



Australian Conservation Foundation

Submission on Consultation Paper

Review of not -for-profit governance arrangements

The Treasury (December 2011) -

Australian Government -

ACF Contact Details

Name: Ms Sari Baird, General Counsel

Email: s.baird@acfonline.org.au

Phone: 03 9345 1174

Confidentiality: This submission is a public document

27 January 2012

Australian Conservation Foundation -
Submission on Consultation Paper -
Review of not-for-profit governance arrangements

1. - Background

ACF welcomes the opportunity to make this submission.

ACF acknowledges the challenge faced by Treasury in meeting the timelines required by the 2011 Budget decisions. ACF appreciates the additional week offered to complete the submission to all NFPs. It is, however, regrettable that the timelines around the release and response to the Consultation Paper may result in organisations being unable to respond if they were not operating at their full strength during this timeframe.

ACF is a national, community-based environmental organisation that has been a strong voice for the environment for over 40 years, promoting solutions through research, consultation, education and partnerships. We work with the community, business and government to protect, restore and sustain our environment.

ACF is a medium sized NFP and has charitable status. It was established under what is now the *Associations Incorporation Act 1991 (A.C.T)* and holds an ABN (for GST purposes) under the *Corporations Act 2001 (Cth)*.

Through its own activities and involvement in sectoral representative bodies including the National Roundtable of Nonprofit Organisations (**NRNO**) ACF has a longstanding interest in the policy setting affecting the Not-for-Profit (**NFP**) Sector and has been a regular contributor to the debate on these issues.

ACF welcomes the opportunity to have input into the consultation process and it is hoped that the results will much to enhance the effectiveness and governance of the sector.

2. - Summary and outline of ACF submission

This initiative is aimed at improving governance and at addressing duplicative, burdensome and unclear governance: these issues have been addressed in past submissions lodged by ACF and by others also interested in the sector. It is ACF's hope that the outcomes of these previous processes are taken into account, noting the substantial resources that the sector has invested in them over time.

To summarise our response and recommendations:

- ACF is generally supportive of a 'principles based' approach to governance for the NFP sector.

- ACF supports the clarification of duties and responsibilities by individual responsible persons to a range of stakeholders through legislation and guidelines that draw on and take into account current references for those duties.
- ACF notes the diversity of the sector and supports a tiered approach that ensures smaller NFPs are supported and assisted in readiness for change and notes that NFPs in some sectors may require flexibility and particular operating support.
- ACF regards as essential, efforts to harmonise and involve all States and Territories in developing a uniform governance platform for the NFP and Charitable sector, as many organisations in the sector, including ACF, are established and operate under State and Territory legislation.
- ACF sees opportunities for new forms of NFP and community based entities to be established and regulated by the ACNC. There is also scope for different means of accounting to stakeholders as technology changes and develops.

3. - 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?**

Clear details on who responsible individuals should consider when exercising their duties is necessary. Rather than this being provided in legislation, a Guideline or Ruling may be a better source of guidance to NFPs and may provide more effective flexibility. A Guideline may be more readily updated to take into account the diverse categories of ‘responsible person’ in NFP entities where those ‘responsible persons’ are bound by other sources of duty (for example, trustees in bankruptcy).

ACF notes the proposal to clarify who the responsible individuals will be in ACNC legislation: this would be desirable to provide clarity in view of the potential for confusion given the divergence across companies, incorporated associations and other entities.

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?**

It is noted that the conventional director/member¹ relationship is broadly governed by applicable legislation governing organisations. Legislation such as the *Corporations Act 2001* (Cth) and the common law are resources that aid in clarifying the role and rights of members. Not all NFPs take that form of organisation and there would be some benefit in having this issue clarified for the non-company and unincorporated entities.

The requirement of a responsible person to consider Donors could present practical challenges, including balancing the collective interests of individual Donors. Similar challenges arise in relation to member interests and this has informed the body of law on good faith, in particular, the directors’ duties to act in the interests of the organisation as a whole. In the case of organisations like ACF, where the bulk of funds come from its many Donors, Donors are a vital and valued source of support. It is arguably a ‘chicken or egg’ discussion, as

¹ ACF is an incorporated association under the *Associations Incorporation Act (1991) ACT*: it has a skills-based Board which acts as the “Committee” for the purposes of the legislation. ACF also has a Council, elected by its members, which sets ACF Policy and appoints Councillor representatives to ACF’s Board.

anecdotally, Donors can be motivated by their satisfaction with the organisation's track record and its leadership and on that basis they will contribute funds; they may not, however, desire further involvement through engagement. ACF provides regular information to Donors and to its many other stakeholders and members through its web based and other regular reports and feedback. However, as regards decision making by 'responsible individuals' ACF's elected Council are authorised to set ACF's policy and this in turn, is implemented by ACF's skills-based Board. The influence of a single Donor over responsible individuals to say, shape ACF policy or ACF decision making would run counter to ACF's Constitution and operating model².

There is support for more discussion around how the interests of beneficiaries and other stakeholders could be addressed, especially in circumstances where the beneficiary does not have a voice (is not human) for instance, the environment³. Arguably a responsible person acting in good faith and in pursuit of an organisation's goals and objects will, in turn, be acting in consideration of the beneficiaries. Whether that has been the case might be better assessed if there is more 'holistic' communication by the NFP sector to a wider stakeholder group (ie. wider than the conventional membership who would receive an annual report) about how the interests of others, including Donors and the beneficiaries can be said to have been considered or addressed.⁴

The discussion paper rightly points out that in generally carrying out their duties a responsible individual will if acting in good faith very likely also be taking into consideration their entity's mission and purpose. Consideration of the organisation's or entity's mission by responsible individuals is essential and it is arguably paramount for a responsible individual in an NFP that is also a charitable entity.

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

ACF is generally supportive of a clarification of core duties in accordance with the terms enunciated in paragraph 91 to 93 of the Consultation Paper. The diversity of the sector presents the challenge for the ACNC in bringing together a balanced approach that gives greater clarity but which, at the same time, does not deter community volunteers from volunteering with smaller NFPs. There is considerable scope to consider past submissions to government including the submission by the Public Interest Law Clearing House (PILCH) in their to the Victorian Government *Submission to Consumer Affairs Victoria on the Associations Incorporation Amendment Bill 2010*⁵: that is the inclusion of duties of care and diligence, good faith and proper purpose, and the duty to prevent insolvent trading. A notable addition to the

² A point made by ACF President Professor Ian Lowe, see Lowe, I, *The Monthly*, October 2011.

³ See for example, Jepson, Paul, 2005, 'Governance and accountability of environmental NGOs' *Environmental Science & Policy*, vol. 8, pp. 515 – 524.

⁴ See for example, Nicholls, Alex "'We do good things, don't we?': 'Blended Value Accounting' in social entrepreneurship" in *Accounting, Organizations and Society* vol. 34 (2009) pp. 755-769

⁵ PILCH and PilchConnect "Submission to Consumer Affairs Victoria on the *Associations Incorporation Amendment Bill 2010*" (2010)

duties under the Victorian Government proposal was a duty to pursue the objects of the entity (association)⁶: a recommendation that has merit for inclusion in the ACNC legislation.

4. What should be the minimum standard of care required to comply with any duties?

ACF supports the approach described in paragraph 102 of the Consultation Paper, to ‘act with, for example, care and diligence, however the standard of care and diligence expected ...would depend on the size of the entity...’ and the amounts of public monies received and the qualifications and position of the individual and risk of the entity’s activities.

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)?

Whilst this need not be a specific requirement in the legislation, ACF supports this principle being articulated as ‘best practice’ in guidance notes for NFPs. It is noted that a mandated requirement could pose difficulties for populations in regional and remote communities who, because of a smaller population, may be challenged to find a sufficient number of willing and ‘formally’ qualified volunteers for each of the community organisations.

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

This section is intentionally left blank

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

ACF supports the harmonisation of responsible individual’s duties to the extent possible.

The benefits of harmonisation include improved mobility of resources, including access by NFPs to flexibly skilled volunteers, professionals and NFP employees and more cost efficiency from service providers who provide guidance to the sector (such as lawyers and accountants). A disadvantage would be that if the benchmark for all organisations is set at more onerous duties that may be disproportionate to the size and scale of an NFP’s operations this could be burdensome and may discourage involvement. Given the diversity in the sector, a tiered approach may be a practical and achievable model that could accommodate the relative scale, the variety of stakeholders and the various sources of funding and different risk profiles for NFPs.

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?

Volunteers may be required to observe duties of confidentiality and to disclose a conflict of interest. At present many volunteers in NFPs including at ACF would enter into a Volunteers’ Codes of Behaviour or Conduct. Development of model guidelines or ‘best practice’ Codes of Conduct for volunteers could form part of the ACNC resources for the sector.

⁶ See page 13 paragraph 64.

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 mentioned above, standards of care should be tiered and could reflect a broad matrix of factors; these could include the scale of financial risk and the amount of government funds that support the operations. The standards could take into account whether or not members are disadvantaged or in some way or vulnerable.

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 *Corporations Act* is a useful template for the core duties, having said that, it is important that these duties are not overly restrictive and reflect the diverse nature of NFPs. In general the model described in the Consultation Paper at paragraphs 187 – 190 (the UK *Companies Act 2006*) is useful, including the proposal to lower the age to 16 years of age.

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

ACF supports a basic level of disclosure by incorporated NFPs through a national online filing system which would include accounting and financial information.

There are already a number of filings lodged by NFPs such as ACF, including Annual Statements (with the Office of Regulatory Services in the A.C.T), Audited Financial Statements, Annual Notices with ASIC, reports to State based consumer and fair trading bodies and the like. The desired scenario for an entity such as ACF would be a single place of lodgement that would serve as a central lodgement facility to meet the requirements of the various Commonwealth and State based agencies.

Furthermore, there is scope for reporting beyond the financial and for the ACNC to provide the vehicle for a broader way of reporting to stakeholders such as donors and supporters, beneficiaries and clients. Typically at present an entity like ACF reports to its members through the Annual General Meeting and the publication of the Annual Report. For many NFPs, including ACF, these reports are publicly available through the website thus providing a degree of transparency and access about the organisation's performance to stakeholders well beyond its membership. There may be a role for ACNC in becoming a 'library' or resource that hosts such information for the sector (in much the same way as the ASX is for the listed environment).

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

Where the responsible individuals are directors or on the management committee there may be a case for disclosing remuneration. However, disclosing the details of executive remuneration could lead to challenges for NFPs in attracting and retaining staff who may perceive disclosures to be unreasonably intrusive. ACNC could support NFPs with a guidance note on appropriate template policies for remuneration and review of effective performance whether it be for executive or non-executive responsible individuals.

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

ACF is of the opinion that the suggested criterion is appropriate but should be in more detail.

ACF has a comprehensive guideline statement for conflicts of interest. This guideline covers both actual and apparent conflicts of interests. Board members, employees and volunteers must complete a 'register of interests' and complete a declaration that they have read the conflict of interests' guideline. ACNC could prepare 'best practice' policies or guidelines for use by NFPs and responsible individuals to disclose conflicts of interests.

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

Yes, ACF is in support of different requirements for NFPs that accommodate the operating environment for particular NFPs such as native title groups.

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'?

ACF is supportive of a broader approach to define conflict of interest that incorporates but also expands on the 'material personal interest' concept.

Some writers caution against environmental NGOs applying accountability regimes from the business sectors uncritically and ACF supports that view⁷. However, ACF supports ACNC using definitions from the *Corporations Act 2001 (Cth)* as a useful starting point.

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

It needs to be said that NFPs are already adhering to the highest standards of risk management as a standard part of their business practice. Risk management forms part of the general duty of care expected of a board or committee of management who will often establish financial and/or risk committees. Furthermore, where 'public' funds are received from donations, many NFPs report annually to the State or Territory consumer bodies and maintain registration and disclosure with those authorities. If the funds are 'public funds' such as government grants, there are also internal contractual obligations to demonstrate risk management which are frequently a condition of the grant.

ACF recognises that risk management is an important part of any NFP's prudent and careful management of financial resources. But in the context of existing practice, it is vital that risk management requirements should not become so burdensome and complex that they absorb an undue proportion of funds raised. They should be tiered and proportional to the size and nature of the NFP and to the scale, likelihood and consequences of the risk.

NFPs with lean operating budgets, particularly new or smaller NFPs, may benefit from support by ACNC with recommendations on how to conduct and carry out practical and tailored risk

⁷ See article by Jepson, Paul in discussion point 2 above.

assessments and from 'best practice' ACNC draft policy templates to support risk management.

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

ACF is supportive of broader requirements to have adequate procedures in place rather than specific requirements mandated.

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

Mandatory insurance for NFPs, given the costs of insurance, may result in unrealistic pressure on smaller NFPs. This may also be the case for larger NFPs who may in turn find it possible and more practical to 'self-insure', i.e. to determine their levels of risk and their current asset holdings and decide that their risk profile and management outweighs the cost of insurance from an outside body. If mandatory minimum insurance is imposed, a level of financial support could be provided by government for access by NFPs (for example, where it may be required to cover the costs of insuring volunteers). PilchConnect's submission to the Victorian Government suggested that in order to help small-to-medium size NFPs with the costs of insuring volunteers, the Government could provide some form of insurance through its own insurance agency, similar to the cover given to Government funded services by the Victorian Department of Human Services.⁸

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

Mandatory insurance for responsible individuals working for NFPs can be problematic for the reasons given under Consultation Question 18 above. The extra funding required for indemnity insurance may drive NFPs to closure. Insurance may be unobtainable for reasons unrelated to the particular NFP but attributable to other entities in the sector thus placing the entity in potential breach. Furthermore, any such mandate imposed on NFPs would need to be supported by government coordinated and subsidised indemnity insurance as described in response to Question 18.

20. What internal review procedures should be mandated?

ACF acknowledges the importance of internal reviews and as discussed above, holds the view that many NFPs currently undergo internal reviews including through audits of their Financial Statements. The tiered financial reporting obligations for companies limited by guarantee and as described in the Consultation Paper have the effect of imposing mandated reviews on entities such as ACF. In support of more effective internal review ACF proposes that NFPs be assisted with practical guidelines that help them develop their own internal review procedures, appropriate to their size and management structure. ACF agrees that it would be useful for model templates to be tiered for different size NFPs.

⁸ See PilchConnect, 'Submission to Consumer Affairs Victoria on the Associations Incorporation Amendment Bill 2010', 30 March 2010, available online at <<http://www.pilch.org.au/submissions/#11>>, page 24. The Victorian Department of Human Services provides insurance coverage for their funded services through Victorian Managed Insurance Authority (<<http://www.vmia.vic.gov.au>>).

ACF supports the tiered auditing requirements currently present under the *Corporations Act 2001* (Cth) and the *Associations Incorporation Act 1981* (Vic) which allow for different NFPs to have different auditing requirements based on their size, and suggests that tiers similar to these be present in any new legislation. For this to add some value to existing practice, where reporting is required from an NFP to be made to other government or statutory bodies (eg State based consumer protection departments in relation to fundraising) ACF proposes that lodgement of single report could form the basis of these other reporting obligations, so that small-to-medium NFPs are not overburdened by excessive reviewing and auditing requirements.

The Consultation Paper appears to suggest in paragraph 151 that even small NFPs who may not have the resources to perform a review or audit may be required under new legislation to perform internal/external audits. ACF believes that the arrangements under the current *Corporations Act 2001* (Cth), which do not require 'small' companies to prepare a financial report or have it audited etc., is the appropriate approach for small NFPs, which would often struggle to find the resources to fulfil more onerous reporting obligations.

At this stage it is again appropriate to note the trend in discussion abroad and in Australia about reporting to stakeholders such as members, donors and beneficiaries beyond the conventional annual report. Proposals include providing a meaningful narrative based account (as well as the usual financial reports) about the organisation's activities, its successes and failures and the connection between its activities and mission and objectives. Such a report that takes into account the broad 'performance' of the organisation could also better reference the context including timelines that are many years longer in duration than those that apply to Financial Statements – for example, the objective of seeking a better outcome for the environment in response to climate change by asking government to introduce legislation for a price on carbon is an objective that ACF pursued for over a decade and took many years to deliver.

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

ACF believes that there should be the minimum possible requirements for governing rules of registered entities and supports the use of templates as described in the Consultation Paper and aimed at different types of NFPs. Flexibility is important given the wide variety of NFPs and it is important not to overly regulate their prospective governing structure, or attempt to apply a one-size-fits-all approach.

ACF reinforces its concern (as mentioned in our submission on the Draft Research Report, *Contribution of the Not-for-Profit Sector*, Productivity Commission)⁹ that any new requirements retain the flexibility for various NFP structures. For example, ACF's 'Federal' governance structure e.g. an advisory Council constituted on a proportional representation basis which sets policy and a skills-based Board which has appropriate statutory management responsibilities and duties.

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?

⁹ ACF 'ACF Submission on Draft Research Report: *Contribution of the Not-for-profit Sector* Productivity Commission' (2009) p. 6.

As has been mentioned earlier, generally NFP members might be expected to uphold the mission and the interests of their organisation. There may be a role for ACNC in providing a dispute resolution vehicle for stakeholders and the NFP governing body to resolve disputes as regards the protection of mission.

The Charity Commission of England and Wales risk-based and proportionate approach to regulating charities may be a suitable model for the way in which the ACNC could operate. The Charity Commission is required to be 'proportionate, accountable, consistent, transparent, and targeted only at cases where action is needed'.¹⁰ It would be desirable for the ACNC to be flexible in its role and application of any requirements, recognising the diversity and vulnerability of some participants in the NFP sector.

23. Who should be able to enforce the rules?

Where NFPs have members, the members should have the primary role of enforcing the rules of the relevant entity. ACNC could be expected to have a role similar to that played by ASIC for NFPs which are formed under the *Corporations Act 2001* (Cth) or Consumer Affairs Victoria for NFPs formed under the *Associations Incorporation Act 1981* (Vic).

Currently they have a role in the enforceability of the rules, and should be available as a legal avenue for members of the NFP, the NFP itself and ACNC. It would however be more accessible for a prescribed alternative dispute resolution process to be set in place prior to any recourse to the Courts. Section 14A of the *Associations Incorporation Act 1981* (Vic) provides a useful basis for any legislation on the enforceability of laws by the court, in particular section 14A (5) which states that the Registrar (which would be the ACNC in the new legislation) can only make an application to the court if it is satisfied that it is in the public interest to do so.

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

ACF supports the ACNC having a role in the enforcement and alteration of governing rules of NFPs, however, ACNC should only intervene where absolutely necessary. At first instance it should be the members of the NFP who hold the power to take the issue to the Board and to alter and enforce governing rules of an association. Again, it would be desirable for ACNC to take a measured and flexible approach to these matters, acting in the best interests of the relevant NFP, its mission and its members. The risk-based and proportionate approach taken by the Charity Commission of England and Wales could provide a useful model for ACNC (see our response to Consultation question 22).

25. Should model rules be used?

ACF is strongly in favour of model rules for NFPs under the new legislation. Model rules as used in the various State jurisdictions have proven to be particularly useful for small-to-medium NFPs who lack the resources to draft a new set of governing rules from scratch. It may be useful to provide different sets of model rules for each tier, tailored to the accounting and duty requirements and obligations of that tier. It would also be useful for the model rules to include annotations explaining the various clauses in plain language.

¹⁰ Charity Commission for England and Wales, *Risk Framework*, 'What we do', available online at <http://www.charity-commission.gov.uk/Our_regulatory_activity/Our_approach/Risk_framework.aspx>.

To complement the set of model rules, it would also be useful for ACNC to provide a free plain language guide for small NFPs, similar to the guide that currently exists for small businesses in s 111J of the *Corporations Act 2001* (Cth).¹¹

Many smaller NFPs are not able to afford legal advice, so it is crucial that the new system provides adequate support and clarity to enable non-lawyers to navigate their way around. The effectiveness of these new model rules will be crucial to the success of this new regime. These new model rules should be developed and tested in consultation with a wide range of NFPs to ensure their usefulness.¹²

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

ACF agrees that it is reasonable to impose minimum requirements for meeting and minute-taking for general meetings and meetings of responsible individuals of those NFPs with members, based on current State legislation. The requirement to have an Annual General Meeting every year, for example, is not an onerous one, and is important to ensure the efficiency and accountability of an NFP entity. The vast majority of NFPs would probably already fulfil these requirements. Again, it would be useful if ACNC introduced model rules and supporting templates for the required Notices, Minutes format, Proxies, checklists for pre- and post-meeting activity and other meeting requirements specifically for those NFPs which have members. ACNC could provide training to NFP staff who find themselves in positions of responsibility for fulfilling these requirements, similar to the training offered by the Privacy Commissioner (for example) in Victoria to responsible staff in public sector agencies.

In addition, s 22A of the *Associations Incorporation Act 1981* (Vic) provides that a copy of an incorporated association's rules must be made available for inspection to a member on request. Again, this seems to be a reasonable and not onerous requirement that could be included in any new legislation.

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

It would be reasonable to expect that larger non-member based entities would have similar operating practices for meeting and minute-taking requirements as for membership entities.

ACF does not have a view on the access requirements to 'stakeholders' (given the entity is a non-membership based entity). It would be expected that grant makers or providers of funding would have a contractual basis for the required information as a condition of their funding to the entity to ensure appropriate financial accountability.

An issue of interest is that whereas it may be possible to obtain a list of members from a State based regulator or from ASIC by conducting a company search, this is not the case for non-member based entities. There is some merit in further considering whether or not such non-member based entities should provide accessible information disclosing where their

¹¹ PilchConnect suggests the introduction of this plain language guide in: PilchConnect, *Further Submission to Productivity Commission Draft Research Report, October 2009, 'Contribution of the Not-for-profit Sector'*, November 2009, page 15.

¹² See PilchConnect, *Submission to Consumer Affairs Victoria on the Associations Incorporation Amendment Bill 2010*, 30 March 2010, available online at <<http://www.pilch.org.au/submissions/#11>>, page 7.

underlying support is derived from if that entity is in receipt of substantial government funds or if it provides substantial services to the public on behalf of government.

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

ACF supports membership-based entities registered with the ACNC holding at a minimum one Annual General Meeting, and to record minutes of all meetings. Such requirements, so long as they do not become too technical or inflexible, are not onerous, and if there is a sole member of the NFP, that member may choose to waive the requirement for an AGM. See also ACF's response to Consultation question 26 (above). ACF is conscious that the concept of an AGM in a meeting room in a building that requires some form of real time or physical attendance may be a model that ceases to meet the demands of the new community and grass roots participant. For example, trends in technology and the way stakeholders engage and interact with organisations today may mean that technology holds better prospects (and challenges) for equally meaningful ways of communicating and for dialogue with a broad range of stakeholders in general, and members, in particular. To this end, ACNC may consider that the 'meeting' be compulsory unless alternative means of 'meeting' are provided by the NFP entity.

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

It is important to recognise the breadth and variety of NFPs and to ensure that any governance requirements be adequately flexible and able to be adapted to the particular organisation. ACF is therefore strongly supportive of a tiered approach to the majority of governance requirements, not only accounting requirements.

This would allow, for instance, very small NFPs to have a much simpler and streamlined set of requirements, obligations and duties. Small-to-medium NFPs in general would benefit from as much assistance as possible, both in potentially adapting their current rules to the new requirements and in ongoing support. As mentioned previously (see ACF response to Consultation question 25), ACF strongly advises the use of model rules to simplify the requirements for small-to-medium NFPs. It would be preferable to have different sets of model rules, adapted to various size NFPs (corresponding to the tiers), and perhaps even different types of NFPs. Membership-based NFPs, for instance, would require different sets of model rules from non-membership-based entities.

It is important for there to be an annotated plain language guide for small NFPs, and it would be preferable to form the new model rules in consultation and with testing with a wide range of NFPs (see ACF response to Consultation questions 25).

If ACNC wishes to introduce any form of compulsory insurance it would be necessary to provide support and funding to the small-to-medium size NFPs that may not be able to afford it (see ACF responses to Consultation questions 18 and 19).

A further comment under this section is best provided by an extract of the ACF Submission on the Productivity Commission Draft Report in 2009¹³.

¹³ As referenced at fn 9 above.

“...ACF is strongly supportive of a joint working party approach to evaluating constraints to, and opportunities for, sector financing. ... we believe that there are several regulatory/tax impediments to NFP participation in community development programs and financing. In addition to a reform agenda focussed upon removing these impediments, we agree with the Draft Report’s conclusions that this agenda should also focus upon how NFP’s access to capital can be proactively stimulated, including through an examination of measures adopted in other countries.

...4.4.2. Further comments

...Whether or not governments participate directly in capitalising NFPs (eg. through matching grants), ACF believes that government has a critical role in creating an enabling environment for seed and growth capital to support social enterprise ventures (both “NFP” and for-profit) not effectively served by traditional government programs or private sector investment.

As the Draft Report has highlighted, debt funding on conventional terms is often unavailable or prohibitively expensive or risky for key stakeholders such as Board members asked to guarantee obligations. Moreover, corporate vehicles currently available to the NFP sector do not facilitate equity capital raising while key regulatory parameters applicable to for-profit vehicles lack the flexibility necessary to adapt to a context in which investment returns are viewed through a different and broader prism than traditional approaches.”

The opportunity for these kinds of entity and their particular governance requirements are possibly beyond the scope of the current Consultation Paper, however, it ACF’s continuing view that “...Australian governments can and should explore ways in which the policy setting and regulatory environment can foster investment in initiatives that generate social or environmental returns, if not profits in the conventional sense.”¹⁴

The UK model (Community Interest Companies) in relation to social entrepreneurial organisations that operate for the benefit of the community but which are not conventional ‘not for profits’ could become a model for adoption and regulation under the ACNC¹⁵.

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?

The most effective way to reduce red tape for NFPs would obviously be to gain the agreement of the States and Territories so that ACNC can become a true national regulator. ACF’s submission to the Productivity Commission in 2009 outlined the scale of compliance in the charitable sector after taking into account the tax, charitable status, fundraising, electoral law and general operating compliance responsibilities. These are compounded as the activity of an NFP crosses each State and Territory border. In an environment where those borders can be crossed electronically, easily and readily, the issue of harmonisation must also be progressed in tandem with the efforts of the ACNC.

¹⁴ As reference at fn 9 above at p.17.

¹⁵ Nicholls, Alex “Institutionalizing social entrepreneurship in regulatory space: Reporting and disclosure by community interest companies” *Accounting Organisations and Society* 35 (2010) 394-415.

In order to truly reduce red tape for NFPs the new requirements will need to be clear, practical and simple and the Government will need to provide adequate training and on-the-ground support for NFPs, in particular small NFPs, so that the changes can be properly communicated. Government and the ACNC will need to be communicate effectively according to a reasonable timetable with the NFP sector in order to gauge the effect of any changes that are made and to constantly focus on reducing red tape.

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

ACF believes that whilst principles are useful and important, they should only be legislated where it is felt to be absolutely necessary. The preferred approach should be to include principles in guidelines. This approach allows NFPs an important degree of flexibility and ensures that NFPs can apply principles that best reflect their size and mission.

It is crucial that any principles included in either legislation or in guidelines be accompanied by detailed, practical guides and where appropriate template sample forms or policies for NFPs to apply in everyday situations and decisions. Any principles included in legislation should be worked into the model rules provided for various NFPs.

As suggested previously (see ACF response to Consultation question 25), there should be several different sets of model rules provided for different size NFPs, and also perhaps different types of NFPs sectors (eg. Sporting clubs or environmental groups).

For basic principles, ACF is supportive of the six high level principles issued by the Commission of England and Wales (listed on page 33 of the Consultation Paper) although much further detail and samples will need to be provided to allow NFPs to easily work these broad statements into every-day practice.

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

ACF suggests that perhaps there should be a separate section within ACNC which oversees Indigenous NFP entities, in particular corporations set up to manage native title. These entities will require a different approach in many areas of regulation, including a more flexible approach to conflicts of interest. ACF believes that any changes that the Government or ACNC wish to make to the governance of Indigenous NFP entities should first go through a rigorous consultation process with a variety of Indigenous NFP entities. In addition, adequate support, mentoring and resources should be provided to any Indigenous NFPs if any changes are required.

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?

A new legal form should be considered for very small unincorporated associations as described by PilchConnect's submission to the Productivity Commission in 2009.¹⁶ This could support the rapid entry of new community-based entities or the formalisation and registration of very small groups. The proposal envisages that it would be tailored for very small NFPs – providing limited legal rights in exchange for minimum reporting requirements.

¹⁶ At page 16.

The legislation must be written in plain language for non-legal readers and there must be plain language leaflets on the changes implemented.

ACF supports the use of intermediaries with legal and compliance expertise such as PilchConnect to assist NFPs, particularly smaller entities, to achieve their mission. With the new legislation it is important all NFPs are aware of how it will affect them in their day to day activities. The intermediaries can play a unique role in assisting NFPs adjust to the changes and part of the ACNC budget could fund such support.

The NFP and Charity reform process needs to be evaluated from time to time to establish whether or not the reforms have added value. In particular, reform must lead to an improvement in the way that government regulates and supports the development of the NFP sector, so that the sector can continue to flourish for the benefit of the community.

Sari Baird

General Counsel, Australian Conservation Foundation

Level 1, 60 Leicester St, Carlton, 3053

Tel: 03 9345 1774 and Mob: 0417 886 207

[END OF SUBMISSION]