



SUBMISSION BY THE  
**Housing Industry Association**

To  
The Treasury  
on

**Review of not-for-profit governance arrangements**

**Consultation Paper**

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**Contact Details**  
**Glenn I Simpson**  
**General Counsel**  
**Housing Industry Association Ltd ACN 004 631 752**  
**Address: 79 Constitution Avenue, CAMPBELL ACT 2612**  
**Ph: 04 1975 1180**  
**Fax: 07 5587 7400**  
**Email: [g.simpson@hia.com.au](mailto:g.simpson@hia.com.au)**

## 1. GENERAL COMMENTS.

HIA supports efforts to improve regulation of the not-for-profit (NFP) sector in particular efforts to promote governance, accountability and transparency of the sector.

However HIA has concerns and reservations with much of the Government's current reform agenda. Whilst the Consultation Paper (CP) advocates reducing red tape and minimising compliance burdens some of the governance reforms advocated in the paper will increase regulatory costs and compliance for HIA other like organisations without any public or private benefit.

Many of the problems with the Government's proposed approach flows from a misunderstanding of the diverse nature of the NFP sector.

More specifically, the CP, in attempting to grapple with the diversity of the NFP sector, seeks to justify imposing increased transparency and accountability regulation on NFPs on the basis of their 'receipt of public support' and 'high community expectations'.

However, not all NFPs are community based, in receipt of public donations, and staffed by volunteers – only a very small minority fall into this category. The vast majority are small and member-driven with limited capacity to meet red tape requirements. 'Good governance procedures' should be a matter for the members to decide, not the ACNC.

In HIA's submission, Treasury is seeking to justify comprehensive regulations across the whole sector on the basis of what may be appropriate for only a very small part of the sector, the larger charities. Many statements are made about particular situations involving public charitable donations which do not stand up to scrutiny when applied across the whole NFP sector.

For example, on the basis of a comment (Par 120) that the public should know if a charity is sending money overseas by way of membership fees to an international parent organisation, the CP argues that all NFPs should be required to publicly disclose related party transactions. The argument that this "improves the information they [the public] have about the entity, and allows them to make more informed decisions" is quite irrelevant if the entity does not accept public donations.

Another example is at Par 129, where the CP says – "Given that NFPs are relied on by the community, and could represent the most vulnerable people, it is vital that NFPs have appropriate risk management strategies in place." And Question 6 starts – "Given that NFPs control funds from the public.." These are obvious cases of selecting assumptions to justify pre-existing conclusions. Very few NFPs are 'relied on by the community' and only public charities 'control funds from the public', yet the CP canvasses the need for legislatively imposing risk management procedures on all NFPs.

In HIA's view, the public's legitimate interest in the fate of its charitable donations is wrongly generalised throughout the CP into a public 'right' to intrude into all NFP activities. This disregards the fact that many NFPs such as clubs and societies were set up and continue to

exist for the benefit of their members, rather than the public at large.

Hitherto, so long as their objects were legal, there was no obligation on unincorporated clubs and associations to achieve any particular level of transparency or accountability to, or to meet the expectations of, those who were not members. HIA notes that no-one is compelled to join or remain a member of a club, and there is no public interest in subjecting them to a standardised regime of 'transparency and accountability'.

The CP does not explain the legal basis from which this purported new public 'right' to know about the club's affairs is said to derive, or just why it is considered that all clubs and other NFPs should now meet this range of additional governance obligations to the public.

The CP (Par 118) does cite a Senate Standing Committee on Economics 2008 report which noted "community expectations that even small entities need to be accountable to government and the community in the event of fraud, mismanagement, or concerns for public safety". HIA considers that this has very limited relevance beyond charities. Fraud, mismanagement in office amounting to a crime or misdemeanour, and public safety, are well covered by existing criminal law, and if no public money is involved, then mismanagement not involving a breach of the existing law is purely a matter for the entity's members.

To say that all NFPs have 'high community expectations placed on them' seems to HIA to be an exaggeration. Whilst some NFPs certainly do have 'high community expectations placed on them', the vast majority exist solely for, and are of interest only to, their members, and there is no justification for ACNC interfering in their internal affairs or subjecting them to additional and unnecessary costs.

The sections of the CP that deal with 'accountability' mention, but do not deal with in detail, the persons to whom the NFP is accountable. HIA considers that it is fundamentally unsound to say that a NFP may be "accountable to groups which may not have a voice". An organisation is accountable to whoever its governing documents say it is accountable to. In addition, it may by contract choose to undertake accountability obligations. But that accountability does not include persons who are strangers to the organisation but who may, directly or indirectly, benefit from its activities. HIA considers that attempts on moral grounds to expand company directors' existing legal accountability into a broader 'social responsibility' are misconceived, and inconsistent with directors' duties under the *Corporations Act*. The fact that an organisation has NFP status does not alter that fundamental rule.

While 'Tiered/proportional reporting requirements' are proposed, any requirements will necessarily involve additional burdens while in the vast majority of cases providing no identifiable benefits to anyone. They represent an intrusion of the state into private affairs which, if applied to individuals rather than to associations of individuals, would be a major violation of National Privacy Principles. The costs imposed across the whole sector will in the aggregate be very significant, yet the Consultation Paper fails to identify any real benefits beyond regulatory consistency for its own sake.

HIA considers that any proposals for 'increased transparency and accountability' or 'improved disclosure regime' should be confined to charities, where there is a legitimate public interest in the management and destination of the public's contributions. There is no justification for subjecting other NFPs to the extra costs and inconveniences of such a

regime, nor has the CP put one forward.

HIA also considers that the statement (Par.23) “Some duplication during a transitional period might result while Australia moves towards a truly national NFP regulator, however, the governance arrangements are likely to be similar, and not pose a large burden on NFPs” is unduly optimistic and fails to recognise the reality of a prolonged and indefinite period of dual regulation. Regulators, who are paid by the taxpayer to regulate, often have difficulty appreciating the burden they impose on the regulated, who are not.

## 2. CORPORATIONS REGULATION

HIA is opposed to ACNC taking over governance arrangements of NFP companies limited by guarantee from ASIC. Splitting corporate regulation in this way is fundamentally wrong.

HIA, as a company limited by guarantee, has been regulated by corporations law for many years and has no desire for change. HIA considers that compliance with corporations law amply provides for all of the safeguards sought in the CP in relation to conflict of interest, risk management and audit. However, the Consultation Paper now contemplates that HIA's governance arrangements, like all NFP corporations, will need to be reviewed and perhaps altered.

To say, as the CP does (Para.19) “we do not expect [NFP entities] to make any substantive changes to existing arrangements” is belied by the rest of the CP, which canvasses a range of quite substantial changes apparently in the contemplation of Treasury. Once some companies are administered by ACNC and others by ASIC, divergences will inevitably emerge.

HIA also considers that it would be very regrettable if any “new uniform governance requirements” imposed on the NFP sector were inconsistent with those placed on companies and their officers under the *Corporations Act* 2001. Still worse would be the situation if the new governance requirements were in excess of those in the *Corporations Act*.

For example, Paras 122ff put forward a proposal for all NFPs to abide by a conflict of interest policy. There is already a strong body of statutory and case law governing this area. Further codification is unnecessary and risks confusion by applying two differing sets of legal requirements to the same conduct.

It would be anomalous if the governance arrangements and disclosure regime under which Australia's biggest public companies operate were now to be considered inappropriate for a 'large' not-for-profit company limited by guarantee.

HIA strongly suggests that NFPs which are companies should be required to continue to meet the legal requirements of the *Corporations Act* rather than a new set of requirements created for, and having relevance mainly to, charities.

Other NFPs which are not corporations have adopted a structure which best suits them, usually because the formalities associated with corporate form are too complex, costly and burdensome. It undermines that deliberate choice for simplicity and informality if governance requirements akin to corporations, such as general meetings, directors meetings

and keeping of minutes, external audit, etc are to be now imposed on unincorporated bodies by ACNC.

While such things are undoubtedly good practice, it is flying in the face of experience to expect unincorporated bodies to consistently meet such standards. HIA doubts whether the administrative effort in enforcing such requirements would be a prudent use of ACNC's limited resources.

### 3. RELATIONSHIPS WITH MEMBERS

Most, but not all, NFPs have members rather than shareholders. The CP raises a number of interesting questions about minimum standards for governance rules relating to an entity's relationship with its members.

HIA considers that this should in most cases be an internal matter for the membership rather than be imposed by outsiders – no-one is compelled to remain a member if they are dissatisfied with the entity, and detailed Commonwealth regulation in this area is in practice neither cost-effective nor necessary to protect the wider public interest. Clubs should be left to club members.

HIA considers that there are a however few large or influential NFPs for which some minimum standards of governance should apply. These are NFPs which regulate or substantially control entry to a trade, profession or livelihood. There may be other cases of NFPs with similar economic significance or monopoly position. However, such NFPs should not be required to attain a higher standard for their relationship with members than the requirements imposed by the *Corporations Act* on public companies.

### 4. HIA'S ANSWERS TO CONSULTATION QUESTIONS.

#### "6.1 RESPONSIBLE INDIVIDUALS' DUTIES

1. *Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to? Yes, in terms of the entity's constitution, contract or other basic document rather than in terms of inferred social responsibility.*
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? This must be in terms of the entity's basic document rather than in terms of inferred social responsibility. Those who created the entity should not have their creation diverted to someone else's purposes.*
3. *What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation? If a company, as per Corporations Act. Otherwise none.*
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? As per existing law of negligence and trusts. The*

ACNC should not attempt to rewrite the law on duty of care.

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)?* There are no such legal requirements for directors of public companies, elected officials or statutory officeholders, and it would be unjustified, unfair and counterproductive to single out NFPs for such requirements.

6. *Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?* No

7. *Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?* Corporations should be dealt with by ASIC not ACNC, and so duties should not be standardised.

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?* No

9. *Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?* No

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?* See above

## 6.2 DISCLOSURE REQUIREMENTS AND MANAGING CONFLICTS OF INTEREST

11. *What information should registered entities be required to disclose to ensure good governance procedures are in place?* There should be no new requirements.

12. *Should the remuneration (if any) of responsible individuals be required to be disclosed?* Only as required by the *Corporations Act*

13. *Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?* Conflict of interest should be handled by education and information rather than creating new legal requirements – existing law is adequate, it is the application of the law that lags.

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)?* No, existing law is adequate in general, and if required, specific and tailored conflict of interest provisions should be provided for specific cases

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'?* There should be no specific ACNC governance obligations for unincorporated associations,

and none for companies regulated by ASIC

### 6.3 RISK MANAGEMENT

16. *Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs? Only for Charities as these are the only NFPs that control funds from the public.*

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

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

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

20. *What internal review procedures should be mandated? Only for Charities*

### 6.4 MINIMUM REQUIREMENTS FOR AN ENTITY'S GOVERNING RULES

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

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? Only for Charities*

23. *Who should be able to enforce the rules? ASIC or State Attorneys-General*

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

25. *Should model rules be used? Only for Charities*

### 6.5 RELATIONSHIPS WITH MEMBERS

26. *What governance rules should be mandated relating to an entity's relationship with its members? As per Corporations Act, and only for companies*

27. *Do any of the requirements for relationships with members need to apply to non-membership based entities? No*

28. *Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC? As per Corporations Act, and only for companies*



## 7. SUMMARY

29. *Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?*  
No.

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?* . HIA considers that it is conceptually difficult to reduce red tape by adding red tape, which is what adding new Commonwealth regulation on top of existing State regulation will do. Only if States vacate the field is there any hope of reducing the administrative burden on NFPs. HIA considers that if the Commonwealth is serious about red tape reduction it should not seek to extend ACNC regulation beyond charities in any State unless and until that particular State agrees to refer their constitutional powers in this area to the Commonwealth.

31. *What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?* Guidance based on existing and well known principles of corporate governance would be both relevant and useful. Imposing such principles by statute would provide a minimum standard of governance for all NFPs but is likely to be uneconomic to administer. Compliance with the *Corporations Act* should be sufficient compliance with ACNC requirements.

32. *Are there any particular governance requirements which would be useful for Indigenous NFP entities?* HIA has no expertise or opinion in this area

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?* The Government might care to consider HIA's previous submission which opposed the creation of ACNC as a regulator for all NFPs, and restrict its operation to charities. While Not For Profit organisations are related to charities and charitable purposes, they are fundamentally different in that they do not accept public donations and do not use public money. To the extent they obtain tax concessions, that is a recognition of their public benefits, which are not the same as charitable purposes."

## 5. CONCLUSION

HIA considers that, for the time being, the scope of operation of the ACNC should be restricted to public charities. There is no justification for the extensive and unnecessary regulatory burden proposed to be placed on all Not for Profit Organisations.

Housing Industry Association