

Our ref: NFP:5: RDC

15 February 2013

Manager
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Dear Manager

CONSULTATION PAPER: GOVERNANCE STANDARDS FOR THE NOT-FOR-PROFIT SECTOR

The Queensland Law Society (the Society) welcomes the opportunity to contribute to the public debate on the governance of not-for-profit organisations that is taken to the next stage by this consultation paper.

The Society is the peak professional body for Queensland's legal practitioners. We lead a profession of more than 8,500 members throughout Queensland. The Society is comprised of several specialist committees who provide policy advice on law reform and areas of concern to the profession. We also assist the public by liaising with the Government on improvements to laws affecting Queenslanders, and working to improve their access to the law.

Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au for further inquiries.

Yours faithfully



Annette Bradfield
President

Submission

CONSULTATION PAPER: GOVERNANCE STANDARDS FOR THE
NOT-FOR-PROFIT SECTOR

*A Submission of the
Queensland Law Society*

15 February 2013

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2. Introduction

This response to the consultation paper has been prepared with the assistance of the Society's Not-For-Profit Law Committee. Members of this committee have a thorough understanding of the various issues impacting this area of the law. Whilst the Society has an interest in the not-for-profit sector reforms because it is a not-for-profit organisation, this submission is made on behalf of the Queensland legal profession which the Society represents.

From the outset, the Society would like to affirm that encouraging organisations towards good governance in the not-for-profit sector as a whole is a commendable objective. This submission focuses on perceived weaknesses in the conceptual framework and the standards in an endeavour to improve the quality of the regulatory environment. The Society considers that the consultation paper has not adequately addressed how the governance standards will fit into the regulatory framework. We consider that without this background, the outcome may be arbitrary and may have unintended consequences. It will become apparent from the submissions that there may be significant difficulties with at least some of the standards.

One of the strengths of the not-for-profit sector is that it is diverse because of the freedom of association allowed in large measure to the general population. Diversity allows for innovation, easy entry into associational life (no barriers or bureaucratic impediments) and population ecology which is robust. This diversity should not be taken for granted. Similarly, any tendency to impose a particular form of organisation should be resisted to allow for the greatest flexibility of human endeavour. For example, whilst we have seen a convergence in commercial markets to the Anglo-American corporate form¹, one of the stimulating and constructive aspects of the not-for-profit sector is its variety of form.

It can be argued whether this convergence is efficient for commercial markets, but the Society suspects it is not for civil society if one is to value freedom of association, belief, participation and robust population ecology. An important question to consider is whether it can be demonstrated that a theocratic governance style is any less valid than a member democracy.

These are comments by way of broad introduction, because the governance standards proposed, and particularly standard 6, are drawn from or mimic corporate/shareholder governance models where the focus is quite different. For the not-for-profit sector, the outcome is the pursuit of objectives, not profit. The emphasis is quite different.

The Society also notes that it has come to our attention that despite a large proportion of charity officers and governing body members being volunteers, no consultation sessions appear to have been made available outside business hours (when these volunteers are at work), other than the online portal. This does not seem equitable nor prudent as it may have the tendency to skew participation in favour of professional advisors who may have different concerns to those of people working 'on the ground'.

¹ 89 Geo. L.J. 439 (2000-2001) End of History for Corporate Law, The; Hansmann, Henry; Kraakman, Reinier

3. The conceptual framework

The Society recognises the farsighted international leadership of this government in establishing a regulator which, it is intended, will regulate the whole of the not-for-profit sector, rather than being limited just to charities (although that will occur in the short term).

The English academic Jonathan Garton in his doctoral thesis *The Regulation of Charities and Civil Society*² undertook a 'comprehensive analysis of the legal boundaries of the English charitable sector' and concluded 'that there are no theoretical grounds on which to differentiate between the charitable sector and the wider organised not-for-profit community for regulatory purposes'.³ Garton argued cogently that:

...regulation of the charitable sector in isolation is untenable because (i) no meaningful distinction between this and the wider organised civil society can be drawn on the basis of either organisational structure or social function and (ii) the reasons traditionally given by successive governments for treating charities as a special case are inadequate.⁴

This is an important threshold concept because we understand that the government's standards are to apply not only to charities, but to all not-for-profit organisations in the long run.⁵ Further, the standards are stated to be minimum standards, not world best practice, and it is important to ask whether it is appropriate to impose on all not-for-profit organisations demanding duties (such as with proposed Standard 6) that were originally intended for trustees of charitable trusts or the officers of public or proprietary companies.

It seemed common ground amongst the parliamentarians participating in the various subcommittees that examined the draft Australian Charities and Not-for-profits Commission (ACNC) legislation that the governance obligations placed upon charities and not-for-profits should not be greater than those placed upon for-profit businesses.⁶ Where the proposed governance standards have that effect, it is submitted that they should be modified.

In our submission, governance standards, indeed regulation of the not-for-profit sector as a whole, should be 'no heavier, nor cut more deeply, than is necessary.'⁷ Standards should not be more extensive or complex than is necessary. Indeed, this principle is embedded in the purpose of the *Australian Charities and Not-for-profits Commission Act 2012* ('the Act') because the Act states that its objects are:

² Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005).

³ Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 28,152.

⁴ Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 152-153 and Chapter 5.

⁵ Whilst the Act does not say that governance standards are to apply ultimately to the whole sector, when the ACNC takes over other not-for-profit organisations in addition to charities, it will be cumbersome to have a different set of standards for non-charities.

⁶ Eg Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012; the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*, September 2012 at [2.78]; Senate Community Affairs Legislation Committee, *Australian Charities and Not-for-profits Commission Bill 2012 [Provisions]*, *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 [Provisions]*, *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 [Provisions]*, September 2012, pp 42-43 (dissenting report by Coalition Senators).

⁷ Karla W Simon, 'Principles of Regulation for the Not-for-Profit Sector' (International Centre for Not-for-Profit Law, 1998) 246.

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- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.⁸

Objects (b) and (c) in particular oblige the government to test each proposed standard against standards of proportionality, their likelihood of supporting and sustaining the sector, and their effectiveness in targeting so as to reduce regulatory burden, not add to it.⁹ These are very general statements, so it is useful to examine the grounds which others have identified as areas for regulation of not-for-profit organisations. Jonathan Garton's work lists six principles justifying regulation of not-for-profit organisations:

1. Preventing anti-competitive practices;
2. Controlling campaigning;
3. Ensuring trustworthiness;
4. Coordinating the sector;
5. Reifying philanthropic favours; and
6. Preventing challenges to organisational quiddity.¹⁰

These provide a starting point quite different from the Treasury paper and, in our submission, is one that is more useful.

By way of comment on the conceptual framework, objects (b) and (c) of the Act are rooted in two important concepts that do not adequately find expression in the governance standards as proposed. The first of these is that in liberal democracies like Australia, there is a presumption that robust, vibrant, independence and innovation (to use the language of the ACNC Act) is best achieved by declaring in law or regulation only what must *not* be done, thus leaving entities free to do all else as they see fit. To the extent that government prescribes what *must* be done, it deprives the sector of independence and the opportunity for innovation.

In many, if not most cases, it may simply be a matter of wording, but behind the wording is the fulfilment of the object of the Act. The second related point is that the law for the voluntary sector is fundamentally different from the law for other sectors, in that its primary purpose is facilitating the voluntary provision of public benefits and public goods, not deterring anti-social behaviours. Thus, most of the existing laws expressly designed for the sector are 'enabling' statutes or laws, providing exemptions or favours of some kind. The Society also notes the importance of s45-10(2) of the Act which states that the standards may require the entity to achieve specific outcomes, and not specify how the entity is to achieve those outcomes.

The Society's conclusion in terms of the general conceptual framework is that the Act does not require the promulgation of detailed governance standards or the imposition of new legal

⁸ *Australian Charities and Not-for-profits Commission Act 2012* s 15-5(1).

⁹ Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 150.

duties which masquerade as governance standards. Additional consultation and Parliamentary scrutiny is required and of course, in doing so, there will need to be necessary adherence to the Senate's principles for the scrutiny of delegated legislation which will also require compliance with the provisions of s45-20 of the Act.¹¹ Whether the governance standards become regulations may well depend upon not just their wording, but the extent to which they discharge all of the objectives of the Act.

We will now address a number of the consultation questions posed in the paper.

4. Does draft standard 1 establish the appropriate principles?

Introducing draft standard 1, the consultation paper states: '1) The object of this governance standard is: a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes...' Importantly there is no reference to the words 'not-for-profit' in the introduction to the standard. The words 'not-for-profit' appear only in the standard itself.

This is important, because the expression 'not-for-profit' is not a charity law concept. Charity law is concerned with purposes. It is the "charitable" or otherwise "community-serving purpose", not technical adherence to not-for-profit distribution constraints, or member exclusion from benefit, that is important to the concept of "charity". The standard might be more usefully reframed as focused only on purpose – that is, ensuring that the purpose of the organisation is fulfilled, rather than requiring a particular form (not-for-profit) to be adopted.

The significance of this is apparent from the comments in relation to draft governance standard 1 made in the Council of Australian Governments' *Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities* (the COAG Report). The COAG Report, released on 25 January 2013, states that in assessing the standard, it is assumed that 'the definition which is in a Bill to amend the *Income Tax Assessment Act 1997 (ITAA 1997)*' will be adopted.¹²

That Bill is stalled in the House of Representatives, in part, it would seem, because its definition of 'not for profit' expressly prohibits organisations providing any benefit at all to its members. The proposed definition is as follows:

not-for-profit entity means an entity that:

- (a) is not carried on for the profit or gain of its owners or members, neither while it is operating nor upon winding up; and
- (b) under an *Australian law, *foreign law, or the entity's governing rules, is prohibited from distributing, and does not distribute, its profits or assets to its owners or members (whether

¹⁰ Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 37b, Chapter 4 generally and 151.

¹¹ Clause 23 of the Senate Standing Orders provides:

"(3) the committee shall scrutinise each instrument to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties; and
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment."

Refer also to the 4 principles to be considered as part of the Senate Standing Orders.

¹² Council of Australian Governments, *Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities*, 25 January 2013, p 26.

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in money, property or other benefits), neither while it is operating nor upon winding up, unless the distribution:

- (i) is made to another not-for-profit entity with a similar purpose; or
- (ii) is genuine compensation for services provided to, or reasonable expenses incurred on behalf of, the entity.¹³ [emphasis in original]

This definition would prohibit distribution to anyone if not achieving its purpose. It does not catch distribution to a third party which does not further the purposes, and it does inappropriately catch distributions to members, where such a distribution would further its stated purposes.

The Society acknowledges that divergent views have been expressed by the government, the conservative parties and the greens on what the proposed 'not-for-profit' definition means.¹⁴ It is submitted, though, that it is of no benefit to the not-for-profit sector as a whole for confusing concepts, ambiguously worded, to find their way into legislation or governance standards.

The general principle should be clearly stated that organisations must demonstrate that they are pursuing their purposes. The Society queries whether more is required in a governance standard. As to the broader question of the definition of 'not-for-profit', the Federal government has announced that it intends to introduce a statutory definition of charity from 1 July 2013.¹⁵ The Society submits that the debate regarding the definition of not-for-profit might best be accommodated in the discussion of the definition of charity, and must be agreed and settled on before the standards proposed in the consultation paper are adopted, if in fact reference to the term "*not-for-profit entity*" is to be retained in the Standard. As stated above, that is not the preferred option of the Society.

5. Is the wording of draft governance standard 1 appropriate?

The Society acknowledges that there is an important issue at stake in this governance standard, but does not consider the current wording appropriate, with its focus on the definition of not-for-profit, because it undermines the primary focus of "purpose" and in any event, there is no comprehensive definition or understanding of the term "not-for-profit".

Apart from anything else, there are many charitable organisations that do not contain a "not-for-profit clause" in the way preferred by the ATO. This particularly applies to older charities. Standard 1 is likely to cause a significant burden on a large percentage of charitable organisations in complying with the standard. We query if that is consistent with the object set out in s15-5(1)(c) of the Act.

¹³ Proposed s995-1(1), clause 44 *Tax Laws Amendment (Special Conditions for Not-for-profit Entities) Bill 2012*.

¹⁴ Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012; the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*, September 2012 at [4.14]-[4.15], [4.38], [4.48]- [4.50] (Majority Report); [1.30]-[1.34] (Additional Comments by the Australian Greens); Senate Community Affairs Legislation Committee, *Australian Charities and Not-for-profits Commission Bill 2012 [Provisions]*, *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 [Provisions]*, *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 [Provisions]*, September 2012, [2.51]-[2.53] (Majority Report), p 63 (dissenting report by the Australian Greens).

¹⁵ The Hon Tanya Plibersek MP and the Hon Bill Shorten MP, *Making it Easier for Charities to Help Those Who Need It* (Joint Media Release, No. 077) 10 May 2011, available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/077.htm&pageID=003&min=brs&Year=&DocType=0>.

6. Does draft standard 2 establish the appropriate principles?

While the object of this standard appears admirable, the Society queries whether there might be a negative net benefit in practice. The standard is easily avoided by reducing membership. At a practical level, members of the Society are already receiving enquiries from organisations that do not wish to comply with this standard on how their membership might be reduced.

If there are simple ways of achieving non-compliance, and there are, the net effect of the provision might be to reduce engagement in civil society and therefore be counter-productive. Second, there is a philosophical question as to whether it is government's role to decide what, if any, reporting is appropriate in a membership based not-for-profit organisation. Arguably this is more properly left to the membership itself.

This question is heightened in the context of religious organisations. Where is the line to be drawn between church governance and state control? The Society supports the principle inherent in draft standard 2, but considers there are practical and philosophical issues that might need to be addressed.

7. Is the wording of draft governance standard 2 appropriate?

As is evident from our comments, our concern is related to the standard itself, not its wording. If the idea is to be developed, it may be that the subject matter is embedded in the more abstract concept of quiddity. This would merely repeat the principle behind standard 1. Standard 2 could then be removed entirely, or become part of an extended standard 1.

8. Does draft standard 3 establish the appropriate principles?

The Society queries how the rule of law, the presumption of innocence and procedural fairness is served by the standard being able to be breached if the ACNC *reasonably believes that an offence has occurred* (presumably on the balance of probabilities). The example given is "the offence of fraud". Fraud is of course a serious offence. Breach of the standard should only be triggered when it has been definitively determined (to an appropriate standard of proof) that the offence has occurred. At the very least the ACNC should apply the *Briginshaw Test*¹⁶ when making these conclusions.

The stated object of this draft standard is to promote public trust and confidence, but its effect seems to be to disadvantage charities operating at an international level vis-a-vis commercial

¹⁶ "Whether an issue has been proved to the reasonable satisfaction of a tribunal depends upon the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding and should not be reached by inexact proofs, indefinite testimony or indirect references." *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J; [1938] ALR 334 [Para 10-994 Halsbury's Laws of Australia, Lexis Nexis]

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operators. It possibly also deprives charities of a right to quasi-judicial or judicial procedures when rights are to be lost.

There are members of the Society who act for public benevolent institutions (PBIs) or health promotion charities, which are charities within the scope of the governance principles. It is quite common that these organisations have some involvement overseas. It is also possible that they could employ persons domiciled in jurisdictions overseas. The effect of this standard would seem to be that all employees, even if they were Chinese nationals working in China, say, would have to be paid wages in accordance with Australian law and otherwise provided with all of the benefits attendant on being an employee in Australia.

Those who are engaged in commercial activities would not be subject to the same restraints, and would therefore seem to be given an advantage over charities. The Society queries whether it is the intention of the government to place commercial operators in an advantageous position vis-a-vis charities in the international context.

At a more general level, there is a long tradition in common law countries of allowing people and organisations access to judicial or quasi-judicial hearings when rights are to be lost. In this case, rights to income tax exemption and deductibility can seemingly be lost by operation of law if the government standard is breached (see s45-5 (2) of the Act, noting the obligation to self-incriminate under s65-5). The Society submits that issues of fairness and the rule of law need to be considered in this context. The requirement seems to well exceed that which would be needed to promote public confidence in charities.

It is our submission that this proposed standard does nothing to contribute to governance improvement. The not-for-profit sector, like all citizens, must comply with the law. We see no reason for the unnecessary complication of a simple principle. We consider that widening the power of the ACNC to be able to take regulatory action in matters is more appropriately done through legislative intervention to amend the principal Act.

9. Is the wording of draft governance standard 3 appropriate?

If the standard remains, then there seem to be a number of concerns to be considered in any redraft. These include ensuring that charities are not at a disadvantage vis-a-vis commercial businesses, and ensuring that the principles of justice and fairness embedded in the rule of law are properly protected. For example, it should be limited to operations in Australia or to laws of Australia that would otherwise apply to its international activities; and breach of the standard only enlivened when conviction for the relevant offence is recorded.

In the view of the Society, we consider that draft governance Standard 3 may infringe the Senate's principles for the scrutiny of delegated legislation highlighted earlier in this submission.

10. Does draft standard 4 establish the appropriate principles?

In broad terms, the Society has no difficulty with the object behind draft governance Standard 4.

11. Is the wording of draft governance standard 4 appropriate?

The concern with the standard is that reasonable steps taken to manage a charity's financial affairs will differ significantly depending on the type and size of the charity.

The Society wonders if this is a standard which could more appropriately be expressed in the negative; that is to say by stating what cannot be done rather than what is to be done to give maximum opportunity for individual charities to develop their own concept of best practice financial management.

12. Does draft standard 5 establish the appropriate principles?

The proposed standard is going to impose ongoing and regular duties to ensure that "responsible entities [individuals]" are not disqualified from being able to hold that role. Amendments to governing rules will be required to include the obligation to submit to these processes (e.g. provision of declarations) by the "responsible [individuals]" and resulting disqualification and removal from the role of "responsible [individual]" if the "test" is failed.

The Society queries whether thought has been given to the intersection between employment contracts and ex-officio "responsible [individual]" roles tied to the employment and the need for amendments not just to governing rules but also the employment contracts.

The Society also refers to its answer to the next question.

13. Is the wording of draft governance standard 5 appropriate?

It would assist clarity to replace the words 'responsible entity' with 'responsible person' or 'responsible individual', as it is clear that the standard is intended for people, not organisations. The term 'responsibly entity' is causing confusion for many.

14. Are there concerns with allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register?

The Society has no comment on this question.

15. Does draft standard 6 establish the appropriate principles?

Two issues which should be clarified further are what **reasonable steps** are needed to ensure that its responsible entities are **subject to, and, comply with** the duties mentioned.

In the case of companies limited by guarantee and incorporated associations, inclusion of appropriate obligations in the constitution amounts to a statutory contract between individual directors/management committee members and the association.¹⁷ However, there is some confusion regarding how this would work for an unincorporated association (which is in fact the bulk of registered charities in Australia today) or charities which are structured as charitable trusts or a number of church-based organisations which, in a legal sense, are wholly different structures as well e.g. – corporations sole or letters patent.

The wording of the standard raises questions as to the constitutional enforceability of the obligation. If it cannot be an "obligation", some organisations will be unable to "ensure" its responsible entities "comply with the duties". Although the consultation paper refers to board charters or letters of appointment, these are not necessarily legal obligations.

There is also a question as to whether the words 'subject to' require the entity to enter into a legally enforceable agreement with each responsible entity. If the words 'subject to' merely require an arrangement such as a board charter or code of conduct, this would not necessarily be legally binding. The Society would then be unsure of the purpose of the standard.

We also note that many charities will have to review the basis upon which existing directors/trustees hold office and how future members will be appointed. This is going to add considerably to the legislative burden for the sector.

Another concern in relation to the standard is the adoption of duties and protections largely taken from the *Corporations Act 2001*. However, there are discrepancies in wording and our concern is judicial interpretation of different words used in the *Corporations Act 2001* context. Refer to Annexure A to this submission which identifies wording used in the *Corporations Act 2001* and the governance standard outlined in the consultation paper. In our view this is likely to be the source of considerable contention over time.

16. Is the wording of draft governance standard 6 and the draft protections appropriate?

Refer to our answer at item 14 of the submission. Further, the Society questions if the layer of duties that exist for the directors of the largest listed public companies in Australia is sensible and necessary for our registered charities many of which are very small, unincorporated associations.

¹⁷ S140, *Corporations Act 2001*.

17. Are there any additional protections which should only be provided to volunteer responsible entities?

Under the *Civil Liabilities Act 2003* (Qld) ('the CLA') Ch 2 Pt 3 Div 2, protections are extended to volunteers that are not extended to other persons. The Society does not have a view on whether volunteers should have additional protections under these proposed governance standards, but it points out that there is precedent in Queensland law for this idea. Similar provisions exist in other states.

The COAG Report does not identify any potential conflict between the operation of the CLA and these proposed governance standards, but the interplay between the two pieces of legislation may need to be considered.

The creation of statutory duties raises the potential issue of members of the public, such as donors, being able to sue charities and other not-for-profit organisations for breach of these duties. In the past, it has been difficult for potential plaintiffs such as donors to establish both locus standi and a cause of action. The government needs to clarify whether or not its intention is to assist potential plaintiffs in bringing actions, or whether it is intended that the only potential plaintiff is the ACNC.

18. If so, what would these protections be?

The Society does not recommend particular protections but underscores the importance of any protections offered being consistent with state law or an extension of it.

The Australian Centre for Philanthropy and Non-Profit Studies (ACPNS) has provided an excellent overview of the scope of, and background to, the *Civil Liabilities Act 2003* (Qld).¹⁸

19. Are the transitional arrangements proposed adequate?

The Society has no comment at this stage.

20. Concluding Comments

It appears to the Society that, in some instances, the ACNC may be trying to achieve powers that do not wholly concern governance. For example, Standard 3 deals with widening powers to be able to take regulatory action. We consider that the more appropriate method of achieving this would be through legislative intervention, rather than by regulation.

¹⁸ See <https://wiki.qut.edu.au/display/CPNS/Civil+Liability+Act+2003+%28Qld%29>.

McGregor-Lowndes, Myles & Edwards, Scott B. (2006) Volunteer Immunity and the Public Sector. *Australian Journal of Public Administration*, 65(4), pp. 29-40.

McGregor-Lowndes, M. and S. Edwards (2004) —Volunteer immunity and local government, *Local Government Law Journal* 9 (November):53-72.

McGregor-Lowndes, M. (2003) —Australian volunteer protection provision', *Australian Journal on Volunteering*, 8 (2): 42-53.

McGregor-Lowndes, M. (2003) —Volunteer Protection in Queensland, *The Queensland Lawyer*, 24 (2): 81-94.

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Australia has provided world leadership, and arguably world's best practice, in establishing the ACNC as a regulator for the whole of the not-for-profit sector, rather than simply charities. It is the only major legislative reform of this government in the not-for-profit area to have passed the Parliament. Intense scrutiny of the governance standards is to be expected, given the quality and length of debate that attended the passing of the ACNC Act. First, the government is likely to be called upon to demonstrate why governance standards are necessary. Second, it will be required to show how the standards further *all* of the objects of the Act, including objects (b) and (c). Third, an explanation of why the proposed list of governance standards are world's best practice may also be expected.

In our submission we have touched on the powers of the ACNC to enforce obligations against a range of charitable organisations which are not necessarily structured as corporations. This brings into consideration the constitutional capacities of the ACNC and we consider that this issue needs further consideration and clarification for the sector.

The comments in this submission suggest that there is still a journey to travel. This submission, we trust, contributes to that discussion, and progress towards a world's-best regulatory framework for the not-for-profit sector, in what is acknowledged to be uncharted legal terrain.

Annexure A

Corporations Act 2001	NFP Governance Draft
<p>180 Care and diligence—civil obligation only</p> <p><i>Care and diligence—directors and other officers</i></p> <p>(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:</p> <p>(a) were a director or officer of a corporation in the corporation's circumstances; and</p> <p>(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.</p> <p>Note: This subsection is a civil penalty provision (see section 1317E).</p>	<p>(2)A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p> <p>(a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;</p>

Differences:

1. Under the *Corporations Act 2001* the duty is owed by the director or other officer – NFP draft the duty is primarily upon the 'registered entity'.
2. Under the *Corporations Act 2001* the duty is mandatory (use of 'must'), in the NFP draft it is lesser with merely 'take reasonable steps'.
3. Under the *Corporations Act 2001* the standard is that of a 'reasonable person' whereas the NFP draft it is 'reasonable individual'.
4. The NFP draft limits the duty to 'if they were a responsible entity of the registered entity' whereas the *Corporations Act 2001* uses notions of 'having the same responsibilities within the corporation'.

Discussion:

- The primary duty is upon the charity to comply not the individual.
- The charity's standard is only to take 'reasonable steps'.
- Under the *Acts Interpretation Act 1901* **individual** means a natural person (s2B) whereas **s2C says:**

References to persons

(1) In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.
So the NFP draft is confined to natural persons.

- It appears that the NFP draft may not extend to the *Corporations Act 2001* situation that the scope of the responsibilities of a particular officer is to be determined by an examination of all of the tasks in fact performed for that company by that officer. The recent Hardie's litigation established that one could not divide their responsibilities and capacities and that they must be viewed as a composite whole. In that situation the

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company secretary was also the general counsel - *Shafron v. Australian Securities and Investments Commission* (<http://www.hcourt.gov.au/cases/case-s173/2011>)

- Therefore there may be unforeseen or unintended consequences as a result of this distinction.

Corporations Act 2001	NFP Governance Draft
<p>181 (1)A director or other officer of a corporation must exercise their powers and discharge their duties:</p> <p>(a) in good faith in the best interests of the corporation; and</p> <p>(b) for a proper purpose.</p>	<p>(2)A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p> <p>(b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;</p>

Differences:

5. Under the *Corporations Act 2001* the duty is owed by the director or other officer – NFP draft the duty is primarily upon the ‘registered entity’.
6. Under the *Corporations Act 2001* the duty is mandatory (use of ‘must’), in the NFP draft it is lesser with merely ‘take reasonable steps’.
7. The *Corporations Act 2001* is restricted to ‘exercising powers and discharging duties’ whereas the NFP draft is expressed as ‘to act’.
8. The *Corporations Act 2001* the duty is for ‘a proper purpose’ whereas the NFP draft is ‘to further the purposes of the registered entity’.

Discussion:

- The primary duty is upon the charity to comply not the individual.
- The charity’s standard is only to take ‘reasonable steps’.
- Does using the word ‘to act’ rather than ‘powers and discharge duties’ give a wider reach to what is included, such as general comments to the media?
- Will furthering the purposes of the NFP always be use of a power for a proper purpose – or putting it in the alternative, could an NFP exercise a power improperly if it furthers its purpose?

Corporations Act 2001	NFP Governance Draft
<p>182 A director, secretary, other officer or employee of a corporation must not improperly use their position to:</p> <p>(a) gain an advantage for themselves or someone else; or</p> <p>(b) cause detriment to the corporation.</p>	<p>(2)A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p> <p>(c) not to misuse the responsible entity’s position</p>

Differences:

9. Under the *Corporations Act 2001* the duty is owed by the director or other officer – NFP draft the duty is primarily upon the ‘registered entity’.
10. Under the *Corporations Act 2001* the duty is mandatory (use of ‘must’), in the NFP draft it is lesser with merely ‘take reasonable steps’.
11. *Corporations Act 2001* has a broader scope to employees
12. The NFP draft is not limited to ‘gaining advantage’ or causing detriment to the ‘corporation’.

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Discussion:

- The primary duty is upon the charity to comply not the individual.
- The charity's standard is only to take 'reasonable steps'.
- The NFP draft is wider as it is not confined to a person gaining advantage for themselves or someone else or causing detriment to the registered entity. So the NFP draft may include this and other 'misuses' – for example, causing detriment to others apart from the entity?

Corporations Act 2001	NFP Governance Draft
<p>183 (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:</p> <p>(a) gain an advantage for themselves or someone else; or</p> <p>(b) cause detriment to the corporation</p>	<p>(2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p> <p>(d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity</p>

Differences:

13. Under the *Corporations Act 2001* the duty is owed by the director or other officer – NFP draft the duty is primarily upon the 'registered entity'.
14. Under the *Corporations Act 2001* the duty is mandatory (use of 'must'), in the NFP draft it is lesser with merely 'take reasonable steps'.
15. *Corporations Act 2001* has a broader scope to employees
16. NFP draft does not apply to information after the responsible entity has left the charity
17. The NFP draft uses 'misused' rather than the *Corporations Act 2001* term 'improperly use'
18. The NFP draft is not limited to 'gaining advantage' or causing detriment to the 'corporation'.

Discussion:

- The primary duty is upon the charity to comply not the individual.
- The charity's standard is only to take 'reasonable steps'.
- The NFP draft is wider as it is not confined to a person gaining advantage for themselves or someone else or causing detriment to the registered entity. So the NFP draft may include this and other 'misuses' – for example causing detriment to others apart from the entity?

Corporations Act 2001	NFP Governance Draft
<p>191 Material personal interest—director's duty to disclose</p> <p><i>Director's duty to notify other directors of material personal interest when conflict arises</i></p> <p>(1) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.</p>	<p>(2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p> <p>(e) to disclose perceived or actual material conflicts of interest of the responsible entity</p> <p>For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:</p> <p>(a) if the responsible entity is a director of the registered</p>

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Corporations Act 2001	NFP Governance Draft
<p>(1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the director of a company has a material personal interest in a matter that relates to the affairs of the company.</p> <p>Note: For strict liability, see section 6.1 of the <i>Criminal Code</i>.</p> <p>(2) The director does not need to give notice of an interest under subsection (1) if:</p> <p>(a) the interest:</p> <ul style="list-style-type: none"> (i) arises because the director is a member of the company and is held in common with the other members of the company; or (ii) arises in relation to the director's remuneration as a director of the company; or (iii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or (iv) arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company; or (v) arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to in subparagraph (iv); or (vi) relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not make the company or a related body corporate the insurer); or 	<p>entity—to the other directors (if any); or</p> <ul style="list-style-type: none"> (b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or (c) if the registered entity is a company—to the members of the registered entity; or (d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form. <p><i>Note 1</i> Company is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).</p> <p><i>Note 2</i> Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.</p> <p><i>Note 3</i> Part 7-6 of the Act provides for the approval of forms.</p>

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Corporations Act 2001	NFP Governance Draft
<p>(vii) relates to any payment by the company or a related body corporate in respect of an indemnity permitted under section 199A or any contract relating to such an indemnity; or</p> <p>(viii) is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate; or</p> <p>(b) the company is a proprietary company and the other directors are aware of the nature and extent of the interest and its relation to the affairs of the company; or</p> <p>(c) all the following conditions are satisfied:</p> <p>(i) the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company under subsection (1);</p> <p>(ii) if a person who was not a director of the company at the time when the notice under subsection (1) was given is appointed as a director of the company—the notice is given to that person;</p> <p>(iii) the nature or extent of the interest has not materially increased above that disclosed in the notice; or</p> <p>(d) the director has given a standing notice of the nature and extent of the interest under section 192 and the notice is still effective in relation to the interest.</p> <p>Note: Subparagraph (c)(ii)—the notice may be given to the person referred to in this subparagraph by someone other than the director to whose interests it relates (for example, by the secretary).</p>	

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Corporations Act 2001	NFP Governance Draft
<p>(3) The notice required by subsection (1) must:</p> <p>(a) give details of:</p> <p>(i) the nature and extent of the interest; and</p> <p>(ii) the relation of the interest to the affairs of the company; and</p> <p>(b) be given at a directors' meeting as soon as practicable after the director becomes aware of their interest in the matter.</p> <p>The details must be recorded in the minutes of the meeting.</p> <p><i>Effect of contravention by director</i></p> <p>(4) A contravention of this section by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.</p> <p><i>Section does not apply to single director proprietary company</i></p> <p>(5) This section does not apply to a proprietary company that has only 1 director.</p>	

Differences:

1. Under the *Corporations Act 2001* the duty is owed by the director or other officer – NFP draft the duty is primarily upon the 'registered entity'.
2. Under the *Corporations Act 2001* the duty is mandatory (use of 'must'), in the NFP draft it is lesser with merely 'take reasonable steps'.
3. The use by NFP draft of 'perceived' is foreign to the *Corporations Act 2001*.
4. The Corporations Law has proportionate levels of duties, while the NFP draft uses the term 'reasonable steps', this only refers to ensuring compliance, not the actual duty.
5. The *Corporations Act 2001* has a series of carve outs in subsection 2 which do not appear in the NFP draft.

Discussion:

- The primary duty is upon the charity to comply not the individual.
- The charity's standard is only to take 'reasonable steps'.
- The use of 'perceived' widens the range of potential conflicts. The determination of what is 'perceived' is a novel concept in corporations jurisprudence (the word 'perceived' is not contained in the Corporations Law). If perception is to any stakeholder, then this will be difficult to ascertain, if it is to a 'reasonable person' then this will be capable of being ascertained by a court, but a fairly novel concept.
- What happens in situations of a charitable corporation sole or a sole member charitable proprietary company?
- An interest that arises because the person is a member of the entity and is held in common with the other members of the company unless not 'material' will cause compliance costs and difficulties in administration.
- "Material personal interest" is not defined in the *Corporations Act 2001* and few cases have considered the scope of the term. See *Grand Enterprises Pty Ltd v Australian Resources Ltd* (2001) 50 A 512

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Corporations Act 2001	NFP Governance Draft
<p>588G Director's duty to prevent insolvent trading by company</p> <p>(1) This section applies if:</p> <p>(a) a person is a director of a company at the time when the company incurs a debt; and</p> <p>(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and</p> <p>(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and</p> <p>(d) that time is at or after the commencement of this Act.</p> <p>(rest of section not reproduced)</p>	<p>(2)A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p> <p>(f) not to allow the registered entity to operate while insolvent</p> <p>In this section:</p> <p>insolvent has the meaning given by subsection 95A (2) of the <i>Corporations Act 2001</i>.</p>

Differences:

1. Under the *Corporations Act 2001* the duty is owed by the director or other officer – NFP draft the duty is primarily upon the 'registered entity'.
2. Under the *Corporations Act 2001* the duty is mandatory (use of 'must'), in the NFP draft it is lesser with merely 'take reasonable steps'.
3. The *Corporations Act 2001* focuses upon 'incurring a debt' which causes the insolvency, rather than operating whilst insolvent.

Discussion:

- The primary duty is upon the charity to comply not the individual.
- The charity's standard is only to take 'reasonable steps'.
- As the NFP draft is expressed not allowing 'operation' whilst insolvent, then it may be breached if a responsible entity does not know or cannot reasonably be expected to know of the insolvency. For example, a massive cyclone washes away an entity's property which is mortgaged with a repayment clause that immediately takes effect on such an event. All communication is impossible from the cyclone region and other parts of the entity continue to trade until they hear of the event.

Section 187 *Corporations Act 2001* - there is no equivalent in the governance draft. Should similar arrangements apply for wholly owned subsidiaries of charitable entities?