

The NFP Governance Arrangements Discussion Paper Submission by Endeavour Foundation (25 January 2012)

Herewith, Endeavour Foundation's submission to this discussion paper together with responses to the specific questions raised.

Endeavour is one of the 11,000 Not-for-profits (NFP's) that are Companies Limited by Guarantee. While the NFP sector comprises an estimated 600,000 organisations, 440,000 of these are unincorporated and do not file any returns. The extent and size of the remaining 150,000 incorporated organisations is not known. It is a reasonable assumption that Companies Limited by Guarantee conduct the majority of activity carried out by the sector. This assumption is based on the larger more sophisticated organisations requiring the statutory advantages of carrying out their activities as a Company Limited by Guarantee. Consequently we believe that our observations may also be relevant for a significant proportion of the activities conducted by the NFP sector.

As such, the Corporations Act prescribes the governance obligations under which we operate, these are also annually disclose in our published annual report.

We believe these are adequate and appropriate for an organisation of our size and complexity.

However we support the move towards governance arrangements and universal principles proportionate to the size, turnover, risk and government and community support of other organisations who are not Companies Limited by Guarantee.

We consider the Corporations Act as the appropriate legislation for Companies Limited by Guarantee and would be supportive of the ACNC stipulating governance obligations provided they did not impose any further cost or compliance effort

We consider our current compliance costs and duties associated with the Federal Government agencies, ATO, ASIC, State Government agencies, to be reasonable and appropriate for an organisation of our size, complexity, turnover and level of government funding.

We consider the federal and state agencies should retain ownership of the accountability mechanisms in respect of funding agreements and associated acquittals and are commensurate and appropriate for organisations of our scale carrying out activities on behalf of those agencies.

We note there is to be a further Government review, and submission process, in respect of the continuing appropriateness of the Companies Limited by Guarantee structure for NFPs.

Providing information resources and universal principles in respect of good governance to enable smaller NFP organisations to either start up or grow and mature, is viewed a positive goal, as is requiring them to meet governance standards proportionate to their size and government and community support.

The Government will need to consider the type and level of activity for thresholds to trigger scalable or proportionate governance arrangements. It is understood that the draft ACNC Bill, for example, recognised that general purpose reporting requirements be proportional to small, medium and large entities and sets out revenue turnover as the thresholds. A similar parallel could be drawn to regulate governance principles.

RESPONSES TO QUESTIONS BELOW

Consultation questions - Review of not-for-profit governance arrangements

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

Response:

This should not be legislated. It would depend on the specific circumstances for each NFP entity, but should as a bare minimum be recorded as part of each entity's "purpose and objects clauses", similar to what most companies that are incorporated under the Corporations Act have in their constitutions.

The duties of responsible individuals within companies limited by guarantee are covered by the requirements of Part 2D.1 of the Corporations Act and we believe these are adequate.

We do support the development of a principles based approach similar to the United Kingdom for NFPs not covered by those requirements.

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?

Response:

This is likely to be different for each organisation and would ultimately depend on each entity's individual purpose and objects clauses. For those organizations with DGR status those objectives the objectives should be consistent.

It should not be legislated. It should be made a requirement for each entity to make that clear.

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

Response:

The core duties should be the same as those required under the Corporations Act, specifically: to show a duty of care and diligence; a duty to act in good faith in the best interest of the entity; a duty to not misuse one's position, a duty to not misuse information and a duty to disclose material personal interests.

These principals are universally relevant and appropriate, irrespective of the size or complexity of an organisation.

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

Response:

In line with the requirements of the Corporations Act, the minimum standard should be one of utmost care and good faith and should be applied, irrespective of the size or complexity of individual organisations.

There should be no difference in the standard of care owed between paid employees, volunteers, professionals or lay persons. The duty of care stems from accepting or holding the position of a “responsible individual” within an organisation and is not dependant on personal skills, training or the mode of employment.

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)?

Response:

There should be no requirement to hold particular qualifications or have particular experience or skills in order to act as a “responsible individual”. Rather, the legislation should contain a list of specific exclusions that would disqualify an individual from accepting a position as a “responsible individual”, similar to the disqualification criteria for directors contained in the Corporations Act.

The qualifications will be determined by the need to be able to meet the duties required under the Corporations Act – see above 3 above.

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

Response:

No. See 5 above.

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

Response:

No. Universally, the standard of duty and care should be that of utmost care and diligence, irrespective of an entity’s structures or sectors in which they operate.

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?

Response:

No. The ACNC should facilitate and encourage training or mentoring facilities to bridge any knowledge and skills gap, possibly through the provision of an information portal that is accessible by all "responsible individuals".

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

Response:

All "responsible individuals" would need to act with care and diligence. The extent would be commensurate and proportional to the size and complexity of each individual entity.

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?

Response:

Yes - The core duties should be based on those contained in the Corporations Act Any gaps that exist could be filled by drawing examples from other established pieces of legislation.

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

Response:

The extent of the governance information disclosed should be dependent on the size and complexity of individual organisations and should be similar to the information required to be disclosed in a "Directors Report" under the provisions of the Corporations Act and AASB accounting standards. (eg directors' names, qualifications, length of service on the board, number of meetings attended, membership of any sub-committees, details of board processes, directors' benefits and remuneration, directors' interests / contracts, indemnification and insurance of officers, audit, etc.).

Endeavour discloses its complete governance arrangements in its Annual Report.

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

Response:

Yes. The total remuneration in aggregate and number of all key management personnel (KMPs) / responsible individual should be disclosed as a grouped amount. Individual remuneration need not be disclosed.

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

Response:

Yes. The suggested criteria in the discussion paper are appropriate. This is a comprehensive list which is consistent with generally accepted norms within well managed companies regulated by the Corporations Act.

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

Response:

This should be a matter for each of those entities to consider and determine under the conflict of interest framework set out in the ACNC Exposure Draft.

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'?

Response:

It should be based on the Corporations Act's definition or understanding of 'material personal interest' but should also provide a list of examples to guide and frame the specific application of these general principles.

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

Response:

Should be proportionate and commensurate to the size, turnover, entity requirements and risk management generally.

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

Response:

This should not be mandated. Broad guiding principles may be appropriate as individual entities will have differing levels of funds for investment and differing risk appetite and risk profiles.

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

Response:

Organisations should be required to have public liability insurance coverage. Otherwise, insurance requirements should form part of an entities risk management strategy proportionate to its own characteristics.

We note that some level of public liability insurance is currently required by most funding bodies and should therefore consequently receive consideration in drafting the final governance principles.

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

Response:

Yes,

20. What internal review procedures should be mandated?

Response:

None. Internal review procedures should form part of a policy decision that NFPs are encouraged to adequately consider and determine, as part of their good governance framework.

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

Response:

The Corporations Act provides a useful core framework of governing rules comprised of default rules which members automatically adopt unless they provide an alternative (the 'replaceable rules'), and also rules which cannot be replaced (the 'mandatory rules') that apply to all corporations.

In addition, a core requirement of any NFP's governing rules should prevent it from distributing profits or assets for the benefit of particular people – both while it is operating and when it winds up.

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?

Response:

Yes, but these should be no more than what is already mandated under the Corporations Act.

23. Who should be able to enforce the rules?

Response:

ACNC should enforce the rules.

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

Response:

Yes. The ACNC as the peak statutory body, should also be responsible for the enforcement of these critical aspects of governance and as the ATO have required in any case for DGR eligibility.

The ACNC should also have a role in the distribution of assets on a wind up or a conversion from a Company Limited by Guarantee to another form of governance.

25. Should model rules be used?

Response:

This should be a matter for self determination and the availability of model rules is to be encouraged. They should be available for selection to meet individual entities' requirements.

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

Response:

There should be the requirement for an Annual General Meeting as an absolute minimum, similar to what is set out in the Corporations Act, CATSI and the various Incorporated Associations Acts and model rules. This will promote openness, transparency and accountability. It could have a tiered application requirement, dependent on size and complexity of each organization.

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

Response:

Not necessarily, but encouraged. This aspect would be covered by the tiered reporting requirements envisaged in the draft Legislation.

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

Response:

Yes.

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

Response:

Given the diversity of the 600,000 NFPs we would expect there to be particular needs, especially re support, that ACNC ought to address as it evolves, and as the sector matures. However further research is required to determine the extent of support required – refer to our comments above about the lack of knowledge about the extent and sophistication of the 140,000 incorporated societies that are not Companies Limited by Guarantee.

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?

Response:

Annual survey of NFPs should provide feedback for the ACNC to evaluate the effectiveness of same.

If the envisaged general purpose reporting requirements (report once, use often) by registered entities, to the ACNC obviate the need for duplication of same across multiple Commonwealth agencies, that would assist as a starting platform.

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

Response:

The 6 principles cited in the International Comparisons in Appendix 1 of the Consultation Paper provide a sound framework to base the governance legislation and regulations on.

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

Response:

This is a matter that is best responded to by those particular entities.