

# **Submission to the Consultation Paper: Review of not-for-profit governance arrangements, December 2011**

Submission made by

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## **Introduction**

In addition to addressing the specific consultation questions, this submission provides some comment on principles based regulation and the role of guidance material issued by a regulator. I have also made some observations on the competing priorities of reducing red tape on the one hand and increasing accountability on the other, and the need for proportionality in the regulatory requirements.

This submission draws on my experience of working and volunteering in the not for profit sector; and on my employment in the public and private sectors in roles that involved working for and with regulatory agencies, and implementing regulatory requirements.

The creation of a public register of not for profit entities is only valuable if it is a comprehensive catalogue of not for profit entities. To achieve this, the register needs to include not for profit entities which currently exist and have been created under a range of Commonwealth, State and Territory laws.

On the other hand, the object of minimising regulatory duplication is only achieved if such entities can be registered without having to comply with compliance obligations imposed by the ACNC Bill and the ACNC itself.

I submit that the governance requirements of the ACNC Bill should not be applied to NFP entities that are created and/or governed under other regulatory jurisdictions.

The comments in this submission on governance requirements are made on the basis of what should apply to a NFP entity that is created after the Bill is implemented, and which is not created under, or regulated by other legislation. For such an entity it is envisaged that the ACNC will be 'the regulator' rather than an 'additional' regulator. It is acknowledged that there are a number of challenges to achieving this, not the least being the relationship with State and Territory based laws and regulations, but the benefits of a uniform 'one stop shop' regulator are worth the effort.

## **Principles based regulation and guidance**

I support the general conclusion of the discussion paper that the governance requirements for the not-for-profit sector should be principles based. The NFP sector is extraordinarily diverse, with entities that have a range of different purposes, structures, and resources. There are some common, high-level characteristics shared across the sector, which lend themselves to the adoption of some common principles for governance. A more prescriptive approach to regulation is likely to result in an excessive burden of regulation on many entities, and inadequate regulation for others. And any attempt to tailor prescriptive governance requirements for different types of entities will result in greater regulatory complexity, with a plethora of rules, disputes about how entities should be categorised, and increased compliance costs. Principles based regulation is clearly the best option.

Principles based regulation does however; require a high level of maturity on the part of the regulator. It requires the regulator to make subjective and qualitative assessments about whether the broad principles are being met by individual entities. This is more challenging than the 'tick the box' approach that can be taken to assessing compliance with more prescriptive requirements. The implications of principles based regulation need to be considered carefully in establishing and resourcing the ACNC.

Principles based regulation also provides a challenge for the regulated entities. Applying the governance principles to an entity's own operations requires the development of policies, processes and procedures. Such development requires a level of sophistication and resources that is beyond the capabilities of many entities and has the capacity to divert resources from the entity's purpose.

For this reason I support the provision of guidance by the regulator, including 'template' policies and governance documents which can be easily adapted and adopted by entities, and these should be as comprehensive as possible.

The reality is that over time, many new entities (probably the majority) will choose to adopt the guidance, and it should be as easy as possible for them to do so. The uniformity of practice that will accompany widespread adoption of the guidance will make the task of regulating the sector easier for the regulator. However, entities which choose to comply with the governance principles in other ways should not be penalised or disadvantaged for doing so, and should not be subject to pressure to adopt the guidance.

In an environment in which a regulator provides guidance which is widely adopted, it becomes easy for the guidance material to assume the status of 'quasi legislation', with the regulator adopting the guidance as the benchmark against which an entity's governance framework is measured, rather than being assessed directly against the principles. In my experience, this phenomenon has been evident in other industry sectors, such as financial services, where the regulators- the Australian Securities and Investments Commission, and the Australian Prudential Regulation Authority- provide 'guidance' which is almost universally adopted by entities and where there is clear pressure from the regulators for entities to follow the guidance. In such an environment, 'guidance' becomes quasi-prescription.

The provision of guidance to NFP entities must be subject to the clear understanding that these documents are for guidance only, and that alternative means of applying, and complying with, the governance principles are both possible and legitimate. Further, where the regulator questions an entity's governance, the burden of proof for demonstrating that governance requirements are inadequate should rest with the regulator, rather than the entity being required to demonstrate that its processes are adequate- a presumption of compliance ('innocence') rather than non-compliance ('guilt').

## **Competing priorities**

The review of the not-for-profit sector is part of the government's broader reform agenda for the not for profit sector.

The twin aims of the reforms appear to be to:

- promote the good governance, accountability and transparency of NFP entities, and
- to minimise regulatory duplication and simplify such entities' interactions with governments.

The basis for the latter aim is well established and generally supported by the sector as a whole. It seeks to benefit the NFP sector by reducing its operating costs, making entities easier to operate and by removing a disincentive for individuals to become involved in NFP entities. (No one joins the committee of a local community group so that they can fill in more government forms and deal with more bureaucracy, but many people are deterred by these responsibilities.)

The first aim is multidimensional. Good governance, accountability and transparency are separate although related concepts. It would appear from this consultation paper that requirements to promote governance are sometimes confused with measures to promote accountability and transparency.

It is acknowledged that certain benefits are bestowed on the NFP sector at a cost to the community more generally. Public benefits enjoyed by NFP entities vary but include:

- The ability to enter contracts and commercial transactions as an entity in a manner that limits the personal liability of the membership
- Access to exemptions from income tax and other Commonwealth and State Government taxes
- The ability to collect donations for which the donor is able to claim an income tax deduction (which provides an incentive for the public to make donations)
- Access to direct funding from different levels of Government
- In-kind support, such as free or subsidised access to publicly owned sporting and recreational facilities.

The public interest is protected by ensuring that these benefits are bestowed and used appropriately, and this requires a level of public accountability and transparency.

Additionally, the NFP sector provides many economic and social benefits to the community, (which is the reason why the sector receives public benefits and support). In this broader sense, the public interest is also served by promoting the effective and efficient operation of the NFP sector. To this extent the Government has a role in promoting and facilitating good governance by the NFP sector. However, while it can set the scene, the Government cannot deliver good governance by the NFP sector- responsibility for this rests with the NFP entities.

There is an inherent tension between the two objectives, as improving the governance, transparency and accountability of the sector necessitates imposing some regulatory requirements which come at an administrative and compliance cost for regulated NFP entities. A compromise is necessary, which strikes an appropriate balance between the two.

Primary responsibility for governance rests with an entity's governing body, and its primary accountability is to its membership /stakeholder group.

The extent of the accountability to Government should be commensurate with the extent of the public benefit provided to NFP entities. This varies widely between entities, depending on the categories of benefits an entity receives and the size of the organisation. For example the value of an exemption from income tax for a small recreational club, even though it is entitled to it, may be negligible, whereas this benefit may be very significant for an entity with a large staff and millions of dollars in revenue.

While there may be a case for increasing the accountability of some parts of the NFP sector, the justification for this, and the extent of the need for increased accountability, need to be considered at the sub-sector level.

The point at which the balance is struck should depend on the nature of the regulated entity, with some entities requiring further public accountability and therefore subject to greater regulation than others.

For entities that receive little or no public benefit, the scales should be tipped in favour of reducing red tape rather than increasing accountability, by minimising the registration and ongoing reporting requirements.

While reducing red tape and improving accountability are competing objectives, there may well be some opportunities to improve the transparency and accountability of the sector while at the same time reducing the current red tape. This can be achieved by replacing existing regulatory obligations with new requirements that are just as effective but are easier to comply with, and this should be an objective of the review of governance requirements. (Increased use of technology has a role to play in this regard.)

While the consultation paper recognises the tension between reducing red tape and increasing accountability, and I support the consultation paper's proposal for proportionality, I question whether the paper is starting at the right point.

While acknowledging the variety of entities across the NFP sector and referring to the need for proportionality in the regulatory response, the paper nonetheless seems to pre-suppose that all NFP entities either receive government funding, donations from the public, or some other public benefit, that this benefit is significant, and that all NFP entities should be subject to greater accountability and transparency. For example, at paragraph 33, the report states

*NFPs play a unique role in Australia, and as a result are funded by governments, both directly and indirectly, and by donations from members of the public. This unique role means that governments often afford them special treatment by way of grants, tax concessions and exemptions from a range of laws and fees.*

A similar view is reflatd at paragraph 106:

...Given that NFPs are in receipt of public support, there is placed upon them high community expectations, thereby making transparency and accountability very important. In addition, NFPs rely heavily on their reputation in the community, and a lack of transparency may lead to a loss of donations and lower levels of volunteering.

I submit that the assumption that all NFP entities receive significant government or public support is incorrect. While this may be true of the largest and most important NFP entities it is not true of many entities. There are approximately 600,000 NFP entities in Australia. In paragraph 1.12 of the explanatory memorandum to the exposure draft of the ACNC Bill 2012, it is estimated that approximately 400,000 of the 600,000 NFP entities receive Commonwealth tax concessions.

Many of the 600,000 NFP entities are sporting and recreational clubs, which operate to provide services to their members and are funded by their members. (These entities would appear to be 'not-for-profit entities that provide public benefits' as defined in the exposure draft of the Australian Charities and Not-for-profits Commission Bill 2012.)

There are also other entities which are focused on providing services for their membership rather than any sector of the broader community, and are funded by their membership. (Whether some or all of these entities are 'not-for-profit entities that provide public benefits' is less clear.)

The justification for public accountability and regulation to protect the public interest is strongest where entities receive some form of public support in the form of government funding, public donations, tax concessions or exemptions etc.

For entities that do not receive public support, the argument for public accountability is weak and there is only limited, if any, public benefit in regulating their governance requirements. (There is no evidence of widespread mismanagement of NFP organisations which would justify intervention on behalf of their membership.) There may still be good public benefit arguments for a publicly accessible register of NFP entities, but requiring registration is much less onerous than prescribing governance requirements. (A couple of examples of such entities is provided at Appendix 1.)

In assessing the regulatory requirements for these entities the starting point should be whether these entities should be subject to public accountability at all, and if so, whether the current regulatory requirements are excessive.

If this is not the starting point, there is a risk that these entities will be subject to excessive regulation, with the balance between reducing red tape and improving public accountability swinging too far in favour of public accountability. This imposes unnecessary costs on the entities, and also increases the costs of regulation without any concomitant public benefit.

## **Governance, public accountability, and disclosure**

There may be some public benefit in a minimum level of public disclosure and accountability for all NFP entities, but it is important that the case for this is made independently, and that the public benefit of such disclosure is not confused with the entities' own requirements for good governance.

While the principles of good governance require each entity to be accountable to its own membership, good governance principles do not require all entities to be accountable to the Government or to the general public, or to make public disclosures.

The question needs to be asked why entities such as these should be accountable at all to the public or a government agency for the way in which they govern themselves. What disclosure should they be required to make to a government agency or the public? And to what extent should the government determine how the entity operates or governs itself? Any consideration of new governance requirements for such entities needs to consider not only whether governance requirements can be increased, but also whether governance requirements for some entities are already too onerous under existing regimes and should be relaxed in the new ACNC regime.

The following responses to the specific consultation questions are provided within the context of the above comments.

## Consultation questions

The governance requirements of the ACNC Bill should not be applied to NFP entities that are created and/or governed under other Commonwealth, State and Territory regulatory jurisdictions.

The responses to the consultation questions are made on the basis of what should apply to a NFP entity that is created after the Bill is implemented, and which is not created under, or regulated by other legislation.

### 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?**

The legislation should not seek to determine the particular classes or groups that an entity's responsible individuals must consider when exercising their duties. However, each entity applying for registration could be required to specify the category of persons to which it is accountable in its application for registration- eg. 'members'.

#### **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?**

The entity's mission and/or purpose will determine whose interests it must consider.

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

The primary duty of the responsible persons should be to make decisions in a manner that is consistent with the mission and/or purpose of the entity. Responsible persons should also be required to comply with the entity's governing rules.

#### **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?**

This has been an area of significant debate in financial services, where the duty owed by financial planners to clients has been contrasted with the fiduciary duty owed by trustees of superannuation funds and registered managed investment schemes.

The legal distinctions that have been made between various formulations of the wording are largely lost on lay people, and while it is important that any formulation have an acceptable legal meaning, it is equally important that it have a meaning that is clearly understood by members of the public who are responsible persons of NFP entities, or considering becoming a responsible person. A formulation that is not able to be clearly understood or is too onerous can discourage individuals from accepting positions of responsibility with NFP entities.

I am not in a position to propose a particular formula for the wording, and will leave this to the legal experts. As a general statement, decisions must be made in good faith, and after appropriate consideration/deliberation. How and what should be considered will depend on the perceived significance of the decision and the individual's own abilities.

#### **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 should be no such requirements stipulated for smaller entities that receive little or no public benefit.

For larger entities, consideration could be given to requiring the Treasurer or equivalent individual to meet a minimum standard of financial literacy either through a qualification or experience. Alternatively, rather than a governance requirement, this could be a condition for receipt of Government funding in excess of a certain dollar value , for example.

While there might be some merit in seeking to require the Chairperson or equivalent of an entity to have some qualification or experience in conducting meetings etc. I do not believe that this should be a requirement. Instead, appropriate guidance and training materials could be provided by the ACNC. (There are community agencies in existence that provide training and educational materials of this type.)

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

See above, Treasurer or equivalent only, for larger entities

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

This depends on the extent of the governance requirements. If the requirements are truly principles based, and at a high enough level, standardisation is both possible and desirable. If the duties of responsible persons were to be more prescriptive, this could have the effect of placing a governance 'straitjacket' on entities, limiting how and when they exercise their duties in a manner that may lead to inefficient and burdensome governance practices, and detract from good governance. (Strict adherence to prescriptive but inappropriate governance requirements can sometimes be advanced as a justification for decisions which are not consistent with the broader governance principles.)

**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?**

Responsible persons need to be accountable to their stakeholder group while still having sufficient executive authority to ensure the entity functions effectively. At a minimum there should be a requirement for the responsible persons to engage with their stakeholder group.

What form this engagement should take, and the extent to which the views of the stakeholder group must be considered is a matter for the entity's governing rules and should not be prescribed by legislation.

As a matter of good practice, NFP entities should undertake periodic reviews of their governance and management structures, to assess whether they continue to have the right number of responsible persons and whether they continue to have responsible persons with the right level of skills and expertise. This is particularly relevant at points of major change or transformation, such as becoming an employer, significantly increasing revenue, or receiving a government grant. While it is not appropriate to mandate such a review on a regular basis for all NFP entities, this is a matter which could be addressed in guidance issued by the ACNC.

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

Generally, no. There will continue to be entities whose own structure will impose higher governance standards- eg. entities operating trusts will be subject to a fiduciary duty. There may also be instances where higher governance standards are imposed by a third party, for example where the



provision of a government grant contractually requires an entity to undertake certain actions, such as evaluation of a program's effectiveness, or consultation with stakeholders. However the governance standards imposed by legislation on NFP entities should not be higher for different entities.

This position on governance standards should be distinguished from accountability standards for entities. It is, for example, reasonable to impose higher financial and other reporting standards and requirements on larger entities, such as requiring audited financial statements.

**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?**

There is no specific preference. The important thing is that the core duties have a clear legal meaning but are also expressed clearly and concisely so that a member of the public can understand them.

**Disclosure**

Part 6.2 of the Consultation Paper deals with disclosure and conflicts of interest. In relation to disclosure, it is unclear whether the Paper is dealing with disclosure to the entity's own membership, the regulator, or what information the regulator should make publicly available. This distinction is important because disclosure to each of these groups is for different purposes.

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

It is unclear why this question is focusing on disclosure to ensure the existence of good governance procedures rather than actual good governance. Responsibility for ensuring good governance rests with an entity's stakeholders (usually its membership). The appropriate level and type of disclosure required to the entity's stakeholders will vary from one entity to another and depend on a range of factors. These include the size, structure and purpose of the entity, and the level of engagement of the members/stakeholders. The ACNC legislation should not specify requirements for disclosure to members.

In respect of the ACNC, it is not clear that it is charged by the legislation with ensuring that good governance procedures are in place for regulated entities. The most relevant object of the Act is to promote good governance, and the relevant functions of the Commissioner are to monitor and investigate entities for the purposes of the Act, and enforcing the Act.

As such, the information that should be disclosed to the Commissioner should be the information it requires for its functions. It needs to be recognised that disclosure of information to the Commissioner necessarily places a burden on entities, and should be kept to the minimum necessary.

I propose the following model for the disclosure of information to the ACNC by NFP entities in receipt of no or insignificant government benefits.

Such entities should only need to provide the basic detail about their operations, including the name of the group, its purpose and the contact details of two of its responsible persons. On an annual basis, the primary contact person should be asked to confirm that the recorded details remain correct (or update them) and make a declaration that the entity continues to operate for the stated purpose, is active, and remains accountable to its members.

There should be a presumption that this information is correct. The Commissioner should have the power to require further information to be provided in support of an individual investigation or on a 'project' basis, but basic entities should not be required to provide large amounts of information on a routine basis for statistical purposes. Basic entities should not be subject to an obligation to ensure that the information recorded with the Commission remains up to date, relying instead on annual updates. This risk based approach to registration and regulation will lead to a more efficient use of public and NFP entities' resources.

Disclosure for larger entities and entities that receive significant public support could be more substantial, and some details could be required to be updated more regularly. This would be a reasonable balance between regulatory burden and public accountability.

Public disclosure is another matter again. It is not apparent that public disclosure serves any purpose as a governance tool, and disclosure to the public will not ensure good governance practices are in place.

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

Again, it is not clear to whom it is intended that the remuneration should be disclosed.

Disclosure of remuneration has been a relatively recent development in the corporate sector, where there has been a demand for this from shareholder groups, as form of accountability to shareholders.

Disclosure to the members of an entity of the salaries of its employees may be of some benefit to the members in assessing the operation of the entity, but I submit that the nature and form of this disclosure is a matter for the individual entities rather than the Government to determine.

In relation to members of the public, potential donors may benefit from information about the overall expenses and overheads of a charity, but the specific remuneration of individual responsible persons is probably less relevant and may even be misleading. For example, a charity that pays its CEO \$150,000 per annum but expends a low percentage of donations on administration and overheads may be more worthy of support than a charity that pays its CEO less but expends a relatively higher percentage of donations on administration and overheads.

There is no justification for public disclosure for an entity which does not raise funds from the general public.

The public disclosure of the remuneration of individuals in publicly listed companies is a relatively new and controversial practice, and its full effects have yet to be seen. While this information may be useful to a shareholder, it is unlikely that a 'normal' member of the public making a donation to an entity will seek this information before making a donation. Individuals making a large donation or contribution to an entity are likely to have their own criteria and to seek a range of information from an entity before supporting it.

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

Conflicts of interest and duty are invariably situation specific. What constitutes a conflict will vary from one situation to another and from one entity to another. While an entity and its responsible persons have an obligation to manage conflicts of interest in a manner that gives appropriate priority to the interests of the entity, the means by which entities can and should manage conflicts of interest will vary enormously.

While the proposed criteria are generally good, there will be situations and entities for which these are not appropriate. In particular, requiring the avoidance, rather than management of conflicts can be problematic for many entities, particularly small entities with small governing bodies. For this reason, I don't support including the suggested criteria for management of conflicts of interest in the ACNC Bill.

The ACNC Bill should require that entities appropriately manage any conflicts of interest, and have appropriate regard to conflicts of interest and duty when making decisions. The ACNC can, and should provide guidance and draft conflicts of interest policies, but neither the ACNC nor the legislation should mandate how conflicts are to be managed.

**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)?**

Generally, no. The same principles for managing conflicts of interest remain relevant.

**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'?**

As stated above, the Bill should require that all entities appropriately manage conflicts of interest. The governance obligations should not stipulate the types of conflicts that should be managed or how these should be managed.

## **Risk Management**

In its most basic form, risk management is integral to decision making, whether by an individual in their own lives, or by a group of individuals. We all do it every day.

Risk Management has evolved into a distinct practice or discipline, whereby risks associated with a particular decision or activity are explicitly considered and assessed, and in which strategies to reduce risks are developed, implemented and monitored. In this regard it is a management tool to enhance decision making, and good decision making is integral to good governance.

Risk Management as a discipline is particularly relevant where the decisions that are being made are significant to the individual or entity; the environment is complex; there are a range of possible options; and there are a number of factors that can affect the outcome of the decision.

While the concepts are not necessarily difficult to grasp, the Risk Management discipline has its own terminology, methodologies, risk matrices and tables. The uninitiated can find this intimidating and confusing, and it often requires the involvement of risk management professionals to assist an entity's governing body with the formal risk management process.

Paragraph 127 links risk management to specific processes, suggesting that it is risk management as a distinct practice or discipline that is being contemplated in the consultation paper.

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

Firstly, not all NFPs control funds from the public, so the premise for the question is incorrect. Furthermore, Risk management is a management tool, not a governance requirement. No specific requirements in relation to how entities manage their risks should be included in the legislation. Formal risk management disciplines are not relevant to all decision making or to all entities. Furthermore, their use can impose an unjustifiable expense on small NFP entities, and can alienate and confuse responsible individuals who are not familiar with formal risk management techniques.

(Paragraph 129 provides as a justification for all entities having risk management procedures that 'NFPs are relied on by the community, and could represent the most vulnerable people.' This is also not an appropriate justification for requiring all entities to have explicit risk management practices. )

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

No. See above.

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

No. While insurance may be appropriate for some NFP entities, it will not be appropriate for all. And what 'unforeseen circumstances are to be insured against?

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

No. Whether indemnity insurance is appropriate and even available will depend on the nature of the entity and its activities. For entities with very limited activities and revenue, indemnity insurance could be unwarranted and impose an unreasonable cost on the entity.

**20. What internal review procedures should be mandated?**

There is no apparent justification for mandating reviews beyond those currently required by other laws, which primarily relate to statements of account.

## **Governing Rules**

The consideration of good governance necessarily requires the consideration of governing rules. All human activities that involve two or more people coming together over an extended period for a specific purpose operate with some rules. Even a group of three friends who catch up regularly for lunch will operate with some 'rules' – how often they meet, the types of places they will meet in (food and price range), who makes the booking.

In the case of a NFP entity that is registering with the ACNC, it is reasonable to expect that the entity will have written governing rules which bind the responsible persons and the membership.

The legislation should, however, provide flexibility about how these rules are recorded. It could even provide that certain rules contained in legislation are deemed to be part of the governing rules of the organisation, and that, for example, information provided in the registration form about the mission, purpose and membership of the group form part of its governing rules. Such an approach would enable entities to fill any 'gaps' in their governing rules which might otherwise prevent them being registered through the registration process itself. For small entities in particular this could provide a significant reduction in red tape, particularly in the transition to the new regulatory regime.

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

The governing rules should cover:

- The purpose/mission of the entity
- Eligibility for membership or equivalent (where applicable)

- Where a sub group of the membership is able to make decisions for the entity, rules about the election or appointment of these responsible persons and provisions for their removal/re-election/re-appointment.
- Where a sub group of the membership is able to make decisions for the entity, the authority provided to these responsible persons, and what decisions and discretions are reserved for the broader group. (This would include the ability to transact on behalf of the entity, open bank accounts, incur debts and otherwise bind the group.)

Where an entity already exists under a different jurisdiction, eg. as an incorporated association under state law, there should be no additional requirements imposed as a condition of registration with the ACNC.

**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?**

No. In addition to the core requirements to be included in legislation, the ACNC should be able to provide guidance but not mandate requirements. Such a power would seem to go beyond the ACNC's role of 'promoting' good governance.

**23. Who should be able to enforce the rules?**

An entity is primarily accountable to its members, and the enforcement of an entity's rules rest with the membership. Where a member believes there has been a breach of the governing rules, he/she is entitled to lodge a complaint and/or take other action.

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

It is not apparent that there is any need for the ACNC to have such a role.

**25. Should model rules be used?**

Model rules can be provided as a template to be used by new entities on a voluntary basis, but should not be mandatory.

**Relationships with Members**

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

Where a sub group of the membership is able to make decisions for the entity, the governing rules should specify the authority provided to these responsible persons, and what decisions and discretions are reserved for the broader group. (This would include the ability to transact on behalf of the entity, open bank accounts, incur debts and otherwise bind the group.)

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

No. Non-membership based entities, such as trusts, typically already have their requirements determined by their governing rules which are created under existing legislative requirements.

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

No. The means by which the responsible persons are held accountable to, and provide information to, the membership should be determined by the entity itself.

## 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 comment.

**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?**

This is only possible if the governance requirements only apply to entities that are not covered by other jurisdictions. For example, if an entity is an incorporate association under State law, it should be able to be included in the register maintained by the Commissioner without being subject to regulation of its governance requirements by the ACNC.

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

No comment.

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

No comment.

**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?**

No comment.

## **Appendix 1: Example of member based NFP entities receiving little or no public benefit.**

### **Ballarat Chess Club**

It is an association incorporated in Victoria with a membership of 37, and seven office bearers. It imposes membership fees on its members, (\$125 annually for adults, and \$75 concession). The purpose of the club is to bring individuals together to play chess against each other and to compete as a club against other chess clubs. (As such it appears to provide a 'public benefit' under the exposure draft, as a club that encourages games or sport'.)

The public benefits the club receives appear to be very limited if non-existent. The Club meets at the Central Highlands Library and in doing so potentially receives some in-kind public support. The Ballarat Chess Club does not have an ABN and does not appear to receive any other public benefit such as exemptions from income tax.

(I have no personal knowledge of the club, and the information I have has been obtained from its website, [www.ballaratchess.com](http://www.ballaratchess.com).)

### **Association of Superannuation Funds of Australia**

An example of a quite different and larger entity is the Association of Superannuation Funds of Australia, a public company limited by guarantee. Its membership consists of individuals, trustees of superannuation funds and service providers to the superannuation industry. Its mission is *'to advance effective retirement outcomes for members of funds through research and advocacy, and to serve ASFA members by providing a range of services'*. In 2010/11 it had \$10.6 million in revenue and \$10.3 million in expenses. Its income is generated from its membership base, it does not receive any government funding, and does not solicit funds or donations from the public. It does receive an exemption from income tax.