriad of risks.
- iii) There is the possibility of a computer systems breakdown and corruption which might cause loss of data, programs, databases and intellectual property developed at considerable cost and effort and without which, any entity ceases its ability to operate. Backing up and duplication of systems is one measure.
- iv) Privacy and copyright issues of images, written material, etc are an area of risk. Any disclosure of private information eg donors needs approval from persons involved.
- v) Security of data bases and donor and other persons or entities details is at risk, and there have been many examples of private data base, account details, private persons banking and credit cards details being stolen and put at risk.
- vi) Risk from cyber criminals getting access to banking details and accounts and stealing funds.
- vii) Employee theft when the old two signatories on a cheque may be bypassed.
- viii) Viruses and cyber attack destroying databases, being used to slander others, and general malfeasance.
- ix) Employee rules for personal use of the internet, social media etc.
- x) New technology such as smart phones adds another layer of risk and these at this time seem most at risk of cyber attack.

This is an issue of risk management which cannot be ignored. This may be the greatest area of risk facing any entity requiring good corporate governance and well managed systems and oversight.

**Consultation question 17. Should particular requirements (for an investment strategy) be mandated, or broad requirements for NFP's to ensure that they have adequate procedures in place.**

In regard to paragraph 134 (investment strategies), it is common for public trustees etc to reinforce trustee responsibility. A general statement is often, along the lines, 'trustees should not take the same degree of risk that one might with their own investments, and should avoid speculative investments'. There is a lot of information and trustee guidelines in this matter of investments.

An important issue, particularly for capital invested trusts, is protection of the real value of the corpus capital against inflation. Any investment strategy does require investment of a proportion of corpus to be placed in growth investments but which bring higher capital risks. The statements above about trustee attention to risk are appropriate when investing in such investments.

The issue of commission payments and transaction costs to advisor (also addressed in superannuation financial advisor requirements) is important. Investment returns can be severely reduced by excessive commissions and charges. Formal advice is something that some boards might feel is essential but costs must be evaluated. Diversity of investments is another matter.

**I think it better, that broad requirements for NFP's, should be in place, rather than mandating the issue.** It is matter of a performance and good management, rather than a prescriptive or administrative methodology. The knowledge and practices applied to managed funds and superannuation funds are relevant and should be consulted and viewed when addressing this question and the application to guidelines within the NFP sector.

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

What are unforeseen circumstances? Can one actually get such insurance? There are so many NFP's operating in risky places than others. There might be physical risks to staff and workers compensation insurance is already mandated usually by States. Risks from a major computer systems breakdown or it happening might cause catastrophic effects on the entity, but can one insure against this?

The sections in the appendix England and Wales 177-179 seem to be quite reasonable guidance.

**NO**, I do not think that minimum insurance cover should be mandated.

The ACNC could prepare broad guidelines on risks and risk management and develop and these over time based on real experience but consistent with overseas and general Australian Law and practices.

I just see it as being very difficult to have 'a one model fits everyone' mandated insurance position.

Good corporate governance is a better proposition. Responsible persons associated with boards and governing bodies within their ranks should be competent to identify risk and set in place operational procedures to minimise this, and to arrange insurance cover. This is a however a difficult internal issue.

**Consultation question 19. Should responsible individuals generally be required to have indemnity insurance?**

This to is subject to the viability of 'a one model fits all' approach. Every NFP is different and risks of claimable events which would trigger indemnity claims would vary greatly. NFP's could have more risk where acting in politically charged areas where trigger happy lawyers are at hand in cases of defamation. Large indigenous corporations where significant differences or claimants are possible might need large indemnity insurance.

And, it is also difficult to actually settle on indemnity insurance and it is expensive.

I would say, **NO** it should not be mandated.

I would again say **YES** to NDCD having risk management guidelines and codes of practice.

## Consultation question 20. What internal review processes should be mandated?

I return to my earlier philosophical arguments of a 'principles' based and 'performance based' governance rather than an overly 'legal compliance' and a too 'prescriptive' regime of regulation.

I see the need as having a seamless accounting regime, based on model constitutions for NFP's, and a national accounting code for NFP's, and a national auditing code for NFP's and Charities.

This concept would simplify a seamless cross over from corporate governance to accounting to auditing, and harmonisation across state borders and legislations, and to enforcement if required by bodies like the ASIC according to a clear and seamless principles based governance, and thus operation.

I promote a principles based, perhaps less legalistic, compliance and mandated regime. On this argument, I preach a less mandated regime but a properly guided regime.

Section 6.3.1 Internal and external reviews, is quite a comprehensive discussion of issues. Transparency and oversight are part of this. Internal processes are very important.

Nevertheless, NFP's ultimately have government and other entities that they are responsible to eg ATO, ASIC, State Legislations, Charities Licenses (with National Charities and NFP's having to navigate a maze of different federal and state regulations etc).

All NFP entities expected to be registered with NCNC would seemingly have substance.

I am not averse to many of the clauses in section 6.3.1.

**I think that all NFP's should be audited.** And accounts should be of a standard that auditors should be in a situation to be able to not qualify the accounts in any major way eg doubts over cash transactions, lack of records, personal and related persons payments etc.

In regard to using a registered auditor (clauses 140, 141, 142, etc) and preparing proper accounts, I recommend that all NFP's registered with ACNC do so and be audited without major qualification. There may be some scope for a 'tiered approach' but it may be that any NFP entity under the ANCC are of such importance, that a registered auditor is common place. It may be that for smaller entities, auditors and accountants do this task 'pro bono'

Gross annual receipts of \$200,000 \$250,000 as a minimum are mentioned. Most have to do a BAS in regard to GST. I am not unhappy that a tax return be lodged with the ATO (as for PAF's and PuAF's).

I would think that a gradual process would see any returns being to federal sources, and that in time, the issue of doing State returns according to State Legislations, would then be un-necessary red tape and duplication.

In regard to clause 151, such smaller NFP's without resources are unlikely to be registered with NCDC eg small amateur sporting bodies, localised committees in communities, and registration with ACNC is the key to size and need to do all of the proper accounting, auditing and reporting. Those not registered with NCDC should be exempt. As far as I know, most such bodies are accounted for and audited but often, the auditor is not registered (but would usually meet the responsible person definition) and such services are 'pro bono'.

In regard to the question, I recommend that adoption of model, consistent, harmonised governance constitutions or deeds across the sector, in time, would be effective mandating of internal procedures.

### **Consultation questions 21-25.**

I have fairly well answered these questions in my answer to question 20. The philosophical arguments for model rules are argued and accepted totally.

**Governing rules (Q21)** can set minimum requirements eg accounting, auditing, definitions as a not for profit, conflict of interest, third party transactions, roles of officers, meeting procedures and is a concept totally endorsed. **YES.**

For instance, most Community Foundations in Australia, and Trusts associated with Community Foundations, already use common governance documentation prepared by a leading national law firm, which are usually automatically accepted by the ATO.

It is strongly supported that model constitutions and trust deeds are developed by NCNC. Matters to be addressed include

- i) State that bodies are NFP and define what is not for profit or charitable in brief terms as per statements in the introduction.
- ii) Usually the first sections in trust deeds after name etc is a mission statement and lists of or descriptions of the functions of the entity eg working with the poor, scholarships, education, health, environment and some common guidance principles might also be provided in model trust deeds or governing rules.
- iii) Include reasonable and recognised financial, accounting and auditing processes. In time this could refer to Australian accounting and auditing codes for the NFP and Charitable sector as promoted as a concept earlier in this consultation submission. Incorporate a statement in the deed that it would be the intention that audits be unqualified except in a most minor way.
- iv) Include appropriate detail on the roles of Chair, Secretary, Treasurer and Public Officer.
- v) Meeting procedures and the AGM.
- vi) Common rules for transparency, conflict of interest, third party transactions, and disclosure internally etc.
- vii) Once these model documents are determined, NFP's over time could adopt new governance deeds based on the models is a worthy approach.
- viii) New NFP's and Charities registering with NCNC would be either encouraged, or possibly mandated to adopt deeds etc based on the model governance documentation including sections alluded to in clause 160 etc.

- ix) This is a much better approach to the implementation of better, more open governance, better public confidence, and a modernised and harmonised system in Australia. This would also assist implementation of 'like' reporting for public accountability across the sector which is comparative in a real sense.

**ACNC role (Q22)** to mandate a model set of governing rules, to protect the mission, and interests of the public, is endorsed. **YES!**

**Rule Enforcement (Q23).**

The ACNC has a core role in guidance and somewhat, to enforcement eg endowing charitable and DGR status and its removal. It also has a role perhaps in advising the government when bodies receiving federal funds are in breach.

With a seamless and harmonious system of corporate governance, accounting and auditing standards, any unqualified audit would or should trigger when the ASIC and other authorities eg ATO, Police are needed and should be brought into any needed examination, thus leaving the legal enforcement and penalties to these other authorised bodies and thus the ACNC acts within the existing framework of Government entities.

**Q 24, winding up or de-registration** is usually covered in governing rules eg any assets are transferred to a like entity and can simply be covered in the usual clauses in any document of incorporation or registration.

**Q 25, model rules has been consistently argued.**

**Yes.**

**Consultation questions 26-27. Relationships with Members.**

Section 6.5 covers most matters eg Annual General Meetings, General Meetings etc. Keeping minutes is a necessary need for any entity for meetings with members or any formal meeting. Trust deeds or governing rules should set much of the requirements for relationship with members.

Section 168 mentions that there is no requirement for un-incorporated associations or entities to meet. But how can any entity function without actually meeting eg members or appointed officers or board or trustees? Having meetings and some formal procedures is necessary for all entities, those registered with NCDC and those that are not.

To not meet is to infer that the entities do not 'act'! When holding public funds, it is a prima facie obligation to both act and to meet!

I am aware even in my region of several entities which might hold funds and have done so for many year. They do not meet, they do not act or distribute any funds as what might have been the need of the fund raising in past times. These are essentially defunct or moribund accounts. They only exist because some person has taken 'ownership' and might refuse to 'let go'.



I am not sure what ACNC can do about such bodies except to promote their passing and the passing of funds onto like entities who have a properly incorporated entity, and will use the funds wisely for their community and possibly in ways consistent with the reasons for the funds accumulated.

**Q 26, relationship with members.**

Model rules of governance should cover effective rules for members and relationships with members.

**Q27. Rules applying to non-members.**

The issue of say entry to premises is one issue. The NFP being charitable might have beneficiaries of the charity and support these. It is good practice that entities do meet and consult with such persons or persons representing or advocating for them. These are matters for the entity to decide. It should not be mandated, unless there are pressing reasons to do so eg indigenous bodies.

**Q28. Compulsory meetings.**

The AGM is or should be a compulsory meeting and should be held and open to any member. The right for members to call a General Meeting by call of say 25% of members is common. There might be some of compulsory meeting requirements, enshrined in governance rules, for membership based entities registered with ACNC.

**Summary.**

**Question 29. Are there any types of NFP's where specific governance arrangements or additional support would assist to achieve better governance outcomes for NFP's.**

**Questions 29-33 have commonality across question answers as before.**

Many entities have come under the focus of the media and public and rightly so. The Business Review magazine has also from time to time provided critical examination of the charitable sector. In many cases such entities have not liked this disclosure.

Recently the Adelaide Advertiser highlighted charities (Givewell tables) providing details of how much money they raise, what proportion goes to their cause, and how much do they spend on administration. Eg, Surf Life Saving Association Inc spent 62% of its income over \$23 million on expenses, Little Heroes 51% of over \$3 million, Make a Wish 48% of income of over \$13 million. But the Royal Flying Doctors only spent 3% of \$4.7 million, Mission Australia 16% Of \$26 million, Medicines Sand Frontiers 14% of \$56 million, Flinders Medical Centre Foundation 9% of \$2.7 million etc. There is so much variation that questions might be asked. In this case income was described as Gross Fund-raising Revenue and this might need to be better defined.

It seemed that about a third of income typically went in expenses. In some cases, it might be argued that admin and expenses on actual services could be mistakenly misallocated. Some of the reasons for the wide disparities might be;

- 1) RFDS for instance is a recipient of large government grants. It seems that RFDS includes these grants in GFR revenue and thus not as a % of actual donations.
- 2) Little Heroes in subsequent press mentioned that the 51% reported included expenditure on a fund raising initiative (a Monopoly Board type game being developed for sale) and included what might be called an 'initiative' as administration.
- 3) Surf Life Saving Foundation mentioned as 62% responded that administration was over stated as much of the expenditure went into actual operations, not administration.
- 4) GFD Revenue might also include sponsorship eg many Surf Life Saving facilities in NSW receive much funding as sponsorship or some other description from Clubs with large poker machine income.
- 5) Some might also have their own licensed and poker machine venues or operations.
- 6) Other articles in the media have drawn attention to medical and medical research entities raising large amounts of funds were dissipated in admin and entity set-up expenses. In some cases principals or CEO's received a commission on charitable income up to 30%!

**This emphasises the need, as I have mentioned before, for an Australian accounting standards or code for not for profits and charities**, in order that tables like Givewell do accurately report the sector, that 'apples are compared with apples' and that the accounting standard might define

- a) What is gross fund raising revenue? (components might be charitable income from donations and fundraising, sponsorship, income from operations eg licensed club income, continuing or irregular government grants (federal, state and local), estates, and miscellaneous income).
- b) What is administration? Components might be basic accounting and auditing, expenses of head office functions, advocacy, government reporting, etc,
- c) Marketing expenses (correspondence with donors, promoting donations and estates, work place giving etc), new initiatives etc.
- d) Operational expenses. For a charity like the Salvation Army and many more their actual work with the poor. For a medical research body work actually spent directly on research).
- e) indirect expenses
- f) Etc.

It seems that the general charitable sector and NFP sector needs some **guidelines on reasonable levels of administration, marketing expenses and other expenses**, and closer definitions of these expenses. It needs better descriptions on income (federal, state and local government funding), donations, etc other wise government or other performance tables of comparison such as Givewell will be misleading and unfair comparisons of the NFP and Charitable sector.

It is of course assumed that the Federal Government accepts that proper comparisons of this type are fundamental to proper governance, to proper understanding of the sector by governments, and if so, it seems an Australia wide accounting standard for NFP's and Charities is an essential core requirement to the two matters raised in this question, specific governance arrangements and additional support.

**Clear codes of conduct or practice, based on appropriate accounting and auditing standards, codes of practice and wider disclosure and websites such as Givewell, all seem necessary.** But these need to be carefully weighed as to minimise unnecessary prescription and to ensure these measures are to stimulate better performance and outcomes from the funds raised and expended in this sector.

**Many Charities also seem to use marketing bodies to sell expensive lottery tickets** say \$45 and it is reported that the salesperson gets 30% commission, and after other expenses, **less than 10% of proceeds get to the intended charity.** Added to this is the moral question of using gambling as a tool when many recipients of aid to the poor might be victims of gambling addiction. The use of raffles and gambling where small amounts of income actually reach the charity and these charitable marketing for-profit companies is a real matter of concern.

ACNC should consider guidelines for such bodies including disclosures to those phoned, and whether such charitable marketing entities should or should not be covered by 'do-not-call' privacy telephone regulations and not be exempt from these. Are these not for profit? Or are these simply for profit charitable service bodies? But use of these within the charitable sector seems endemic, raises substantial funds of which little actually reaches the charity it seems and should be required to meet standards and accountability and transparency common to the NFP and Charitable sector.

It seems that **indigenous bodies might need additional support and assistance** in the practices of good and proper and legal governance. Based on the FSU situation as mentioned before, NFP bodies such as **Unions might may need to come under ACNC NFP attention,** there is a strong case for much more corporate oversight, that they seem in great need of appropriate governance eg third party benefits, expenses, disclosure, member rules and approvals of major donations or political support with individual opt-out clauses. A guiding consideration is when such entities receive substantive public funding and if so, they might seem to be logically attended to by the ACNC. I have detailed these issues before.

A core minimum condition in the cases of any NFP is that independent Audits are required to be unconditional or without substantive cautions, disclaimers or concerns, and any such shortcomings should be addressed to the ASIC or other corporate regulators and breaches could or should lead to reasonable and known actions, eg loss of deductible gift deductions, loss of charitable status, loss of status as a union or disbanding, loss of government funding and reference to the ASIC or similar.

**Consultation question 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 NFP's?**

The word red tape also means expenses, time consumed on administration, being taken away from tasks associated with the core mission.

- a) Different State Legislations for NFP's and Charities, need to be updated and harmonised across the nation with federal priority to the one-stop-shop concept even states give up duties, functions and legislations in this sector, or that all States and Territories Laws and regulations are the same, and national NFP's might have one jurisdiction.

- b) The roles of ACNC, ATO, ASIC and other regulators needs to be harmonised and the silo approaches removed, and each entity has its clear role.
- c) As above and before, Australia wide accounting and auditing standards for NFPs and Charities using appropriate terminology and definitions. Seamless national standards of this type essentially reduce red tape by reducing confusion, bring consistency and harmony.

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

This has been covered in the other consultation questions. Model governance rules covering the gamut of corporation law, accounting and auditing, conflict of interest etc have been previously answered.

**Consultation question 32. Are there any particular governance requirements which would be useful for indigenous NFP's?**

This has been answered previously eg corporate governance training, separation or better control over expenses and expenditure authorisations, disclosure, conflict of interest, related third party benefit etc. Comment has been made about the Marae in New Zealand and there would be much to be gained from practices in other countries.

**Consultation question 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?**

I think I have covered most issues. If the ACNC is able to provide a clearer, principles and performance based NFP sector, and harmonises regulation within the nation, then it will be a wonderful outcome, and this consultation and the paper will have indeed been worth the effort.

There are consultations on how the ACNC will work, but wide and continuing community consultation, is essential. Other professional groups apart from the legal profession eg the accounting profession can provide key advice and practical methodology. Practitioners in the sector should also be consulted.

Thank you for the opportunity to make a submission. I have done the best that I can, based on the time of year, and short consultation time.

Brian Page  
Po Box 157. 7 Wyatt Street  
Mount Gambier, SA 5290

Contact 08 87256590. 0417 886 953. [brsijpage@bigpond.com](mailto:brsijpage@bigpond.com)