

Submission

Review of not-for-profit governance arrangements
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1. INTRODUCTION

I make this submission not as a CPA, but as a long-time volunteer in Australian NFPs, particularly as a director. (I am also a public servant who frequently has occasion to check, or see the effect of, governance decisions in organizations whose main, or even sole, source of funds is government grants, but I am not speaking on behalf of my employer in this submission.)

In the last few years I have been, both through Indigenous Community Volunteers (ICV) and privately, helping Aboriginal and Torres Strait Islander organisations with practical governance. I say 'practical' because I am not a lawyer, regulator or consultant interested only in the formal frameworks of governance, for instance constitutions and organizational reporting relationships, but also with the day-to-day decision making by those charged with the governance of the organization. The organization may have the right members' rules, policies, and operating manuals in place, but this doesn't assure good governance - these people also need help with 'governance' in the sense of the organization achieving what it is meant to be achieving (which includes being accountable to whom it needs to be accountable.)

I also believe that there is nothing inherent in the nature of NFPs that warrants different 'governance arrangements' than those that are best practice in for-profits.

I am currently mentoring the board of an Aboriginal health service in Far North Queensland. This follows a successful similar role last year with a group of Aboriginal in the Northern Territory. I am also, since 2008, the accountant (remotely) for a small Cape York Aboriginal children's charity.

I have studied governance, and am a former Fellow of, and trainer for, the Australian Institute of Company Directors.

2. SHOULD IT BE CLEAR IN THE LEGISLATION WHO RESPONSIBLE INDIVIDUALS MUST CONSIDER WHEN EXERCISING THEIR DUTIES, AND TO WHOM THEY OWE DUTIES TO?

If by 'be clear' you mean that any NFP will be able to read from the legislation a list of people, organisations, or groups to whom it owes a duty, then, no. If however, you mean the inclusion of the principles for determining who these 'stakeholders' should be in any particular case then yes. The latter approach is consistent with a belief that the directors of an organisation are trustees primarily for people who are in the position, if not legally, then morally, of owners, and that this group varies from organisation to organisation. And that this group sits above all others in a ranking of those who think they are owed accountability by the organisation.

3. 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?

You say in the Consultation Paper (CP) that NFPs are accountable to ‘many groups’. While this may be true in a very general way, you have not offered any evidence for these accountabilities, and particularly, since trade-offs are inevitable, any way of ranking them. For instance, in paragraph 89.1 you imply that the beneficiaries of a NFP are on an equal footing to those closest to an ownership relationship (usually members). But on what grounds can you say that beneficiaries are entitled to ‘oversight’ the NFP?

You say that *‘as these requirements are based on a director-shareholder/member relationship, they may not be sufficient for a NFP entity’*. This does not fit with the evidence that they have quite happily applied to a major grouping of NFPS, incorporated associations, for many years.

4. WHAT SHOULD THE DUTIES OF RESPONSIBLE INDIVIDUALS BE, AND WHAT CORE DUTIES SHOULD BE OUTLINED IN THE ACNC LEGISLATION?

The duties should be those that are now well settled for companies (and associations).

By the way, duties don’t provide ‘oversight’ [paragraph 90]. Duties, if followed, constrain how the directors go about the job of governance, but they are not themselves governance. Governance is about ensuring that the organisation achieves, by appropriate behaviour. Duties help define ‘appropriate’.

5. 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?

For a minimum standard of care, look at the current law on directors’ duties.

For me, as a professional accountant, whether or not I am paid makes no difference to how I work – the job of governance is invariant to who is doing it and whether or not they are paid.

As for professionals, use the current law on negligence.

6. 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)?

Qualifications? No, not in the way this word is usually used. There should be the usual hurdles like legal capacity, but to require particular qualifications would be overkill and a huge disruption on the economy. The same with experience and skills – it is sufficient that those who elect or appoint these individuals do so with knowledge of the job that they will be required to do.

7. SHOULD THESE MINIMUM STANDARDS BE ONLY APPLIED TO A PORTION OF THE RESPONSIBLE INDIVIDUALS OF A REGISTERED ENTITY?

No. This would imply that there some directors who are required to be less ‘responsible’ than others; however there is only one position, that of director (with its attendant duties).

8. ARE THERE ANY ISSUES WITH STANDARDISING THE DUTIES REQUIRED OF RESPONSIBLE INDIVIDUALS ACROSS ALL ENTITY STRUCTURES AND SECTORS REGISTERED WITH THE ACNC?

Not if you keep them at what you call ‘high level’.

9. ARE THERE ANY OTHER RESPONSIBLE INDIVIDUALS’ OBLIGATIONS OR CONSIDERATIONS OR OTHER ISSUES (FOR EXAMPLE, SHOULD THERE BE REQUIREMENTS ON VOLUNTEERS?) THAT NEED TO BE COVERED WHICH ARE SPECIFIC TO NFPS?

No.

10. ARE THERE HIGHER RISK NFP CASES WHERE A HIGHER STANDARD OF CARE SHOULD BE APPLIED OR WHERE HIGHER MINIMUM STANDARDS SHOULD BE APPLIED?

No.

11. IS THERE A PREFERENCE FOR THE CORE DUTIES TO BE BASED ON THE CORPORATIONS ACT, CATSI ACT, THE OFFICE HOLDER REQUIREMENTS APPLYING TO INCORPORATED ASSOCIATIONS, THE REQUIREMENTS APPLYING TO TRUSTEES OF CHARITABLE TRUSTS, OR ANOTHER MODEL?

The Corporations Act. Why reinvent the wheel?

12. WHAT INFORMATION SHOULD REGISTERED ENTITIES BE REQUIRED TO DISCLOSE TO ENSURE GOOD GOVERNANCE PROCEDURES ARE IN PLACE?

After you specify what good governance is, then you can select measures to be reported to show whether or not the organization has good governance.

However, with good governance being about much more than rules and lists of duties, some of the indicators will be hard to measure.

By the way

- ‘Good governance procedures’, whatever you decide they are, do not ensure good governance. It is relatively easy to put procedures in place, but without a system of monitoring, and sanctions, many of these will not produce the result required.
- There is not a strong connection between disclosure, particularly financial information, and the ability to raise donations [paragraph 106].
- Accounting standards are as much, if not more, about classification and measurement, than disclosure [paragraph 110].
- The suggestion in paragraph 111 implies that, contrary to the CP’s prior, very sound, arguments that donors should be protected, some donors, those giving to small organisations, deserve less protection. How can this be defended?

13. SHOULD THE REMUNERATION (IF ANY) OF RESPONSIBLE INDIVIDUALS BE REQUIRED TO BE DISCLOSED?

To the owners, yes. And also to anybody who is going to donate or lend to the organisation.

14. ARE THE SUGGESTED CRITERIA IN RELATION TO CONFLICTS OF INTEREST APPROPRIATE? IF NOT, WHY NOT?

I presume you mean your ‘sample policy’. If so, it’s a start – see my comments below.

A sample policy might include that:

- *a responsible individual should avoid any conflict arising between their personal interests (or the interests of any other related person or body) and their duties to the entity;*

At times it is impossible to avoid a conflict.

- *a responsible individual must not take advantage of their position to gain, directly or indirectly, a personal benefit, or a benefit for any associated entity (their wife, say, or a commercial entity);*

‘Not take advantage’ is too broad.

- *a responsible individual shall not make use of inside information (such as knowing the details of a tender application of a NFP and using this to undercut it);*

This requirement is subsumed in the second one above.

- *the personal interests of a responsible individual member, and those of associated individuals, must not be allowed to take precedence over those of the entity generally;*

Who is doing the allowing?

- *a responsible individual should seek to avoid conflicts of interest wherever possible. Full and prior disclosure of any conflict, or potential conflict, or the appearance of potential*

conflict, must be made to the decision-making body. Once the conflict has been declared, responsible individuals must decide whether the responsible individual should:

'Seeks to avoid' contradicts the first requirement above.

- *refrain from voting (this is a minimum);*
- *refrain from participating in the debate;*
- *withdraw from the meeting during the debate and the voting;*
- *suggest that the responsible individual consider resigning; and*
- *where possible, develop should develop (sic) guidelines on what kinds of appearance of conflict call for what level of care.¹ [paragraph 126].*

This point doesn't fit under the heading.

15. 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)?

Use the model in the CATSI Act.

16. 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'?

Neither. Conflict of interest is situational, the possibilities wide-ranging, and often as much a perception as a 'personal interest'.

17. GIVEN THAT NFPS CONTROL FUNDS FROM THE PUBLIC, WHAT ADDITIONAL RISK MANAGEMENT REQUIREMENTS SHOULD BE REQUIRED OF NFPS?

Additional to what? Risk management is a normally part of the board's duties, and the source of the funds will be one thing that is taken into account when making a plan to manage risk.

18. SHOULD PARTICULAR REQUIREMENTS (FOR EXAMPLE, AN INVESTMENT STRATEGY) BE MANDATED, OR BROAD REQUIREMENTS FOR NFPS TO ENSURE THEY HAVE ADEQUATE PROCEDURES IN PLACE?

The latter.

¹ http://www.ourcommunity.com.au/management/view_help_sheet.do?articleid=757

19. IS IT APPROPRIATE TO MANDATE MINIMUM INSURANCE REQUIREMENTS TO COVER NFP ENTITIES IN THE EVENT OF UNFORESEEN CIRCUMSTANCES?

No. Insurance is only one response to risk, part of a plan to manage risk. Risk management could be mandated, but how do you select a 'minimum insurance requirement' other than to say, maybe, that insurance should be considered in risk management?

By the way, what evidence do you have that the insurance needs of NFPs are different to those of for-profits? [paragraph 136]. And I don't think that the effect of an unforeseen event is a point of difference between NFPs and for-profit companies. Size is more likely to be the main determinant. [paragraph 137].

20. SHOULD RESPONSIBLE INDIVIDUALS GENERALLY BE REQUIRED TO HAVE INDEMNITY INSURANCE?

No. It is the organization that should insure against these risks, not the directors. Directors, once they realize their risk, demand such insurance.

21. WHAT INTERNAL REVIEW PROCEDURES SHOULD BE MANDATED?

None. Whatever you mean by an 'annual internal review' there is too much variety in the complexity and way NFPs operate to mandate particular procedures. A board that understands good governance will review or check what it needs to review or check when required, and in a manner suitable for that organization.

By the way, you need to distinguish between the annual audit prepared for the members and internal reviews or audits. They are not substitutes. And a 'review', will not necessarily be cheaper than an external audit (paragraph 151).

22. WHAT ARE THE CORE MINIMUM REQUIREMENTS THAT REGISTERED ENTITIES SHOULD BE REQUIRED TO INCLUDE IN THEIR GOVERNING RULES?

Base this on the Corporations Act and the CATSI Act. Why reinvent the wheel? Change what evidence has shown needs changing and leave the rest.

By the way, the inability to distribute profits to people is no bar to a NFP spending large on individuals.

23. 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?

Given the purpose of the legislation, this would not be unreasonable.

By the way, it would be insufficient to achieve the stated purpose.

24. WHO SHOULD BE ABLE TO ENFORCE THE RULES?

The members, if applicable. Otherwise, apart from the courts, the regulator.

25. SHOULD THE ACNC HAVE A ROLE IN THE ENFORCEMENT AND ALTERATION OF GOVERNING RULES, SUCH AS ON WIND-UP OR DEREGISTRATION?

Yes.

26. SHOULD MODEL RULES BE USED?

No. The variety of organizations covered by the proposed legislation is too great. Have a tool like the one ORIC offers instead.

27. WHAT GOVERNANCE RULES SHOULD BE MANDATED RELATING TO AN ENTITY'S RELATIONSHIP WITH ITS MEMBERS?

See those in the CATSI Act.

28. DO ANY OF THE REQUIREMENTS FOR RELATIONSHIPS WITH MEMBERS NEED TO APPLY TO NON-MEMBERSHIP BASED ENTITIES?

'Members' needs to be broadened to 'those who, legally or morally, own the organisation'. Then the requirements in the CATSI Act need to be modified for this broader definition.

29. IS IT APPROPRIATE TO HAVE COMPULSORY MEETING REQUIREMENTS FOR ALL (MEMBERSHIP BASED) ENTITIES REGISTERED WITH THE ACNC?

Yes. And also for all other NFPs.

By the way, I don't agree with the implication that meeting requirements for unincorporated associations could be considered (paragraph 168). They seek no concessions or protection, so regulation would be inappropriate.

30. ARE THERE ANY TYPES OF NFPs WHERE SPECIFIC GOVERNANCE ARRANGEMENTS OR ADDITIONAL SUPPORT WOULD ASSIST TO ACHIEVE IN BETTER GOVERNANCE OUTCOMES FOR NFPs?

This should be researched as a prelude to writing guidelines for particular types of NFPs.

By the way, the plan to exempt some NFPs from some requirements because of, for instance, their size, is not consistent with the assertion in paragraph 169.

31. 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?

Before you settle on something that you propose that NFPs will be required to do, ask yourself, and other knowledgeable people, can this be avoided or simplified?

32. WHAT PRINCIPLES SHOULD BE INCLUDED IN LEGISLATION OR REGULATIONS, OR COVERED BY GUIDANCE MATERIALS TO BE PRODUCED BY THE ACNC?

In the legislation: 'high-level' common-denominator principles. In the guidance materials: as much as you like, so long as (a) it starts one level lower than the legislation; (b) is consistent with the principles; and (c) doesn't contain lists of rules that can just be copied without thought.

33. ARE THERE ANY PARTICULAR GOVERNANCE REQUIREMENTS WHICH WOULD BE USEFUL FOR INDIGENOUS NFP ENTITIES?

Leave this to ORIC.

34. 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?

Go forward only after you have stronger support, including empirical evidence where possible, for the assertions that are the foundation, so far, for this regulation.