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Dear Sir,

DISCUSSION PAPER – GOVERNANCE IN THE NOT-FOR-PROFIT SECTOR IN AUSTRALIA

I am writing to you in response to the *Discussion Paper* concerning the *Review of not-for-profit governance arrangements* and as someone with a permanent disability. At various times one is reliant on the services of the so-called “third” or charitable/community sector. I have also previously been on the board of a major charity, which was an eye-opening experience.

Whenever discussion of the charitable sector occurs, it begins with a retelling of a familiar story; it talks of how wonderful staff give generously of their time (often voluntarily) to care for needy and vulnerable people, in services which should be far better supported *if we truly claim to be a civilised country*.¹ And it is not that this image lacks a degree of truth; there are many people who are living

¹ I hear the line in italics more and more from advocates, politicians and other commentators, perhaps prompted (at least in part) by the fundraising campaigns of some charities. For example, in response to the Productivity Commission’s Draft Report into Disability Care and Support, Sally Richards told the *Canberra Times* of the urgent need for the Commission’s proposed National Disability Insurance Scheme. She wrote in part:

Whether the disability is genetic or acquired is not the point here. What is the point is that all of us have a responsibility to provide for those Australians who are vulnerable or marginalised or need support to live meaningful lives because they have a disability.

If we as a nation and a people say that all life is sacred; that all life is valuable; that any life can be saved with the modern marvels of scientific medicine, then we as a nation and as a people have a moral obligation to support the people who have or acquire a disability. It’s not good enough to say, “We have saved your life. Now you go home and deal with it and deal with it for ever and don’t expect the assistance you need to have the life you are entitled to.” This is not the way for a civilised country to behave. It is immoral, unacceptable and deeply unfair. Not to mention hypocritical. (Sally Richards, *Our moral obligation to vulnerable, marginalised*, 24 Jun, 2011 04:00 AM, <http://www.canberratimes.com.au/news/opinion/editorial/general/our-moral-obligation-to-vulnerable-marginalised/2205864.aspx?storypage=1>

Source: <http://everyaustraliancounts.com.au/our-moral-obligation-to-vulnerable-marginalised/> as at 28 December 2011)

On a purely practical and pragmatic level, I cannot deny the need for support, nor that one receives support services – I do. What does leave me cold is the context in which the argument is made. Firstly, all Australians are told they have “a responsibility”, then that meeting this obligation means parting with yet more of their income, but that this should be done without question lest we be considered uncivilised. As an employed PAYG taxpayer I resent the ultimatum; as someone with a disability I fear the consequences of such rhetoric. If

examples of dedicated, selfless service. To invoke Sir Robert Menzies famous “Forgotten People” speech however, these people are often “nameless and unadvertised”.²

The same cannot always be said of the professional executives, CEOs and boards who run many charitable organisations. They will fund, plan and sometimes be the face of considerable campaigns to raise money for some element of their organisation’s “mission”. With the larger charities there can be permanently staffed marketing and fundraising departments, while the phrase “special project” often equates with “management consultant hired”. All of this activity and expense can allegedly be justified by appeals to concepts such as the need to “spend money to make money” and “tailoring messages is necessary to appeal to a range of demographics in an increasingly contested and fragmented marketplace”.³

Most reasonable people believe that the money they give to charity (or a high proportion of it) goes to those in need, be they the poor, the disabled, the elderly, or whichever identified group the organisation was established to aid, in the form of goods or services to alleviate their suffering. And while it would be unfair to claim that not-for-profit organisations failed to support those they were established to serve, whether such service remains the focus of their activities or merely a positive externality of a much wider business is an open question?⁴ It is an open question few seem willing to ask, much less answer. Commentator Vern Hughes is prepared to at least ask the question, as well tease out some uncomfortable realities.⁵

people are going to help and support me I want them to do so for the right reasons; guilt should play no part whatsoever.

² See The Forgotten People - a speech by Robert Menzies on 22 May, 1942
<http://www.liberals.net/theforgottenpeople.htm> as at 27 December 2011

³ And if you suspect this language is verging on the nonsensical you are correct. See for example, Rob Forbes, *Corporate-speak sucks the life out of our education system*, Opinion, May 31, 2011, Sydney Morning Herald, Read more: <http://www.smh.com.au/opinion/society-and-culture/corporatespeak-sucks-the-life-out-of-our-education-system-20110530-1fcp6.html#ixzz1hm9amjFw> as at 28 December 2011. Mr Forbes argues convincingly that there is an increasing amount of corporate doubletalk intruding into education. Also see <http://www.weaselwords.com.au/index3.htm> (as at 28 December 2011) to begin to get an idea of how much the English language has been debased by this ludicrous lexicon of boorish buzzwords.

⁴ It should perhaps be asked whether many charities are in truth event management companies with tax concessions. See for example Richard Noone, *Charities forced to show records on new MySchool like website*, The Daily Telegraph, October 24, 2011 12:00AM, <http://www.dailytelegraph.com.au/news/charities-forced-to-show-records-on-new-myschool-like-website/story-e6freuy9-1226174511400> as at 25 October 2011. To determine whether a document should be regarded as legally privileged the common law generally asks whether the dominant purpose of its creation was to obtain legal advice. Perhaps a similar “dominant purpose” test should be applied to charities. This test should consider whether the dominant purpose of the organisation remains the end service “user” or “client”, or whether fundraising itself has become the principal end product thus calling into question a body’s status as a charity. On the issue of charitable fundraisers, a US website *Charity Navigator*, which describes itself as “Your Guide to Intelligent Giving,” advises on a page headed “Holiday Giving Guide:”

Skip the gala and write a (cheque): *Special events, such as galas and golf outings, are notoriously inefficient ways to raise money for a charity. Not only are these events outright costly (invitations, catering, entertainment and so on), but planning a fancy ball often diverts staff time away from the charity’s mission. So if you really want to help fund a charity’s operations, then stay home, reheat your leftovers and write a big (cheque) directly to the charity. (See <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1305> as at 29 December 2011)*

⁵ See Vern Hughes, *Non-profits lose sight of volunteer heritage*, February, 4, 2011.

Reflecting on my own experience, there is much in what he says with which I agree. Certainly, the response one received when drawing Mr Hughes' February 2011 article to the attention of some in the charitable sector was both swift and blunt. His views were variously described as "mad" or "completely out of touch with contemporary reality". It was not so much questioned that the changes Mr Hughes spoke of hadn't taken place. Rather, the article was dismissed as a plea for the return of a bygone era which was being considered through "rose-tinted" glasses. I was told that the days of wondering whether the next cake stall would pay the bills or see an organisation slip into insolvency and liquidation were long gone and far from missed. Equally, only modern corporate practise and economies of scale would allow a service to reach more of those in need, as well as have the resources for the kind of research and develop that would improve service delivery, as well as support the science expected to cure many diseases in the medium to long term.

While this may be true to an extent, it raises key questions. Primarily, must we accept all "change" simply because it happens? Must we also accept the change, regardless of whether we believe it to be good, bad or indifferent? Finally, regardless of whether we are a client, donor, staffer, manager or director of a not-for-profit organisation, how much should we allow ourselves to become a fatalistic spectator to change, as opposed to trying to impress on "the third sector" what we actually expect from it, rather than accepting what it and its over-venerated leaders deem appropriate.

Ultimately, I believe this *Discussion Paper* on governance reveals one thing; confusion as to the nature and purpose of what we are talking about. In my opinion, "a corporation is a corporation" but as things stand "not all corporations are created equal". There are those that produce everything from breakfast cereal to slate tiles and are still obliged to pay taxes and charges. By contrast, charitable corporations (generally limited by guarantee, as identified in the *Discussion Paper*) receive a variety of concessions and, donations are generally tax deductible. And while there is no doubt they employ people and provide many essential goods and services, they also receive favourable tax treatment that no other business can expect.⁶ Do these "other" businesses *that do pay tax* fail to

Opinion, <http://www.smh.com.au/opinion/society-and-culture/nonprofits-lose-sight-of-volunteer-heritage-20110203-1afbi.html> as at 28 December 2011

⁶ There is as much reason to challenge the favourable tax treatment of church charities and the churches which support them, as there is to question the tax treatment of secular not-for-profit organisations. See my submission to the Henry Tax Review at http://taxreview.treasury.gov.au/content/submissions/pre_14_november_2008/Adam_Johnston.pdf (as at 30 December 2011), where I say on page 3 of the submission:

My final recommendation to this review is that you should recommend that all charities and churches pay all State and Commonwealth taxes, or at the very least, those that would be applicable to a corporate body in Australia. I think it is the height of hypocrisy for large charities, trusts and Church groups to at once hold substantial assets on which next to no duties are paid, simply on the basis that a body is charitable or religious. These same bodies chastise governments regularly about a lack of social services, yet do not appear to see their failure to contribute to the Exchequer as in any way related.

An increasing number of people are calling on the churches to pay taxes, particularly in light of the financial crisis which has swept Europe. See *Church 'must pay tax,'* Sydney Morning Herald, (Italy), December 13, 2011, Read more: <http://www.smh.com.au/world/church-must-pay-tax-20111212-1orcc.html#ixzz1hy0VdxGY> as at 30 December 2011; see also Nick Squires, *Italian Catholic Church under pressure to start paying property tax*, 2:29PM GMT 11 Dec 2011, The Telegraph, <http://www.telegraph.co.uk/news/worldnews/europe/italy/8949226/Italian-Catholic-Church-under-pressure->

produce employment, goods and services which Australians need? It is debatable whether this differential and deferential treatment of not-for-profits continues to be justified.

Again, my personal experience was one of feeling I was part of a board whose primary role was to raise funds; never mind running a company or ensuring that services were delivered to people – that was what managers were for, *so have another canapé and stop fussing*. While raising funds could never be dismissed as unimportant, it was a standing item on every CEO's report, along with reports on discussions with, or grants from, government. Vern Hughes's commentary rang regularly in my ears and, he seemed far from mad. In particular:

Many organisations that began life as voluntary associations have become corporatized instruments of government service delivery and, no longer want, or even need volunteers...Most (have) found it easier to seek and obtain public contracts for their operations and tailor their mission to the delivery of those contracts, than to rely on private fund-raising or commercial income generation. In the process, their programs and operations (have come) to reflect the silo structure of government, and their internal cultures (now mirror) the government's risk-averse culture.⁷

Sadly, I could not agree more. And, as Hughes went on, it was hard not to agree with his view that the third sector is now dominated by “bland managerialism.”⁸ There is no question in my mind that larger charities are professional operations designed primarily to encourage the government, corporate leaders and the public to give grants, or make donations and, to continue these relations in perpetuity. In this context, the golf days and galas which *Charity Navigator* identifies as inefficient become critical, as the charity and corporate managers strengthen and reaffirm networking ties, be this informally on the golf course or at dinner. During the meal, each will shower the other with effusive praise for their selfless work or generous giving, respectively. No doubt all those involved in the activity will feel that it is all very right and proper.

However allegedly virtuous though, it is a “business” whose trade is image, relationships and events which should be treated as the output of any other corporate entity. This means payment of corporate taxes and accountability to shareholders. To achieve such reforms, the Government must be prepared to “pierce the charitable veil,”⁹ embroidered as it is with heartfelt images and good intentions. Then, you must look honestly at the marketing, event management, consultancy and government contracting that is charity in Australia today and ask why it isn't just another business? If anything, it is not a new regulator the sector needs, but a stringent “show cause” test. Not-for-profits should be required to periodically justify continued receipt of concessions and be able to place on the public record evidence that their dominant purpose¹⁰ remains charitable.¹¹

[to-start-paying-property-tax.html](#) as at 30 December 2011. See the pros and cons of taxing churches debated by Erik Stanley and Barry W. Lynn, *Why don't churches pay taxes?*, Living, Los Angeles Times, <http://www.latimes.com/features/religion/la-ow-lynn-stanley23-2008sep23,0,2226105.story> as at 30 December 2011.

⁷ Hughes, op. cit., p.1

⁸ Ibid

⁹ In much the same way as courts may find it necessary to “pierce the corporate veil” to satisfy themselves as to whether a claim of corporate personality is justified, or whether it is being used to obscure the true nature of a business and/or shield the identity of its owners.

¹⁰ Refer to footnote 4, above.

Some may allege that I myself am being uncharitable by imposing such conditions. However, as someone with a disability who is reliant on community goodwill the last thing I want to do is be complicit in asking people to donate to “charity” when in truth we are talking about hybrids which are part government business enterprise, part marketing firm, and part commercial entity hoping for an operating surplus.¹²

Government co-opting not-for-profits into what might be seen as formerly public responsibilities can be exemplified in the state outsourcing everything from employment services to out of home care and disability care services now being run by the not-for-profit sector, courtesy of public grants, advances or contracts. From the point of view of government it can claim, as senior NSW bureaucrat Gary Sturgess has done, that:

*(Our) response to the complexity of modern government should lie in less regulation of front-line public services, not more; in systems that are coupled less tightly rather than more; in empowering and developing the leaders of relatively small-scale organisations within the public service sector, in preference to building leadership at the top...(Through) grants and contracting, it was possible for the scale and scope of the (government) supply side to differ from that of the demand side. A national government could commission services from a small not-for-profit provider, while a local council could purchase inputs from a multinational corporation.*¹³

¹¹ I note by way of comparison that universities in the United Kingdom are monitored on a number of criteria, focused on the quality and consistency of the degrees they award; see Rachel Bennett, *eHow Contributor*, *eHow: Accreditation of Universities in the UK*, http://www.ehow.com/about_6534497_accreditation-universities-uk.html as at 31 December 2011. The oversight body is the Quality Assurance Agency, an overview of their role being available at *An Introduction to the QAA, November 2009* <http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/IntroQAA.pdf> as at 31 December 2011. If quality control standards are good enough for universities, then there should be some public assurance that a charity is and remains a charity, true to a benevolent goal or goals. While there will be a periodic need to reapply for state-based fund-raising licences from the various Gaming and Racing or Fair Trading Departments, neither this nor the grant of corporate personality would appear likely to test too many of the larger charities. A copy of audited accounts, a constitution, an annual report and particulars of directors and officers will satisfy most regulators.

The show cause test I propose would require a charity to demonstrate to the relevant authority that its operations *actually* reflected the benevolent goals its documentation claimed; and further, that the authority was confident that a reasonable donor could be assured the dominant purpose of an organisation was charitable. Applying a generous interpretation by assuming that an organisation which applied 49 per cent or less of its gross fund raising revenue in the act of fund raising retains a predominantly charitable purpose, then three organisations in the *Daily Telegraph* article cited in footnote 4 (containing a table outlining the ratio of funds spent on fund raising) would lose charitable status. Several others would be in danger of going the same way.

¹² Commentators will generally defend operating surpluses as being distinguishable from profits on the basis that charities do not aim to make profits, but to ensure that the outlays meet their income so that they can continue to provide services. See for example, Jonas Elmerraji, *Navigating Government And Nonprofit Financial Statements*, Posted: May 25, 2007, Investopedia http://www.investopedia.com/articles/basics/07/government_nonprofit_statements.asp#axzz1iAMqwCne as at 1 January 2012.

¹³ Gary L. Sturgess AM, *Deregulating the Public Service economy*, The 2011 Spann Oration, Parliament of NSW,

These sorts of issues have been around for a very long time. Ten years ago, I told the Productivity Commission's inquiry into *Public Sector Cost Recovery* that while it did not make sense to blindly oppose the corporatisation and/or privatisation of state instrumentalities and services, questions of accountability and transparency remained. In particular, I was "not convinced that the electorate would ever accept a situation, where a realm of government was not clearly defined".¹⁴ Mr Sturgess, on the other hand, had claimed:

*The boundaries of government will become in time so blurred that we will have trouble knowing whether we are being served by a public servant or a private employee, whether we are dealing with national, state or local government ... This is not about privatisation; it is not about making government smaller, if by smaller government we mean stripping the public sector of its capacity to participate and intervene in society. It is about giving the state greater leverage in society, whatever the people through their elected representatives decided that they want government to do.*¹⁵

Today, while the role of government has not become completely "blurred," its interaction with the not-for-profit sector has created any number of administrative and legal anomalies, which often leave vulnerable clients at a disadvantage. From my own experience as a client in the disability employment sector, agents can make undertakings about job offers which allegedly exist, that you as an unemployed person will be obliged to follow up when the alternative is a loss of benefits.

When it turns out that various "employment" schemes are dependent on the vagaries of public funding, and are supported by a web of legally unenforceable memoranda of understanding, don't expect much from weeks, if not months, of meetings, applications, sitting papers and attending interviews. If "the program" has been "cancelled," "de-funded" or "reprioritised," then you've just blown all that time and effort. Don't expect too much in the way of accountability from not-for-profit employment service providers either. After all, as a client, you are but a third party to the memoranda, with no legal rights of redress.¹⁶ While there might be some bonus payment to the agent for placement of someone in work, they will still get paid on the basis of the number of unemployed people on their books; all of which made me wonder "how genuine the policy of employing people with disabilities is, whether it is from the perspective of industry or government."¹⁷

Sydney, 22 November 2011, Institute of Public Administration Australia (NSW Division), pp. 5-7, <http://www.nsw.ipaa.org.au/content/docs/Sparr%20Oration%202011%20formatted.pdf> as at 30 December 2011.

¹⁴ See my submission to the Productivity Commission's 2001 Cost Recovery Inquiry, p.1, http://www.pc.gov.au/data/assets/pdf_file/0019/39340/subdr112.pdf as at 2 January 2012.

¹⁵ Mark Latham, *Civilising Global Capital*, Allen & Unwin, 1998, p 211 (quoting Gary Sturgess, Virtual Government -- the Public Sector of the Future, Address to the Public Service Commission's Lunchtime Seminar, Canberra, 25 July 1994)

¹⁶ I have written repeatedly on this issue; see my submission to the Senate Education, Employment and Workplace Relations Committees, *The administration and purchasing of Disability Employment Services in Australia* (2011), pp. 1-2 <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=a6fa4e6a-eb31-49de-bb0f-c9f11849c86c> as at 3 January 2012. While I summarise my concerns to the Senate, the detail is contained in the appendices to that submission. The appendices are submissions to related inquiries.

¹⁷ *Ibid.*, p.2

To me, much of the work conducted by not-for-profits in the disability employment sector is done with one eye to the next round of government grants and/or subsidies.¹⁸ This underscores the earlier cited comments of Hughes, about many in the not-for-profit sector morphing into little more than a silo of government. This was why I suggested, when writing to the NSW Government's Panel of Constitutional Experts considering Recall Elections that:

(Given) the growing amount of Government goods and services being delivered by the private sector, it is in my view vital to bring government contractors and private sector providers of goods and services funded by the State, within the remit of the recall procedures. As someone with a disability, government funded employment, equipment and other care providers who fail to deliver on promises (even when I sign contracts of service) have truly tested my patience at times. To find further that one cannot legally enforce fulfilment of agreements because they are based on unenforceable memoranda of understanding (to which I as a client am not a party to) is the ultimate insult and frustration...Ministers, Department CEO's and Director Generals, the Executive Officers of NGO's, their staff, judicial and other officers; indeed anyone who finds themselves responsible for running a publicly funded agency or program, whether it is identified in the State Budget for financial assistance, or support comes as a grant or via some departmental instrument, agreement, or authorisation, all should know the potential power of a Recall Petition.¹⁹

The Panel politely acknowledged my suggestions as “(recommendations for) broader, structural changes to the electoral process in addition to the introduction of recalls.”²⁰ If nothing else though, I wanted to underline how far away many charities have moved from their foundations and indeed, from many of the people they allegedly serve. The professionalization of the staff, as well as much of the money coming from government and corporate benefactors, means an organisation's membership base can be of little importance. Again, as Hughes observed:

(Many)... parents find themselves referred to, in the annual reports of the bodies they created, as “stakeholders” in the welfare of their sons and daughters. They appear alongside key stakeholders such (as) local governments, suppliers and corporate partners. Many shake their heads in disbelief at the entity they unknowingly created. “We gave birth to a monster,” some say.²¹

¹⁸ See *ibid*, pp. 28-29, under the heading “A rent-seeker's paradise”. Also see pages 54-58 which is my second submission to the Fair Pay Commission (dated February 27, 2007), where I raise questions over the economic value of the Supported Wage Scheme and Special Business Enterprises. Without government support and a “wage” outcome which preserves the Disability Support Pension as the principal source of income for the “employees,” these organisations would be unlikely to survive.

¹⁹ See my submission to the Panel of Constitutional Experts, pp. 3-4,

http://www.dpc.nsw.gov.au/data/assets/pdf_file/0008/131120/06_Johnston.pdf as at 3 January 2012

²⁰ Mr David Jackson AM, QC (Chairman), Dr Elaine Thompson, Professor George Williams AO, *Recall Elections For New South Wales? Report Of The Panel Of Constitutional Experts*, 30 September 2011, NSW Department of Premier and Cabinet, p.73,

http://www.dpc.nsw.gov.au/data/assets/pdf_file/0013/134221/Panel_of_Constitutional_Experts_-_Review_into_Recall_Elections.pdf as at 3 January 2012

²¹ Hughes, *op. cit.*, p.1

In this way, a “stakeholder” can be seen as a vacuous status of virtually no value and no influence. Even a small shareholder of a major corporation can better define the value of their holding, while also having defined legal entitlements however small these may be. Yet, those of us who are disabled, elderly or otherwise deemed needy, are increasingly cajoled into accepting support services from the not-for-profit sector, often as a result of public policy, as articulated by Mr Sturgess’s remarks to the Institute of Public Administration.²²

When service recipients have no franchise in the organisations rendering assistance and further, the organisations themselves are shackled by government guidelines and memoranda in order to gain and maintain funding grants, what has been achieved? For government, the direct responsibility for providing care, whether it is in terms of labour or other infrastructure, has been moved to someone else. Despite this, if you apply a “pierce the corporate veil” argument, government remains a “controlling mind” in a charitable corporation, given the amount of money provided, the conditions that are imposed concerning expenditure and the percentage of an organisation’s budget government funding can account for.²³

This has serious consequences for any organisation that wants to remain true to its founders’ intentions and continue to truly serve the people it was established to support. The founder of PLAN (Planned Lifetime Advocacy Networks) Canada, Arthur Mudry, believed independence from government is essential. A guiding principle of PLAN is:

*Self-sufficiency makes us more effective. **Independence from government funding** enables PLAN to advocate on behalf of individuals and families without fear of consequences.*

²² Refer to footnote 13, above.

²³ While this article is from the UK, I note that writing in fullfact.org, Rima Saini observes:

According to the NCVO (National Council for Voluntary Organisations), many of those voluntary organisations who do not rely on state funding and government contracts are small organisations generating a low income, casting uncertainty on how independently sourced the funds accumulated by the third sector really are...Nigel Hawkes of Straight Statistics...states that according to a Charity Commission survey from 2006, two thirds of bigger charities, i.e. those with an income of £10 million a year, derive 80% of their income from delivering public services.

As Mr Hawkes states, bigger charities may derive a large majority of their income from the public sector but out of 162,415 charities as of December 2010, only 883 earn more than £10 million annually. These high earning charities he refers to make up a very small proportion of the total number of charities in existence.

However, the fact that they count for over half of the proportion of total income from all domestic charities serves to substantiate the unmistakable correlation between the size of a third sector organisation and the amount of public sector funding it receives. (Rima Saini , How dependent is the Big Society on the Big State?, 14 February, 2011 - 17:27, http://fullfact.org/factchecks/charity_voluntary_big_society_government_funding-2498 as at 4 January 2012)

I see little reason to believe that the situation in Australia is any different from the English example.

“If government gives you money, they have a certain amount of control, and there may be a fear of advocating there. If we earned our own money, we could advocate and hold government accountable.” – Arthur Mudry, PLAN founder²⁴

This was and remains a central theme in my continuing opposition to proposals for a National Disability Insurance Scheme.²⁵ Yet, my impression of that inquiry was that all “the usual suspects” in terms of third sector advocates, lobbyists and care agencies were circling looking for their enlarged slice of the Magic Pudding. And whether it’s Apple Dumpling or Steak and Kidney, “*the Puddin’*” is a role for which the Australian taxpayer always seems to be typecast.²⁶

Add calls for increased funds to the monies charities already receive from government and, the tax deductions donors obtain for their contributions, and we are talking about significant dollars. This is before we have even discussed the place and/or probity of corporate donations to charities. As a small shareholder myself, I’ve wondered how companies giving to charity (and no doubt claiming a tax deduction) can be classified unquestionably as “corporate social responsibility?” Surely, a firm’s key social responsibilities are to provide a return to its shareholders, employment to its staff, and quality goods and services to its customers; all within the requirements of the relevant law.²⁷ What these parties do with their slice of the corporate return (including giving to charity), should be a matter for them.²⁸ Certainly, far more questions should be asked regarding the appropriateness of

²⁴ About PLAN: Mission and Values, <http://www.plan.ca/sections/mission.html> as at 1 August 2010

²⁵ See my second submission to the Productivity Commission’s Inquiry into Disability Care and Support, Submission 186, p.8, http://www.pc.gov.au/_data/assets/pdf_file/0016/100726/sub0186.pdf as at 4 January 2012

²⁶ For my view on the treatment of the Australian taxpayer, by governments, and many in the third sector, refer to footnote 1, above.

²⁷ It is also unclear to me how giving a company’s funds to an unrelated third party (i.e.: a charity) rather than distributing it to shareholders or reinvesting it in the business can be considered as acting in the best interests of the firm. After all, “corporate social responsibility” is not listed as a duty of directors or officers of a corporation under Part 2D.1 of the *Corporations Act 2001*; see http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/ as at 5 January 2012

²⁸ Some authors defend corporate charitable giving on the basis of an agency theory, where managers are giving funds on behalf of shareholders and directors. This can put the company in a positive public light, but can make the proper supervision of management conduct and outlays difficult. For example, in an article posted on the *Harvard Law School Forum on Corporate Governance and Financial Regulation*, Matteo Tonello has written:

***Is corporate philanthropy an opportunistic (behaviour) by executives?** Agency theory suggests that managers will take actions that maximize their own utility, even if these actions are not in the best interests of shareholders. An agency relationship arises when shareholders (principals) hire managers (agents) to represent their interests in running a company. The resulting potential conflict of interest has been called the “agency problem.”*

Managers are most likely to make self-serving business decisions in companies with excess cash and little monitoring. Corporate philanthropy is one area in which managers often have discretion to use a company’s slack resources independent of business objectives. In particular, because charitable causes benefit from corporate giving, many stakeholders perceive it as a benevolent and unconditionally laudable activity. This perception results in a “halo effect” over corporate philanthropy. The “halo effect” may cause directors to fear being (labelled) misanthropes if they question giving decisions and may result in less oversight of charitable contributions than other business activities.

An executive can reap personal benefit from corporate philanthropy in several ways. Even when a gift is fully funded with company money, the executive often receives some credit. These awards, (honours), and accolades provide the executive with a psychic benefit and elevate his status in elite social circles. In addition, an executive can use corporate contributions to advance his personal preferences, for example, by supporting an organization with his ideological agenda or the pet charity of a family member. Finally, an executive can further his career by using charitable contributions to gain (favour) with board members. Although the board should be supervising the executive, they may be swayed by corporate gifts in their name to their (favourite) cause. (Matteo Tonello, Making the Business Case for Corporate Philanthropy, Posted by Matteo Tonello, The Conference Board, on Saturday August 20, 2011 at 9:16 am <http://blogs.law.harvard.edu/corpgov/2011/08/20/making-the-business-case-for-corporate-philanthropy/> as at 5 January 2012)

In my view, the “halo effect” applies to charities as well as their corporate donors. People are reluctant to be critical of those perceived to be doing “good” in the charitable sector. Thus, commentators like Vern Hughes and Rima Saini struggle to reach more mainstream media, while other government-aligned commentators like Gary Sturgess seem happy to call on (and subsidise) charities to provide public services.

This can lead to charities themselves often lacking the capacity to be self-critical, much less an ability to accept that service users may have different (and even some conflicting) goals to those presumed and/or imposed by either management or government regulators. For example, in my first submission to the Productivity Commission, I related the difficulties of dealing with a case officer from a not-for-profit brokerage agency under the Attendant Care Program (ACP). In part I wrote:

In making its inquiries, the Commission should not hesitate to both critique and be critical of both the government-run and non-government welfare/social services sector. In my experience with the ACP, it seemed assumed that recipients and their families would automatically be grateful for any service package produced (even if it didn't meet an individual's stated needs).

For example, I recall taking a telephone call early last year, at work, from my ACP service provider. She had just had a conversation with my mother, which ended badly. In short, the enquiry revolved around whether we intended staying with the ACP; the question ending with a reminder of the funding on offer. I quickly explained to her that the terms of my staying were clear: both my mother and I had one clear message from the beginning – whatever else happened we wished to retain our Homecare service. This was the one thing that, up until Ms (Name suppressed)'s intervention, was specifically refused. Therefore, I advised that I was very dissatisfied with the ACP initiative and, was prepared to leave the program. Thereupon started the provider's blackmail argument, which was that I had 'failed to consider my mother's future needs' by unilaterally exiting the program.

These comments fitted a pattern of behaviour engaged in by the provider, when it became clear to her that we were not going to say “Yes” to everything she suggested, nor be managed to her funding timeframes. At times when it suited the ACP provider, I was the client; at other times it was my mother. It never seemed to occur to her that the first thing a mother and son would do, was to check with each other as to what had been said to us. A less than subtle ‘divide and conquer’ strategy failed. After I told the provider that I thought she was little more than a bully (to which she claimed deep offence) putting down the phone only made it ring again. It was Mum, in a very distressed state, after also having been interrupted at work by a call from the ACP provider. From then on, we decided I would be the only contact point for ACP, and that would be by email...Reflecting on my ACP experience, I became convinced that the provider was having growing difficulties understanding her “unhappy customer”. Becoming increasingly shrill with me was never going to work though; I knew I could do far more damage to her Community Care organisation by leaving it, than she could ever do to me. After all, my presence brought funding, which was what, in my view lay at the heart of her concern about my potential departure. Expressing apparent concern for my mother's future health and wellbeing (and insinuating that I was being recklessly indifferent) never blinded me to what was really at stake. (Refer to footnote 16, above, pp. 21-23)

corporate philanthropy, from both the donor and recipient perspectives.²⁹ From a governance perspective, how can anyone be sure that all corporate giving is truly altruistic? And if such giving can be constructed as an act “in the best interests” of the donor firm, why should it not come with conditions, be they implied or explicit? It may be as simple as the charity preferring to buy products of the donor firm, or allowing the donor to publicise their association in marketing campaigns selling the donor’s whares. On one level, these acts may be justified and reasonable; on another it may suggest that a not-for-profit organisation has been influenced by a third party. This may or may not be detrimental to the charity’s own best interests. However, unless there is a strong membership base of service users and/or their families or representatives, there may be limited capacity to hold directors and managers to true account.

Ultimately, I question much of the bona fides of much corporate giving, and while this has something to do with the dislike one developed for grandiose fundraising events, it also has much to do with the bureaucratic, process driven burden fundraising has become. This was exemplified by my experience as the secretary of a local sports facility committee of management. It was financially supported by the sports associations who made use of it, as well as the Shire Council. However, the Council’s involvement, while financially welcome, brought with it truly absurd administrative requirements. The most notable was Council’s insistence the Sports Facility Committee seek a fund raising licence from the Department of Gaming and Racing. As I told Father Frank Brennan’s Human Rights Consultation several years ago, when citing this as an example of over-regulation in our lives:

The local Council insisted that if we (the Committee) wanted to run fundraising dinners, raffles and the like, we had to apply for a fundraising licence from the NSW Department of Gaming and Racing. The application form not only required full copies of the organisation’s constitution, copies of minutes and a mailing address, but also every member of the Executive had to provide their name, private address, date of birth and place of birth. For all this, we were generously given a two-year licence. And for what; most of the people who were going to support the facility were families involved in the sporting clubs who used the facility. Did we really have to prove our bona fides to them?...Departmental officials and council officers would probably say licensing was a means of ‘protecting the community’ from fraud. But are governments really the bodies we want to rely on to ‘protect us’? We only have to look at the current international financial crisis to see how few of our political and administrative leaders either predicted the collapse, or were immediately sure of the

This demonstrates the overwhelming power of case officers, and the liberties some feel they can take with other peoples’ lives. While I was never frightened to combat the overbearing, self-righteous social worker involved with my case, many people could well be intimidated by similar ultimatums. Yet, I am sure that most people outside the charitable sector would struggle to believe that some who work in the third sector could behave in the way described above; but they can and do. This is another reason to treat many charities like ordinary companies, thus helping to further reduce “the halo effect” and allowing donors, service recipients and government to more honestly critique the performance of charitable organisations.

²⁹ Another worthwhile contribution to the debate over corporate philanthropy is that of Victor Brudney and Allen Ferrell, *Corporate Charitable Giving*, The University of Chicago Law Review, Vol. 69; No. XX, 2002, http://www.law.harvard.edu/faculty/fferrell/pdfs/charitable_giving1.pdf as at 4 January 2012. Brudney and Ferrell suggest that seeking shareholder advice and approval may be a way of bringing greater transparency to corporate giving, while they acknowledge that there would be difficulties in obtaining information about shareholders’ preferred charities, and weighting these selections, particularly when the shareholder base is numerous and diverse. Despite this, Brudney and Ferrell argue “that the cost of considering the wisdom of such proposals is modest, and not without benefit.” I concur.

appropriate response. Multiple stimulus packages and international meetings later, millions around the globe are still set to lose their jobs and homes. This retelling of what many already know is not intended to depress you, but to rather underline the impotence of government in so many situations.³⁰

In the end, my view is that so many charities have been so radically transformed by corporatism, internally and externally, as well as by government contracting, that the notion of “charity” has become a matter of nonsense. I recommend that such bodies not only be taxed as corporations, but also be treated as political parties³¹ in terms of requirements to publicly declare from whom they are receiving money (or goods in kind), as well as limiting the classes of donors bodies can seek money from. Ideally, donations should only come from private individuals;³² this should encourage some organisations to rediscover their members (if there are any left).

To me, corporations are businesses and businesses exist to make profits, regardless of whether you wish to call the “profit” an operating surplus or not. I support business and the market economy, as sources of wealth, opportunity and entrepreneurship. As such, all “charities” who wish to retain a corporate personality should continue to be regulated by the Australian Securities and Investment Commission (ASIC). ASIC should periodically require charitable corporations to demonstrate their “dominant purpose”. ASIC should then independently form a view as to an organisation’s dominant

³⁰ *Key Consultation Questions* by Adam Johnston (submission) 10 April 2009, p.2, available from [http://www.health.gov.au/internet/main/publishing.nsf/Content/eHealth2010/\\$FILE/010_Adam%20Johnston%20pt2_31-12-09.doc](http://www.health.gov.au/internet/main/publishing.nsf/Content/eHealth2010/$FILE/010_Adam%20Johnston%20pt2_31-12-09.doc) as at 22 May 2010. And if you needed further evidence of the growing burden of silly government interventions and over-regulation, read Paul Sheehan, *Our growing wealth is matched by the explosion in crazy regulation*, Opinion, Sydney Morning Herald, 17 November 2011 <http://www.smh.com.au/opinion/politics/our-growing-wealth-is-matched-by-the-explosion-in-crazy-regulation-20111116-1nizo.html> as at 19 January 2012

³¹ While some may dispute the analogy, many of the larger charities have a high public profile, which allow them access to politicians, the media and others with influence. Indeed, consider the place of people like Cardinal George Pell or Reverend Tim Costello; they can arguably be seen as both leaders of large charitable organisations and religious figures, but also as quasi-politicians cum lobbyists. Their public statements and actions (in the name of a charitable outcome or religious conviction) are widely reported and can often trigger heated, polarised public debate. In many respects, I consider that some high profile charities, in their advocacy and public campaigning generally, are becoming less benevolent and more like US-style Political Action Committees. (PACs) This is why I support their treatment as political parties and, the placement of restrictions on their funding sources and greater scrutiny of their activities. For a summary of efforts to reform political funding in NSW see Jason Arditi, *Political Donations and Electoral Finance*, January 2010, E-Brief No 01/10, NSW Parliamentary Library Research Service, [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/PoliticalDonationsandElectoralFinance/\\$File/Political+Donations+and+Electoral+Finance+E-Brief.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/PoliticalDonationsandElectoralFinance/$File/Political+Donations+and+Electoral+Finance+E-Brief.pdf) as at 5 January 2012. For a detailed discussion of electoral funding issues and options see, for example, Dr Joo-Cheong Tham, *Towards a More Democratic Political Funding Regime In New South Wales: A Report Prepared for the New South Wales Electoral Commission*, February 2010, http://efa.nsw.gov.au/_data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf as at 5 January 2012

³² The O’Farrell Government in New South Wales is wisely in my view, trying to enact legislation to limit political donations to those individuals on the electoral role. The Premier has said previously that funds should not come from foreign nationals, corporations, or other third parties like unions. All of those interests are of course, now railing against the Bill as it enters the Legislative Council; see Josephine Tovey, *Donation reforms favour rich, inquiry told*, Sydney Morning Herald, January 19, 2012, Read more: <http://www.smh.com.au/nsw/donation-reforms-favour-rich-inquiry-told-20120118-1q6om.html#ixzz1jql1KGb1> as at 19 January 2012

purpose and make a recommendation to the Australian Taxation Office (ATO), as to that purpose. The ATO would then make a ruling for tax purposes, on the basis of ASIC's advice.

By contrast, the treatment of small trusts, unincorporated groups and cooperatives should be much simplified. The instance I gave earlier of a sports facility management committee being "required" to obtain a fund raising licence should stand as an example of what not to do. The charitable organisations in which one has felt most at home, and felt the most confidence in the integrity of members have been the radio co-op operating out of a tin shed and the local toastmasters club meeting in the local bowling club. The best "governance regulators" in places like these are members themselves. Everyone knows everyone else; everyone is a volunteer and everyone knows money is tight; so you are careful with equipment. The organisation's purpose is clear and you don't need to conduct a "corporate planning day" to work out "what the vision is;" such indulgences could not be afforded anyway. These small, "grassroots" organisations are the real charities in my view. Whether their interests would really be advanced by the creation of a new regulator is far from clear. Personally, I do not believe there would be any appreciable benefits.

If government insists though, that there is a public benefit in a new charity regulator and, that charities should continue to provide services on behalf of and/or funded by the state, then it should look to the Community Clubs model outlined by Gary Sturgess. In an address delivered to the Nature Conservation Council of NSW in 1997, he argued that community clubs had worked successfully here and overseas in preserving marine resources and dividing up limited mooring entitlements, amongst other things. In particular, when commenting on the use of public-private partnerships in the management of national parks he said:

In most parts of the world, private leases, concessions or contracts are part of the range of management instruments available to the managers of national parks. In most places, this has been so because of existing user entitlements and because, until very recently, it was thought by most park managers that people were a legitimate part of the park environment.

Given the resource constraints...it seems that public-private partnerships are an inevitable part of national park management in the future, both here and overseas.³³

Most importantly, in relation to community clubs, Mr Sturgess observed:

The opportunity also exists to organise private individuals into clubs or associations and to harness their collective self-interest by giving them a sense of "ownership" in the resources.

A notable example in this country is the Cod Hole and Ribbon Reef Operators Association³⁴ which operates at the extremely sensitive Cod Hole in the Cairns section of the Great Barrier Reef. Prior to the formation of the club, the site was dominated by individual anchoring's and the site was being abused through excessive and irresponsible use.

GBRMA (Great Barrier Reef Management Authority) worked with regular users to establish a club at the site and CHARROA was formed to establish two collectively owned moorings.

³³ Gary L. Sturgess, *Government and National Parks: A Plea for Institutional Diversity* – An address delivered at "National Parks: New Visions for a New Century" – Nature Conservation Council of NSW, Sydney NSW, 18 July 1997, p.11 (Sturgess Australia)

³⁴ See the organisation's website at <http://www.charroa.org.au/> as at 18 January 2012

Limitations on use of the public moorings and a de facto right of exclusion on the CHARROA moorings mean that use of the site has been constrained.

One or more of the CHARROA members is at the site most of the time and they police the way in which the Cod Hole is cared for. Private operators have been given an incentive in the interests of the environment.

There are numerous examples of the use of clubs in the United States and the United Kingdom, both in national parks and on private lands. In the United Kingdom, angling associations have traditionally had exclusive fishing rights over some streams and rivers. This has given them an interest in acting collectively to protect the environment. The Anglers Conservation Association takes legal action on behalf of owners to protect the resources from pollution.³⁵

This is an impressive local initiative demonstrating what smaller, local organisations can do. In my view, they have far more to recommend them than monolithic state or nation-wide organisations. The local organisation is clearly focused in terms of its purpose, has a fairly discrete and identifiable membership base and geographic area of operation. There is less danger of what might be termed “mission creep” where the organisation takes on more and more roles over time. Equally, with practical and structural limitations on growth, there is less chance of a grassroots, community club atrophying into a pseudo-bureaucracy. And while small organisations may not be perfect, if they implode due to factionalism of one sort or another, the extent of the damage to the wider population will be limited.

In conclusion, while I have serious misgivings about government asking the third sector to deliver more public services, there are several ways of addressing such concerns. Emphasising the importance of members (a concept which can easily be lost in larger organisations) and having the sector honestly examine how it changes when it accepts government money, would be good places to start. The Government should also reconsider how it treats charitable corporations for tax purpose, as well as the application of a dominant purpose test to ensure a body’s purpose remains charitable over time. There should be limits on donations, conditions on who can make them and greater limits on tax deductibility. Finally, administration should be reduced, if not eliminated, for small clubs and associations. Small private ventures, like CHARROA described above, should be encouraged, while large corporate bodies, presenting as charities, should be closely scrutinised.

Yours faithfully,



Adam Johnston³⁶

19 January 2012

³⁵ Sturgess, *Government and National Parks*, op. cit., p.13

³⁶ All views expressed in this submission are mine alone, as are any errors and omissions.