

20 January 2012

Mr Chris Leggett
Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langdon Crescent
PARKES ACT 2600

By email: NFPreform@treasury.gov.au

Dear Mr Leggett,

Consultation Paper: Review of not-for-profit governance arrangements

Thank you for the opportunity to comment on the consultation paper, Review of not-for-profit governance arrangements.

The Helen Macpherson Smith Trust was established under the Will of the Late Helen M Schutt upon her death in April 1951. The Trustees of the Estate are required to distribute the net income of the Estate amongst “charitable institutions situated in the State of Victoria”. The Trust is now of some \$88 million in assets and it has distributed in excess of \$92 million to charities within the State.

Some background information about the current Trustees and Executives of the Trust is provided as Appendix A.

A copy of the 2010/2011 Annual Report of the Trust is enclosed for your information. You may also wish to refer to the Trust’s website (www.hmstrust.org.au) where previous annual Reports can be accessed as well as information about the Trust’s activities.

The Helen Macpherson Smith Trust strongly supports the establishment of the Australian Charities and Not-for-profits Commission and the introduction of appropriate regulation for the sector. We see the Commission and regulation as important measures to build and to maintain public confidence in charities in Australia.

The Trust also supports the concepts of centralising to a “one-stop” shop and simplifying “existing arrangements in order to reduce red tape and to minimise compliance burdens for the sector”. It is appropriate that any requirements are flexible and are in proportion to the size or operations of particular charities. Governance rules should take into account the size of the entity, the risks it presents by virtue of its activities, the level of monetary and volunteer support provided by the public, the level of government support and the turnover of the entity.

We strongly support a principles-based approach rather than a prescriptive approach. Organisations should be able to develop their own appropriate approach to governance (and other matters). A prescriptive approach encourages compliance “box-ticking” rather than a considered approach to issues relevant to the organisation. A prescriptive approach will not reduce red tape or improve the soundness and integrity of the sector.

The Helen Macpherson Smith Trust does not support the proposal that effectively provides a single governance criteria for all charities. We acknowledge and maintain support for our income tax exemption, but we suggest that a charitable funding trust, such as ours, that is precluded from receiving donations from the public, nor receives any government funding or other benefits, should have minimal registration and governance requirements.

The Will of Helen Macpherson Schutt is a 1936 Will and naturally did not have reference to governance matters. By an Administrative Scheme, amendments were made to the Will and the Trust has the following requirements and procedures in place;

- (a) The preparation of accounts and an annual audit by a registered auditor
- (b) The preparation of an annual report containing statements of financial performance and position
- (c) To hold an annual meeting
- (d) Provisions dealing with the appointment, removal and maximum terms of trustees
- (e) Managing conflicts of interest and a
- (f) Risk management system.

It is worth commenting upon the structure of the charitable trust. Being established under a Will, the Trustees are individuals and have liability as individuals. We have previously explored the prospect of altering the structure to a corporate trustee but the then Victorian Solicitor General advised that he would not support this.

Turning to the specific consultation questions:

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

No. For a charitable fund, such as the Helen Macpherson Smith Trust, the Will establishing the Trust provides guidance as to those to whom a duty is owed, being charitable institutions. To specify a more general or specific group(s) would be inappropriate in the case of this Trust.

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?**

In complying with the requirements of the Will of Helen Schutt, the Trustees can only consider the purpose of the establishment of the Trust. The Trust does not have donors, nor raises money from the public.

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

The duties of the responsible individuals (as these apply to trustees of charitable trusts) should be as outlined in State Trustee Acts. These have served well over the years and an additional set of requirements should not be imposed.

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?**

The minimum standard of care should be that of a reasonable person. There should be no difference in the standard required between paid employees, volunteers, professionals or lay people.

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)?**

This Trust would not be concerned if it were a requirement that, say, a minimum of two Trustees must have particular skills or experience. We imagine that this could be difficult for some organisations in remote or rural Australia. However, certain groups should be prohibited from directing a charity, such as those who are bankrupt, or have criminal convictions, etc. The proposal elsewhere that those who can attest statutory declarations and other documents are considered appropriate as “responsible people” for directing or operating a charity is unacceptable. Some of the professions able to attest documents do not have the appropriate experience compared with others in the general population.

A better approach may be to require the board to assess the skills it needs to operate the not-for-profit effectively.

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

Yes. If this requirement were to be introduced then at least two persons on the board should be qualified as “responsible”.

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 less risks in managing a “funding” charity (such as the Helen Macpherson Smith Trust) than a “doing” charity (for example, different occupational health and safety issues, client related matters, fund-raising, etc) and so it is not appropriate that duties be standardised by regulation.

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?**

The management of a not-for-profit organisation should be no different than the management of a similar sized for profit entity and the requirements should be the same. Where volunteers participate in the management of an organisation they must be required to exercise the same degree of care as paid trustees/directors/managers/employees.

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

It may be appropriate that higher standards of care and management should apply to NFPs accepting donations from the public, receiving recurrent funding and special grants from government and/or are above a certain size. However, charitable funds distributing grants to other charities and not raising money should have minimal obligations.

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?**

The Trust believes that one set of core duties should not apply to the whole sector as there are different responsibilities within the sector. The requirements of the State Trustee Acts should continue to apply to charitable trusts but, say of a code of conduct apply to other organisations.

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

Registered entities should be required to produce an Annual Report with detail varying with the size of the organisation. The Report should include:

- Concise details of directors/trustees and their qualifications and experience
- Details of formal meetings and individual attendance
- Vision and/or Mission Statement
- Review of operations
- Financial statements
- Remuneration of Trustees/Directors
- Auditor's report (where appropriate)
- (for larger NFPs) a statement of governance practices.

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

Yes. This organisation is prepared to adopt this but recommends that disclosure be done in "bands". It should be noted that disclosing remuneration separately can distort the view of members of the public who may not appreciate the complexities of operating a large not-for-profit agency. A public education program may be required.

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

Yes. The suggested conflict of interest criteria appears to be appropriate. It would be hoped that the ACNC would issue guidance material, providing examples, to assist NFPs to determine what is a conflict of interest. Guidance, rather than prescription should result in better outcomes.

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)?**

Yes. The concept of conflict of interest is considered an important matter and any conflicts should be disclosed.

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?**

It would be appropriate for the ACNC to issue guidance material on conflict of interest rather than add to the suggested sample policy.

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

This Trust does not control any funds from the public. Those NFPs that receive funding from government or the public should be required to maintain a risk management register that is reviewed by the board of trustees/directors at least once a year, and any material risks established referred to in the Annual Report.

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

It should be a requirement that NFPs that derive income from investments maintain an investment strategy. That an investment strategy is maintained could be included in the governance section of the Annual Report.

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

Yes. NFP entities should be required to consider insurance matters as part of their consideration of risk. Depending upon the assets, size and operations of a NFP, insurance may not be necessary.

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

No. It should not be a requirement that responsible individuals must take out their own indemnity insurance. NFPs should be required to consider the issue and, if appropriate arrange suitable cover.

20. **What internal review procedures should be mandated?**

The entity should be required to conduct an internal review appropriate to its size. For entities above a certain size, an audit of the financial statements by a registered auditor should be required. Should the auditor detect breaches of ACNC requirements then these should be brought to the attention of the NFP. If the breach is of a material nature then it should be reported (by the auditor) to the ACNC.

Entities below a certain size, should have their financial statements reviewed (by an auditor or qualified independent person) and these lodged with the ACNC. Any material breaches should be reported to the ACNC.

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

Minimum requirements for registered entities should be as in the Corporations Act. However, these cannot apply to all NFPs. For example, this Trust is governed by the requirements of the Will of Helen Schutt and the terms of the Will can only be varied by an Order of the Supreme Court of Victoria.

The Trust favours the adoption of principles for good governance along the lines of those promoted by the Charities Commission of England and Wales. Each organisation is able to adapt the principles to their own needs.

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?**

Yes. It is preferable that the ACNC issue principles of good governance but some important matters such as non-distribution of funds to members upon wind-up etc should be mandated. Again, in the case of this Trust, how would the ACNC have the power to amend the terms of the Will to stipulate governance requirements?

23. **Who should be able to enforce the rules?**

The ACNC should be able to enforce the rules and to prosecute for breaches of material requirements through the appropriate court.

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

Yes. Should the ACNC believe that charitable funds are being inappropriately dealt with, it should be able to seek an order from the appropriate court restraining action or seeking to wind-up a NFP.

25. **Should model rules be used?**

Yes.

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

This entity has no members.

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

The beneficiaries of the Estate of Helen Schutt are charitable institutions operating solely within Victoria. So long as the Trust is meeting its obligations to distribute funds, none of the potential beneficiaries should have any right to enquire or to "interfere" in the management of the Trust. The Trustees have the sole responsibility under the Will.

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

Yes. All membership based entities should be required to hold an annual meeting or to have meetings called, if requested, by a percentage of members.

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

The Trust believes that the proposed governance arrangements for NFPs are suited to those organisations raising money from the public, receiving government funding and/or performing charitable acts within the community. These arrangements should help promote confidence in the sector from the public. However, the general thrust of the arrangements do not seem to be appropriate for “funding” charities, such as this Trust, established by Will.

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?**

Unfortunately, the standardised governance requirements as proposed will only increase the red-tape for charitable trusts. It will be important to provide a simplified governance process for charitable funding trusts, such as ours, especially as funds are not raised from the public or obtained from government.

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

The greater the level of guidance material that can be provided (such as that produced by the Charities Commission of England and Wales) the better that this will result in a reduction of red-tape.

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?**

As mentioned previously, Trusts established by Will, where there can be no corporate trustee, where monies are not being raised from the public and where no government support is received, should not be required to undertake the same governance regime as other charities. The public has little interest in the day-to-day operation of this Trust, an Annual Report is published and a website maintained. Being required (if legislatively possible) to adopt governance arrangements that are not practicable or relevant to the Trust will not improve the outcome for potential beneficiaries. Again, we refer you to our Annual Report (and website www.hmstrust.org.au).

Once again, we thank you for the opportunity to participate in the consultation process. We look forward to working with Government to strengthen the not-for-profit sector and so to enhance a prosperous Australia.

Our trustees and I would be happy to discuss further with you any of the matters raised.

Yours sincerely,

Andrew Brookes
Chief Executive

APPENDIX A

The current Trustees of the Trust are:

Darvell Martin Hutchinson AM FCA

Mr Hutchinson is a former Senior Partner of Pannell Kerr Forster (now PKF) Chartered Accountants; he is a Director of The Décor Corporation, a former Director of the Bank of Melbourne Ltd and former President of Asthma Foundation of Victoria. He was a Trustee and Treasurer of the National Gallery of Victoria and is currently National Treasurer of The Order of Australia Association Foundation. In 1994, Darvell was honoured as Member of The Order of Australia for service to the community, and Monash University conferred upon him the degree of Doctor of Laws honoris causa for his contribution to the Victorian community and “to Melbourne’s role as the major centre of philanthropy in Australia”.

Frances Helen Awcock AM

Ms Awcock was a former CEO and State Librarian of the State Library of Victoria retiring in 2002. Ms Awcock has been a specialist Consultant on Library buildings and services, and also a licensed Civil Marriage Celebrant. She had a distinguished career in the library and publishing field and in 2004 was honoured as a Member of The Order of Australia for her contribution to libraries and the community. Prior to being State Librarian of Victoria, she was Director of the State Library of South Australia, and Executive Director of the National Book Council. Previous Community appointments include being a Member of the Council of RMIT University, former Chair of the Victorian Tapestry Workshop, Council Member of the Constitutional Centenary Foundation and the Victorian Council of the Arts.

Charles Roderick (Rod) Kemp

Mr Kemp is Chairman of the Institute of Public Affairs, Chairman of the National Institute of Circus Arts, and Board Member, Melbourne Scots. The Hon Rod Kemp retired as a Senator for Victoria in 2008 after a long career in Federal Parliament. He was Minister for the Arts and Sport 2001-2007, Assistant Treasurer 1996-2001, and Acting Minister for Finance in 2001. He also held various Shadow Ministerial Portfolios between 1992 and 1996.

Prior to entering Parliament, he was Director of the Institute of Public Affairs, and also held various positions in journalism, economic research, and corporate relations.

Winsome Mavis McPherson McCaughey

Ms McCaughey is Senior Strategic Advisor (Partnerships) at the Office of the Deputy Vice-Chancellor (Research), the University of Melbourne, Chair of the RMIT School of Art Program Advisory Committee, and Director of a family wine company, Seven Sisters Pty Ltd. Amongst her many roles, Winsome was founding Executive Director of Australian Business Arts Foundation (ABAF), Chair and CEO of the Australia New Zealand Food Authority, CEO of Greening Australia Ltd, Executive Director of Lance Reichstein Foundation, a Councillor of the City of Melbourne, and Lord Mayor of Melbourne in 1988-89.

Philip James Moors

Dr Moors has been Director and Chief Executive of the Royal Botanic Gardens Melbourne since 1992, and is a Director of the Royal Botanic Gardens Foundation. He has led the creation of the Australian Garden at RBG Cranbourne. Dr Moors is also a member of the Maud Gibson Trust, Chairman of the Australian Research Centre for Urban Ecology, a member of Life Sciences Antarctic Research Advisory Committee, and President of Botanic Gardens Australia and New Zealand. Philip received his PhD in 1974 at the University of Aberdeen, Scotland, and the Centenary Medal in 2003 for services to the community through conservation and the environment.

Keith Bradbridge Smith

Mr Smith is a consultant based in the UK working with non-profits and charities. He has assisted the boards, directors and senior managers of 60 national and international charities, primarily on governance, strategy, development, benchmarking and communications. As well as working in Africa, Keith Smith has studied the not-for-profit sector in the USA and has spent time in Australia both as an observer of the sector and to visit the Helen Macpherson Smith Trust, which was founded by his great aunt.

The senior executives of the Trust are:

Andrew Brookes

Mr Brookes joined the Helen Macpherson Smith Trust as Chief Executive in March 2011. Andrew commenced his career at The Colonial Mutual Life Assurance Society Limited in 1979 as a Graduate Cadet. He had a variety of roles over his 22 years with the group and worked in a number of States and overseas. Andrew's roles included those of Group Compliance Manager, Group Superannuation Manager and leading the team responsible for negotiating the contract for the joint venture life insurance operation in the Peoples' Republic of China.

Following the takeover of the then Colonial Limited by Commonwealth Bank of Australia, Andrew, in 2001, joined Colonial Foundation, which had become a private charitable fund. As Executive Officer, Andrew was responsible for all aspects of the operation of the Foundation.

Andrew is a member of the Melbourne Health Human Research Ethics Committee and the Melbourne Grammar School Investment Committee. He is a Director of LifeWorks Relationship Counselling and Education Services, Deakin Foundation and the Victoria Police Youth Foundation.

Anthony Hugh Barrington Baird

Mr Baird has spent most of his working life in the investment world. In 1968, he began work in London for a merchant bank, Schroders, and in 1972 joined a firm of stockbrokers, Wood MacKenzie & Co, in Edinburgh. He was with them for 9 years, becoming both a partner and a member of the Stock Exchange, London. In 1981, he and his family moved to Australia to join a local stockbroker, and he became a member of the Melbourne Stock Exchange, (later the Australian Stock Exchange), in 1982. Until Tony retired from full time work in 2005, he spent the final 10 years of his career at UBS, during which time he was in charge of the Melbourne private clients business.

Darren John McConnell CPA

Mr McConnell is a Certified Practising Accountant with over 18 years experience in the finance and accounting industry. His extensive experience includes both public practice and industry accounting roles, including publicly listed investment entities, philanthropic investment trusts and high net wealth family groups. Mr McConnell also acts as the HMS Nominees Ltd company secretary.