

CHAPTER 3: LEGAL STRUCTURE

Do NFP organisations fit the company mould?

SUMMARY OF KEY FINDINGS IN THIS CHAPTER

Importance of legal structure

- The underlying legal structure must be one suited to the needs of a NFP organisation before accountability can be improved by the application of consistent and appropriate reporting obligations.
- The existing myriad of legal structures hampers nationally consistent accountability.

Choice of legal structure

A significant number of NFP companies limited by guarantee were registered prior to the introduction of associations' incorporation legislation. Taking into account this sub-group, the most significant findings as to why a company structure was chosen in preference to, say, an incorporated association were:

- Legal advice and taxation/financial advice received at the time were the two main factors: no doubt this advice would have taken into account a range of reasons, including the other reasons listed in the question.
- More than a third (34%) indicated that being a 'national or multi-state organisation' was an important factor in their choice of a company structure.
- Forty per cent indicated that the 'scale of trading activities' was an important factor, which is an area of debate and variation in the associations' regime.
- Almost a third (31%) identified a preference for Australian Securities and Investments Commission (ASIC) 'rather than State regulator' as an important factor thereby supporting anecdotal evidence that many of the State regulators are under resourced and cannot cope easily with organisations wanting to have variations to the prescribed model rules.
- 'Public perception and status' was important to the majority (52%) which also supports anecdotal evidence that 'serious' or 'more sophisticated' NFP organisations are companies rather than incorporated associations.

Success of company structure

- There was no clear evidence of any overall dissatisfaction with the company structure. About three-quarters of the respondents believe that the company structure is well understood by directors and those dealing with the company, and that it has been a flexible structure with manageable reporting obligations.
- However, it is worth noting that:
 - s 'Small' organisations reported more difficulties than 'large' organisations.
 - s Religious organisations reported more difficulties than other companies.
 - s Forty-four per cent of respondents said that the company structure was not readily understood by members.
- There was dissatisfaction about:
 - s Expense: 41% believe that a company structure has 'added expense' and this was higher for "small" and also member-serving organisations.
 - s Paperwork: the majority (51%) thought a company structure had 'added a lot of paperwork'.
- Written comments highlighted that the difficulties experienced often stem from:
 - s A company limited by guarantee (which is a public company) not being specifically designed to meet the needs of NFP organisations.
 - s Difficulties and expense in migrating to the incorporated associations regime.
 - s The significant cost of audit fees.

Group structures

- Group structures were not common. Only 14% of respondents were part of a group structure.
- Of this 14%, the majority were Philanthropic organisations with only one or two related entities.

Need for unified regulation

- While the survey did not cover incorporated associations, there were several findings (and other feedback) that indicate problems caused by the inconsistencies between the States and Territories.
- The data in this Chapter supports the data in Chapter 4, Regulation, and our recommendation for a single, Commonwealth regime for all corporate bodies, but with a specialised corporate form for NFP organisations.
- The data reported in this Chapter also supports the introduction of different reporting obligations dependent on an organisation's size (see Chapter 8, Disclosure).

RECOMMENDATIONS

Modify existing Corporations Act requirements

While the existing company limited by guarantee structure has proved satisfactory in the main, some aspects need reform. These includes:

- the fee structure should be revised to provide a sliding scale based on size.
- information required for disclosure should be tailored to the needs of NFP stakeholders rather than to 'shareholders', and this needs to be supported by an NFP specific accounting standard.
- the requirement to lodge audited accounts needs to be reconsidered for small NFP organisations.
- a plain-language guide summarising the provisions/obligations relevant to NFP companies (along the lines of the Small Business Guide contained as Part 1.5 of the *Corporations Act 2001* (Cth) should be available.
- all NFP companies should be required to have an objects clause and the directors should have a duty to pursue those objects.
- all NFP companies should be required to have a 'non-distribution' clause.
- the remedies available for a breach of the objects clause need to be clarified and strengthened.

Future NFP legal structures

It is our recommendation that a national regulatory regime be implemented (see Chapter 4, Regulatory Framework). It would be appropriate at that time to reconsider the range of existing legal structures used by NFP organisations. This would be with a view to introducing a single specialist NFP legal structure. Whilst maintaining some level of choice is desirable, the current myriad of legal structures leads to confusion and inefficiencies in regulation. Consideration should be given to combining the best aspects of corporations law and the incorporated associations regimes. The work being done by the UK government would be useful to explore. Any new structure should meet the needs of both small and large NFP organisations, and the issue of converting from existing forms should be addressed in a simple and no-cost way.

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1. INTRODUCTION

This project considers the concepts of ‘accountability and corporate governance’ in the NFP context. It is our opinion that the related goals of improved accountability and good corporate governance must be supported by the underlying legal structure(s) adopted by NFP organisations. If the legal structure meets the needs of the organisation then it will be easier to build consistent and appropriate reporting obligations. In turn, these are the cornerstone of accountability. The current myriad of legal structures under which NFP organisations operate (incorporated association, company limited by guarantee, proprietary company, trust, cooperatives, Royal Charter, special Act of Parliament, aboriginal corporations) are confusing and hamper accountability.

A key research question has been ‘Is a company structure under the *Corporations Law* (in particular, a company limited by guarantee), a structure that meets the needs of NFP organisations and their stakeholders?’ This issue was considered to some extent by the 1995 Australian Industry Commission Report into Charitable Organisations. It recommended that a special form of incorporation under corporations’ legislation should be introduced for ‘community social welfare organisations’. The UK Strategy Report (2003) also recommended the establishment of two new types of company: the ‘Community Interest Company’ and the ‘Charitable Incorporated Organisation’ as discussed under Heading 5.2.¹ On 4 December 2003 the UK government released draft legislation, the *Companies (Audit, Investigations And Community Enterprise) Bill*,² which if enacted, would make the Community Interest Company proposal part of company law.

2. SURVEY QUESTIONS - CHOICE OF STRUCTURE

Part B of the survey form was headed ‘Legal Structure’. The questions under this Heading related to the choice of structure and whether or not the respondent was part of a group structure.

2.1. Factors behind choice of company structure

2.1.1. SURVEY QUESTION

4.1 Please indicate how important the following reasons were for choosing a company as the form of incorporated legal structure rather than, for example, an incorporated association or cooperative?

(indicate your response by circling one number - numbers ‘1’ and ‘4’ both represent very definite positions, the numbers in between represent intermediate positions.)

(1) not at all important, (4) very important, (0) don’t know

- requirement of grant maker	1	2	3	4	0
- organisation’s size	1	2	3	4	0
- national or multi-state organisation	1	2	3	4	0
- public perception and status	1	2	3	4	0
- taxation / financial advice received at the time	1	2	3	4	0
- legal advice received at the time	1	2	3	4	0

Note: All references in this Report to small and large organisations or companies are based on the definition of “small” and “large” (proprietary companies) as contained in s 45A of the *Corporations Act 2001* (Cth), unless detailed otherwise.

¹ Charities and Not-for-Profits: A Modern Legal Framework. The Government’s response to ‘Private Action, Public Benefit’, Home Office, July 2003, p. 15. The ‘Private Action, Public Benefit’ report also recommended an additional legal form called the Charitable Incorporated Organisation, which would be available only to charitable organisations. This recommendation was accepted by the government, although it will not become the compulsory form for charities wishing to establish themselves in a corporate form (p.17).

² See http://www.dti.gov.uk/cld/companies_audit_etc_bill/

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- scale of trading activities	1	2	3	4	0
- preferred to deal with Australian Securities and Investment Commission rather than State regulator	1	2	3	4	0
other important reasons (<i>please specify</i>)					
.....					
.....					

Number of respondents = varied between 1433 – 1464 for each option

2.1.2. BACKGROUND

There is an important historical context to bear in mind when considering the results for this survey question. Respondents in the sample include organisations established prior to the introduction of the incorporated associations' legislation (in Victoria, 1981). Ideally, we should have asked respondents to indicate if they were registered prior to 1980 in order to explore the extent to which the lack of an incorporated association option was relevant to their choice of structure.³ Subsequent to the survey we requested information from ASIC about the number of companies limited by guarantee with a pre-1980 registration date. ASIC has informed us that 3413 (35%) of the 9817 registered companies limited by guarantee registered with ASIC as at 1 March 2002⁴ were companies whose date of registration was 1 January 1980. This is a significant number.

The importance of this historical factor is also borne out by qualitative data collected in the survey. In the space for 'other important reasons', 87 respondents mentioned the lack of other options at the time of registration, see Heading 2.3.1. It is worth noting, therefore, that cost and organisational difficulties are factors likely to have prevented existing NFP companies from changing to the incorporated associations' regime.

In addition to not having the association option, there were three other historical reasons for choosing a company limited by guarantee as the legal structure. First, until 1982, a company limited by guarantee received preferential treatment. For example, they enjoyed exemptions from lodging changes to directors and annual reports. However, since 1982 these exemptions have been removed, though this may not have prompted existing companies limited by guarantee to change their legal structure.

Second, in some instances there has been legislation passed requiring organisations to transfer to the companies' regime. For example, in the 1980's the NSW government required all registered clubs to incorporate as companies limited by guarantee and no longer as cooperatives or associations. More recently, the Commonwealth has required all credit unions to transfer from the cooperatives regime.⁵

Third, it was fairly easy for a company limited by guarantee to obtain a name licence which was thought to give the company a 'halo' of respectability.⁶ However, since 1991⁷ all companies (even those holding a name licence) have been required to include their ACN on public documents.⁸ This requirement has significantly eroded one of the main reasons for applying for a name licence,⁹ namely that without such a licence potential donors may be discouraged because of an (incorrect) assumption that a company necessarily implies 'for-profit' motives.¹⁰ If it can be said, therefore, that holding a name licence is not the incentive it was, why would an organisation choose (or continue) to be a company limited by guarantee?

³ For the purpose of exploring this issue further, the author has requested information from ASIC on the percentage of companies limited by guarantee with pre-1980 registration dates. As at the date of writing, this information has not been provided.

⁴ 1 March 2002 was the date used for the purposes of our survey.

⁵ M. Lyons, *The Legal and Regulatory Environment of the Third Sector*, *Asian Journal of Public Management* forthcoming 2004 at p. 9.

⁶ See M. McGregor-Lowndes & K. Levy, 'Name Licences: the Company Name You Have When You are Not Having a Commercial Company Name', 1996, 4 *Current Commercial Law* 12 and S. Woodward, 'Not-For-Profit Companies – Some Implications of Recent Corporate Law Reforms', 1999, 17 *C&SLJ* 390 at 393.

⁷ Amendment to s 219(3) contained in Sch. 2 of the *Corporations Legislation Amendment Act 1991* (Cth).

⁸ Australian company number: see *Corporations Act 2001* (Cth), s 153.

⁹ See para. PS 50.4 of ASC (now ASIC) Policy Statement 50, Omission of 'Limited' from Company's Name, issued 29 March 1993.

¹⁰ See Mc Gregor-Lowndes and Levy n. 6.

2.2. Quantitative survey results - reasons for choosing company limited by guarantee

Survey question 4.1 asked respondents to rank the importance of the various reasons a company structure was chosen as the legal structure, rather than, for example, an incorporated association or a cooperative. The factors stated in the question for selection were based on those that we believed (from experience and from consultations with others)¹¹ to be relevant considerations. Table 1 shows the reasons listed in the questionnaire and the percentage (in descending order of prevalence) of respondents who indicated that the reason was important. In order to see the significance of these results more easily, the 'don't know' group was removed and the results were collapsed to 'important' (3 and 4 on the scale) and 'not important' (1 and 2 on the scale).¹²

Table 1: Respondents' reasons for choosing company structure

<i>Reason why company structure chosen</i>	<i>Per cent of respondents who agreed was an important factor (in descending order of prevalence)</i>
legal advice received at the time	87
taxation/financial advice received at the time	71
public perception and status	52
scale of trading activities	40
organisation's size	39
national or multi-State organisation	34
requirement of grant maker	33
preferred to deal with ASIC rather than State regulator	31

For each of these factors, at least a third of the respondents thought they were 'important'. Perhaps not surprisingly, 87% of respondents indicated that 'legal advice received at the time' was an important factor and 71% indicated that 'taxation/financial advice received at the time' was important. We suggest that the other factors were probably factors taken into account by the legal and financial advisors. It is also interesting to note that more than half (52%) of respondents indicated 'public perception and status' was an important factor in the decision to use a company structure rather than an incorporated association. This supported anecdotal evidence that 'serious' or 'more sophisticated' NFP organisations use the *Corporations Act 2001* (Cth) rather than incorporated associations' legislation.

¹¹ The author sought the views of a range of advisors to NFP organisations, see Appendix 1, Methodology.

¹² The collapsed chart did not result in any distortion of the refined patterns. The 'don't know' option was given for this question because it was recognised that, unless the company was formed in fairly recent times and/or the CEO had been with the company for a long period, it would be too difficult/time consuming for a view to be expressed. As expected there was a significant 'don't know group' — it varied between the options, but was an average of 16%.

2.2.1. SIGNIFICANT DIFFERENCES BETWEEN RESPONDENTS

Chose structure because 'required by grant maker'

Whilst Table 1 shows the overall ranking of reasons for choosing to become incorporated as a company limited by guarantee, this ranking was not true for all respondents.

Being 'required by a grant maker' to choose a company structure was a significantly more important factor for several types of organisation. Forty-five per cent of those receiving any government income said that 'requirement of grant maker' was 'important' or 'very important' compared with only 22% of those receiving no government income. Whilst we are unaware of any government funding agreements that require the company limited by guarantee structure, many funding agreements specify that an organisation must be 'incorporated' before receiving funds. This general requirement, combined with the results for 'public perception and status', may mean that government funding agreements are being *interpreted* as requiring a company limited by guarantee structure.

Other interesting results concerning the relative importance of the 'requirement of grant maker' in determining the choice of legal structure include:

- Community Services (41%), Education and Education Related organisations (45%) said 'requirement of grant maker' was important compared with the overall frequency for respondents of 33%. Other activity groups cited 'requirement of grant maker' as an important factor significantly less often - 15% of Religious organisations, 13% of Interest groups and 21% of Sport and Recreation groups. See Figure 1.
- Public-serving organisations were more likely to cite this as an important reason (43%) than member serving (25%). See Figure 2.
- Organisations with PBI status (42%) were more likely to cite this as an important reason than those without PBI status (30%). See Figure 2.

One respondent wrote that the reason was a combination of factors:

Substantial assets and construction contracts - corporate reporting requirements give comfort to government and grant makers.

Figure 1: 'Requirement of grant maker', based on principal activity

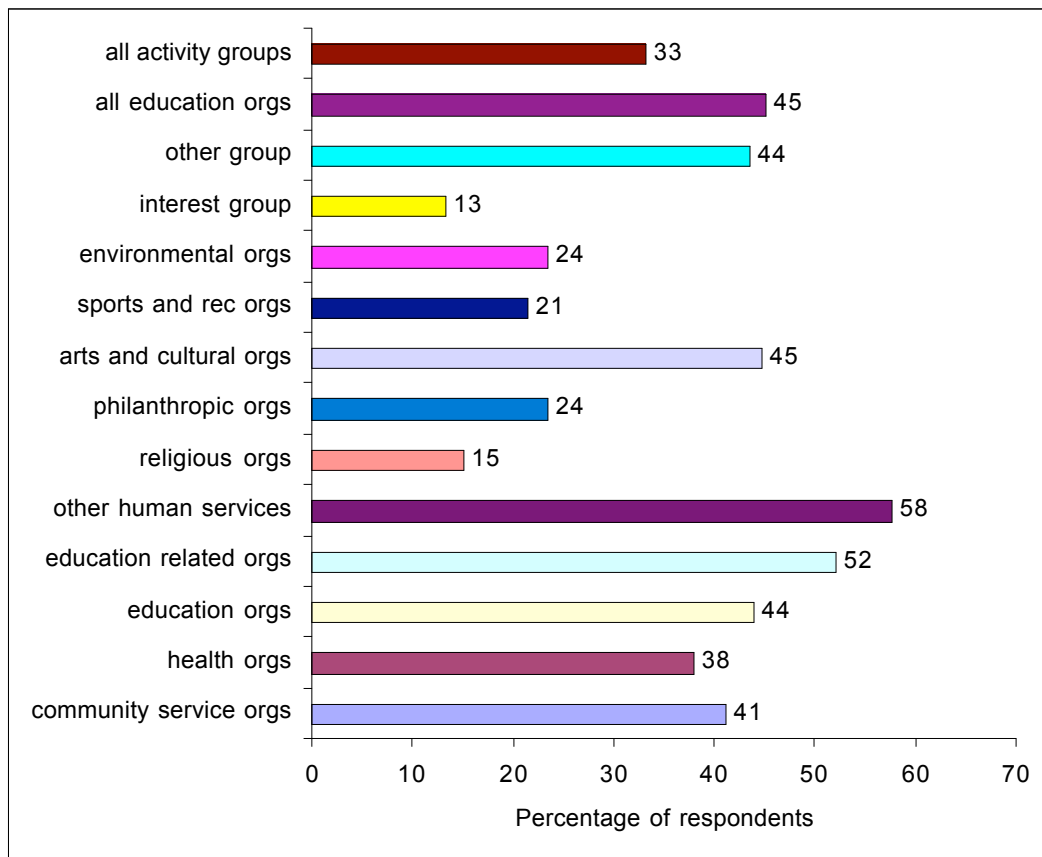
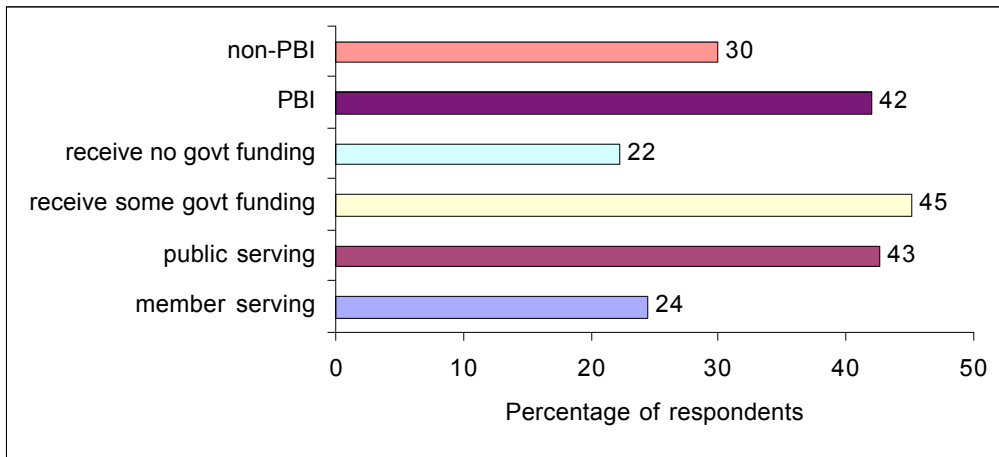


Figure 2: 'Requirement of grant maker', based on key indicators

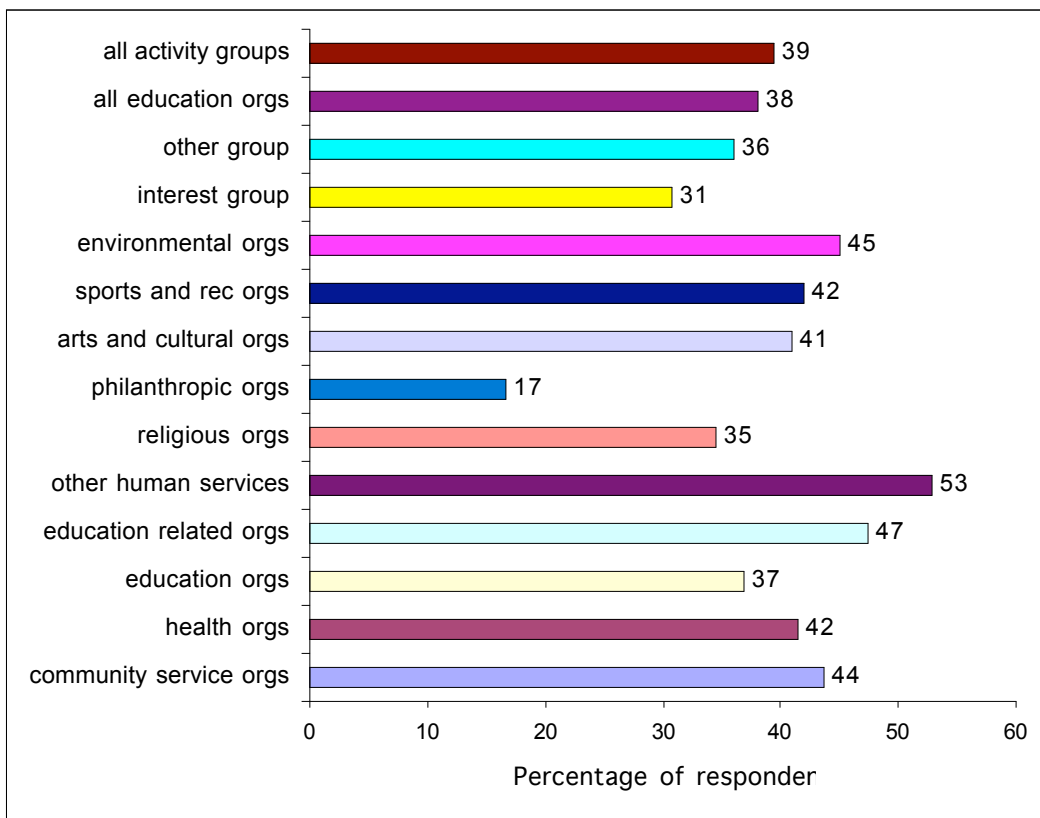


Chose structure because of 'organisation's size'

Respondents from Other Human Services organisations were more likely than other activity groups to mention organisational size as an important factor in their choice of legal structure (53% vs 39%). This is an interesting result, as Other Human Services are not, on average, the largest NFP companies.¹³ In contrast, it was not a commonly mentioned factor for Philanthropic respondents (17% vs 39% for all activity groups).

As might be expected, large organisations are significantly more likely to cite organisational size as a reason for choosing the company structure than small organisations (58% vs 37%).

Figure 3: 'Organisation's size', based on principal activity



¹³ Health organisations, Community Service organisations and Education organisations have, on average, greater income and assets compared with Other Human Services (see Profile Data chapter).

Chose structure because 'national or multi-state organisation'

Almost 69% of Interest Groups said that being a 'national or multi-state organisations' was an important reason for incorporating as a company limited by guarantee. This was more than for any other activity group. Many organisations with this profile are peak bodies - labour bodies, professional bodies and representative organisations that operate on a national/multi-State basis.

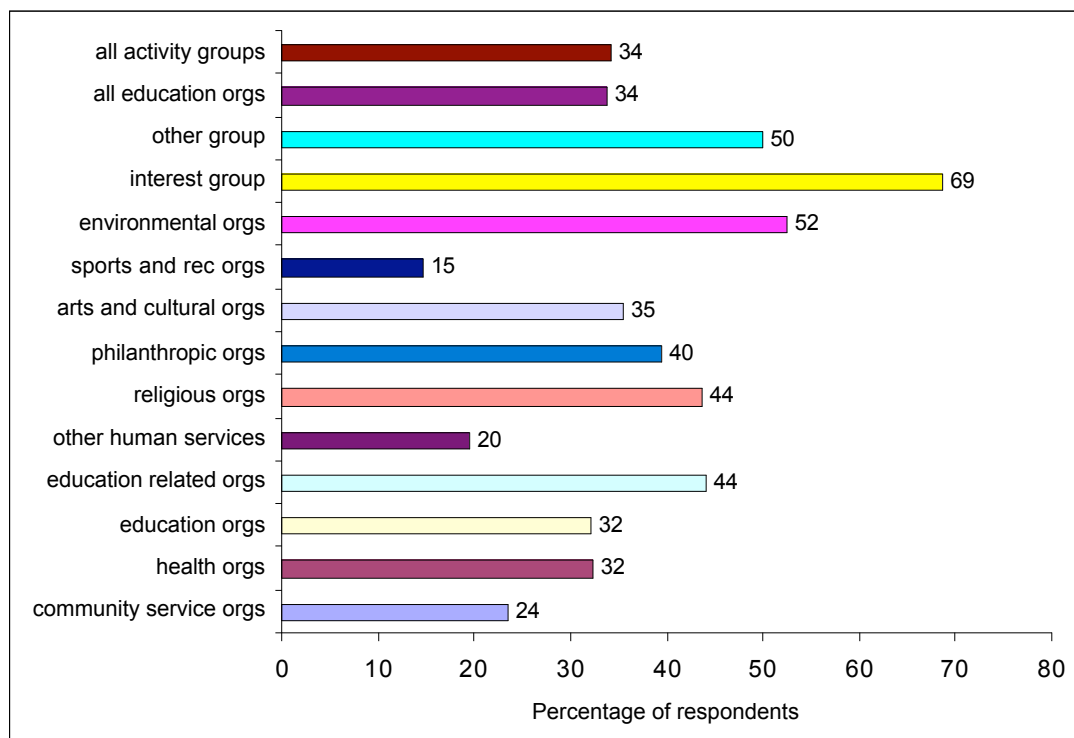
NFP organisations that carry on, or hope in time to carry on, operations in more than one jurisdiction, face a difficult dilemma. To take advantage of the associations incorporations legislation, (which is said to be specifically designed to meet the goals of simplicity and inexpensiveness), it will have to register a separate association in each State and/or Territory it wants to operate in. This will involve duplicating fees, ongoing paperwork and complexity because of a need to appreciate and keep abreast of the variations (even if only in minor detail) between legislation in the respective States and Territories. (The time and difficulty it took to prepare the comparative table in Appendix 5, even by an academic highly experienced in the area, has been practical testament to us of this fact.)

Aside from registration as a company under the *Corporations Act 2001* (Cth), the only other option for such an organisation is to register as an association in one State and then, if it 'carries on business' in another State or Territory, also register in that jurisdiction as a Registrable Australian Body under Part 5B.2 of the *Corporations Act*. Again, this involves extra time, expense and paperwork. This course also involves many uncertainties, especially about the scope of the concept of 'carrying on business' and how this concept applies to a NFP organisation. A breach for failing to register as such a body under the *Corporations Act* may occur quite inadvertently if, for example, a committee member moves to a different jurisdiction and takes part of the association's administrative structure with them.¹⁴

Several activity groups, including Interest Groups, Environmental organisations (53%) and Other Groups (50%), cite this as an important factor. In contrast, only 15% of Sports and Recreation organisations selected this as an important reason. We suggest that this is because they are more often only based in one State.

Interestingly, small organisations (36%) and those not receiving government funding (37%) were likely to cite this as a reason for choosing to be a company limited by guarantee rather than large organisations (22%) and organisations receiving government funding (31%). This is possibly because the larger organisations (Health, Education and Community Services) are often only located in one State and less often have related bodies.

Figure 4: 'National or multi-State organisation', based principal activity



¹⁴ S. Sievers, 'Incorporation of Non-Profit Associations: The Way Ahead?' 18 *C&SLJ* 311–25 at p. 319.

Chose structure because of 'public perception and status'

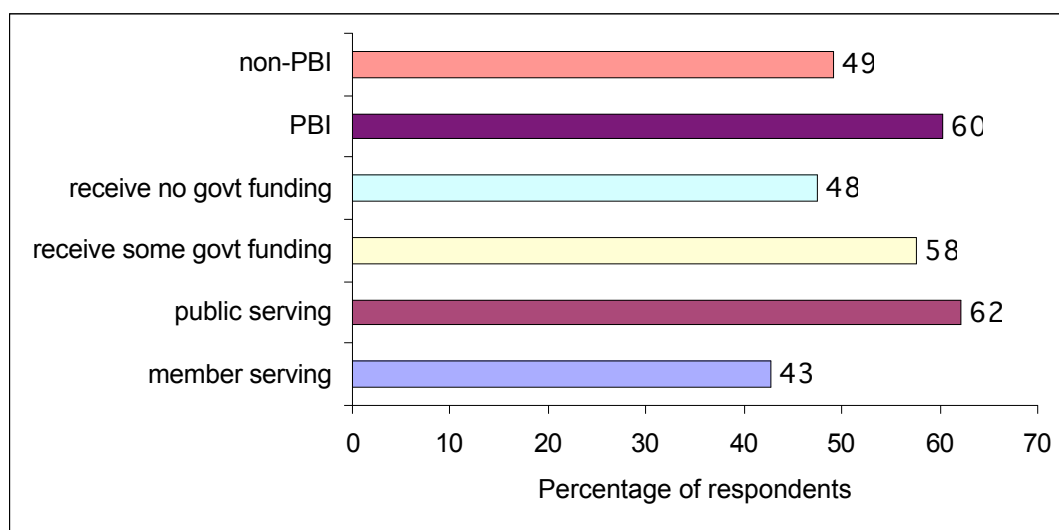
There was little difference between small and large organisations in this respect. However, those organisations receiving government funding were more likely than those that do not to cite public perception and status as an important reason (58% vs 48%). This is interesting given that there is a correlation between size and receipt of government funding

There was also a large difference between member-serving organisations and public-serving organisations. Twenty per cent more public-serving organisations than member-serving organisations thought this was an important reason for choosing this legal structure. As there is a strong correlation between public-serving organisations and PBI status, it is not surprising that there is also a difference between those respondents with PBI status and those without (a difference of 11%).

Sixty per cent of Community Services organisations and 67% of Arts and Cultural organisations also said this was an important reason for choosing the structure - considerably more than overall (52%).

We cross-tabulated the holding of a name licence¹⁵ with this factor to see if those that held a name licence were more likely to cite 'public perception and status' as an important factor. There was a weak yet discernible relationship between the two variables (57% of respondents who *do* hold a name licence chose to incorporate because public perception and status is important vs 50% of respondents who *do not* hold a name licence and who chose to incorporate because public perception and status is important).¹⁶ This was not as significant as we had predicted.

Figure 5: 'Public perception and status', based on key indicators



Chose structure because of 'legal/taxation/financial advice received at the time'

There was only one significant difference between respondents in relation to either 'legal advice received at the time or 'taxation/financial advice' received at the time as an important reason for choosing the legal structure. Philanthropic organisations were the only noticeable exception. Ninety-one per cent of Philanthropic organisations said that taxation/financial advice was an important reason, much higher than the overall figure of 70%. Again 96% of Philanthropic bodies said that legal advice was an important reason, again, higher than the overall figure of 87%. Advice sought from Philanthropy Australia suggests these results may be because this group is accustomed to approaching specialists for advice. Many philanthropic organisations are created by people/companies in high income brackets who (1) are more likely to have access to legal and financial advice, and (2) will be motivated at least in part, by a desire to maximise income tax benefits.

¹⁵ See Chapter 2, Profile Data. Twenty-five per cent said that they held a name licence.

¹⁶ The significant 'don't know' group to the name licence question were excluded from this cross-tabulation. Assuming that at least some of this group do, in fact, hold a name licence the relationship between the two variables could be stronger.

Chose structure because of scale of trading activities

Sports and Recreation organisations (51%) were much more likely than other organisations to cite this as a reason (51% vs 40% overall), as were 'large' organisations (54% vs 40%). Presumably, this is because both of these groups have (or hope to have) more extensive trading activities than other organisations. In contrast, Philanthropic organisations and Religious organisations were far less likely to cite the scale of trading activities as a reason for choosing to incorporate as a company limited by guarantee (23% and 24% respectively vs 40% overall).

2.3. Qualitative survey results - reasons for choosing company limited by guarantee

Two hundred and twenty-two respondents commented in the space provided at the end of question 4.2. These were analysed and coded and Figure 6 summarises the results. Each category is discussed in the subsequent sections.

2.3.1. INCORPORATED ASSOCIATION NOT AN OPTION AT THE TIME OF INCORPORATION

Of these 222 responses, 87 wrote that it was because there was no other option for NFP organisations that wanted to incorporate at the time. This sentiment is summarised by the following comment:

At the time of incorporation, Incorporated Associations Acts did not exist, and no-profit-sharing company limited by guarantee was the only known structure.

2.3.2. LEGISLATIVE OR GOVERNMENT REQUIREMENT

Sixty-one respondents commented that they had chosen the legal structure due to legislative or government requirements. Specific legislative requirements mentioned included the *Registered Clubs Act 1976* (NSW) and the *Aged Care Act 1997* (Cth). Some legislation requires the organisation to incorporate/register as 'a company'. But other provisions only require the organisation to be a 'body corporate', which leaves open the incorporated association option. We are unaware of any legislation that specifically requires registration as a company limited by guarantee.

2.3.3. PREFERABLE REGIME/GREATER FLEXIBILITY

Thirty-five respondents reported that the company limited by guarantee structure provided them with greater flexibility and that the corporations law regime was preferable to other options. This supports anecdotal evidence that some organisations have had difficulty incorporating as an association if their structures or constitution differs significantly from the model rules contained in the incorporated associations legislation.

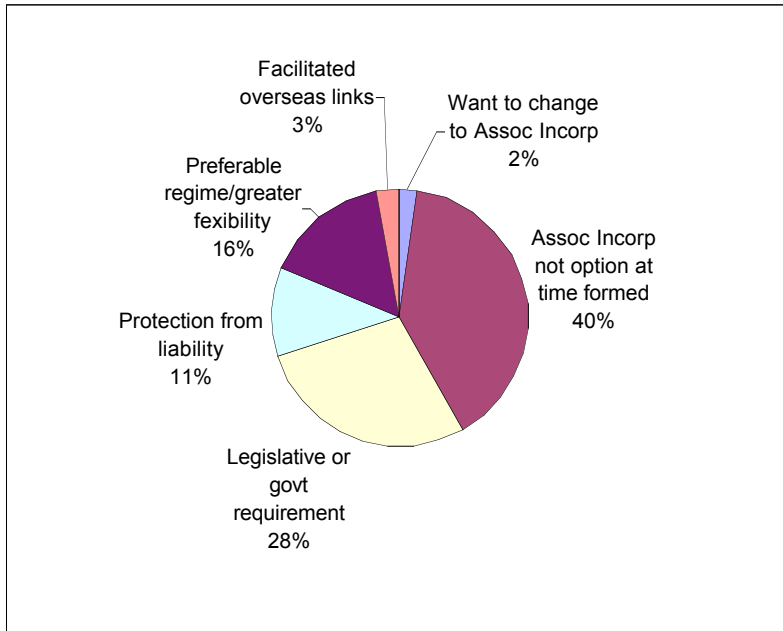
Respondents receiving government funding were much more likely to have this view.

2.3.4. OVERSEAS LINKS

Six respondents commented that the company structure facilitated overseas links.

As organisations follow the general trend towards globalisation and expand across international borders, or form relationships with like organisations overseas, this may become an increasingly important reason for choosing the company limited by guarantee structure. The familiarity of the structure for overseas organisations - compared with the more unusual incorporated associations structure - may make it attractive for international organisations. A comparative study of NFP structures in different countries is an area for further research.

Figure 6: Additional comments made concerning choice of structure (n = 222)



2.4. Success of company structure?

2.4.1. SURVEY QUESTION

4.2 From your experience with this company, would you say that the choice of this form of legal structure (that is, a company):

(1) strongly disagree, (4) strongly agree, (0) can't say

- has caused difficulties 1 2 3 4 0
- is readily understood by the company's directors 1 2 3 4 0
- is readily understood by the company's members 1 2 3 4 0
- is readily understood by those dealing with the company (such as funding bodies) 1 2 3 4 0
- has added significant expense 1 2 3 4 0
- involves manageable reporting obligations to members and the Australian Securities and Investments Commission 1 2 3 4 0
- has been sufficiently flexible to meet the organisation's needs over time (for example, if a merger has been necessary) 1 2 3 4 0
- has added a lot of paperwork. 1 2 3 4 0

Other comments.....

Number of respondents = varied between 1571–1609 for each option

2.5. Quantitative survey results - success of legal structure

Table 2 shows the results to survey question 4.2. Again the 'can't say' responses were excluded and the results were collapsed to 'agree' and 'disagree'.¹⁷

Table 2: Success of company structure

Positive questions about company structure	Negative questions about company structure
<ul style="list-style-type: none"> is readily understood by the company's directors <i>majority (73%) agreed</i> 	<ul style="list-style-type: none"> has caused difficulties <i>majority (76%) disagreed</i>
<ul style="list-style-type: none"> is readily understood by the company's members <i>majority (57%) agreed</i> 	<ul style="list-style-type: none"> has added significant expense <i>majority (59%) disagreed</i>
<ul style="list-style-type: none"> is readily understood by those dealing with the company (such as funding bodies) <i>majority (73%) agreed</i> 	<ul style="list-style-type: none"> has added a lot of paperwork <i>majority (51%) agreed</i>
<ul style="list-style-type: none"> involves manageable reporting obligations to members and ASIC <i>majority (76%) agreed</i> 	
<ul style="list-style-type: none"> has been sufficiently flexible to meet the organisation's needs over time (for example, if a merger has been necessary) <i>majority (72%) agreed</i> 	

There was no clear evidence of any overall dissatisfaction with the structure. The dissatisfaction expressed was about the expense¹⁸ (41% believe that a company structure had 'added significant expense') and the paperwork (51% believe it had 'added a lot of paperwork'). About three-quarters (73%) of the respondents believe that the company structure is well understood by directors and those dealing with the company and that it has been a flexible structure with manageable reporting obligations. However, only just over half (57%) thought that it was 'well understood by members'.

2.5.1. SIGNIFICANT DIFFERENCES BETWEEN RESPONDENTS

Has caused difficulties

Overall, only 24% of respondents said that the company limited by guarantee structure had caused difficulties. However, there were quite significant differences between large organisations and small organisations (11% difference) and a related difference between those organisations receiving government funding and those receiving none (7% difference). Whilst the proportion of small organisations that thought the structure had caused difficulties was still quite low (only 26%), the difference between small and large organisations suggests that the structure is considered to be more suitable for large organisations, despite the fact that most NFP organisations are not particularly large by 'top 100' business standards.

¹⁷ The collapsed chart did not result in any distortion of the refined patterns. The 'can't say' group were 7% or less, except for 'is readily understood by those dealing with the company' (18% 'can't say') and 'has been sufficiently flexible to meet the organisation's needs over time' (25%).

¹⁸ For a comparison between modes of incorporation and costs see K. Fletcher, 'Developing Appropriate Organisational Structures for Non-profit Associations' in M. McGregor-Lowndes, K. Fletcher, A.S. Sievers (eds), *Legal Issues for Non-Profit Associations*, LBC Information Services, 1996, p. 1, especially pp. 9–10.

A significantly higher number of Religious organisations said that the structure had caused difficulties (36% vs 24% overall). This is reflected in the high proportion of written comments concerning problems with the structure that were made by Religious organisations. We did get some anecdotal feedback that the company law model creates problems for Religious organisations when it comes to classifying stipends.

Is readily understood by the company directors

Overall, 73% of respondents said that the legal structure was readily understood by the directors. Large organisations were more likely to say that it was understood by the directors - 81%. This may be because large organisations are more able to attract people with experience on corporate Boards, who understand corporations law requirements of directors.

Is readily understood by the company's members

Only just over half (57%) of all respondents, said that the company's members readily understand the company structure. This raises a significant query over the effectiveness of members' remedies as a mechanism for ensuring accountability, particularly by directors.¹⁹ In the NFP context other accountability mechanisms such as stock exchange regulation, dividends/returns to members and the influence of institutional investors do not apply. Falling back on members to take action must be a concern in view of the data showing that respondents believe that almost half do not readily understand the organisation's legal structure. This data also supports the discussion in Chapter 7, Stakeholders, that the remedies open to members of NFP companies need to be clarified and in some respects, to be strengthened.

Within the overall response of 56%, there was, once again, a significant difference between small organisations and large organisations. Significantly more respondents from large organisations said that the members readily understood the structure (70% vs 57% overall and 55% for small organisations).

Is readily understood by funding bodies

Overall, there were high levels of confidence in the understanding by funding bodies of the company legal structure. This confidence was higher for those organisations receiving government funding (78%) than those that do not (68%).

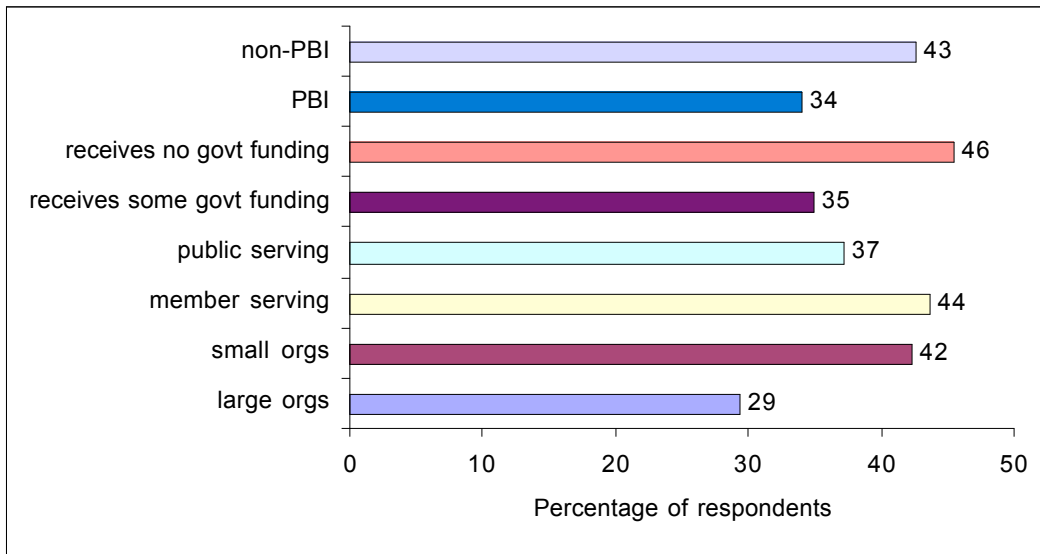
Eighty-five per cent of Arts and Cultural respondents also said that funding bodies readily understood the legal structure. This may be due to the nature of the funding bodies that donate to Arts and Cultural organisations.

Has added significant expense

Overall 41% of respondents thought the legal structure had added significant expense to their organisation. This figure was slightly higher for small organisations (42%) and, predictably, much lower (29%) for large' organisations. Public-serving organisations were also less likely to think that the legal structure had added significant expense. This may be because public-serving organisations believe that, on balance, the cost of more rigorous regulation is worthwhile. More than half of Religious organisations (55%), which are generally member-serving organisations, said that the legal structure had added significant expense.

¹⁹ Alternatively, it may simply mean that CEOs (who made up the bulk of the respondents) do not have confidence in their membership in this respect.

Figure 7: Legal structure has added significant expense, based on key indicators

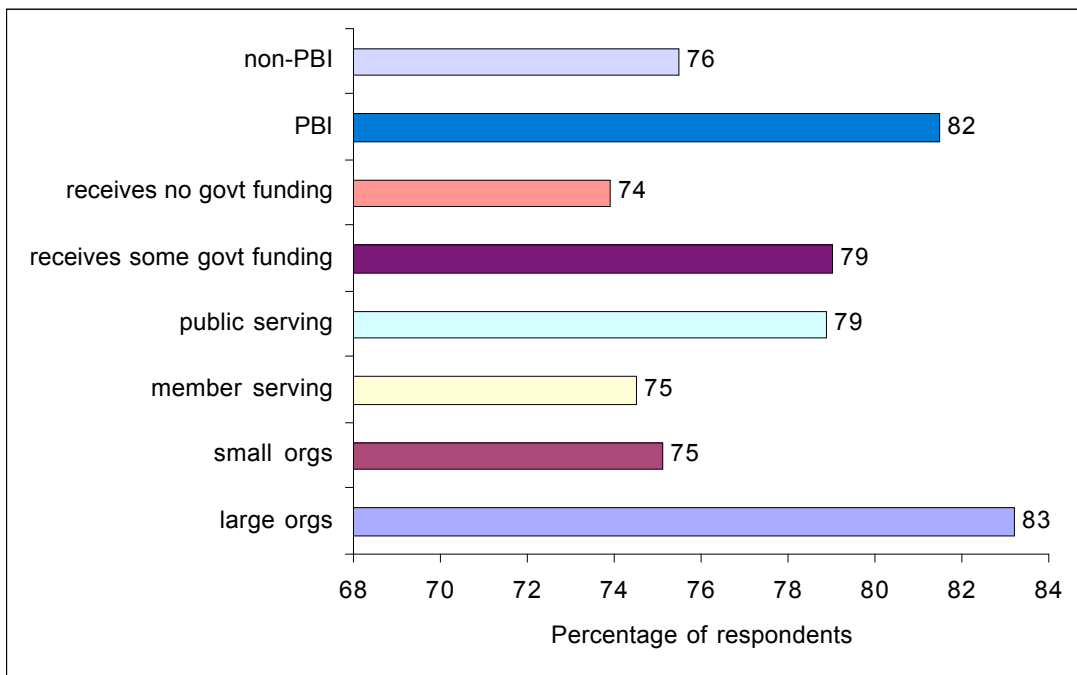


Involves manageable reporting obligations to members and ASIC

Overall, the great majority of respondents (76%) said that the legal structure involved manageable reporting obligations to members and to ASIC. This is an interesting result given that the results for other survey questions concerning what should be reported, indicated that very often respondents did not think that what is currently required should be included in any revised regime (see in Chapter 8, Disclosure).

Once again, there were divisions between small and large organisations (8% difference), those receiving government funding and those that do not (5% difference), public-serving vs member-serving (4% difference) and those with PBI status and those without (6% difference). It is clear that larger organisations receiving government funding and benefit from current taxation regimes, find navigating ASIC and meeting the disclosure obligations easier than smaller organisations.

Figure 8: Involves manageable reporting obligations to members and ASIC, based on key indicators



Legal structure has been sufficiently flexible to meet the organisation’s needs

There was very high approval of the flexibility that the legal structure gives to NFP organisations —overall 72% of all respondents thought the legal structure had been sufficiently flexible to meet the organisation’s needs. Some groups of respondents did not feel quite as positive about the flexibility: 69% of member-serving organisations said that it was sufficiently flexible, and 65% of Sports and Recreation organisations said that it was sufficiently flexible. Although these figures are slightly lower than the overall figure, they still demonstrate relatively high levels of approval.

This data complements anecdotal evidence that many NFP organisations find the application of incorporated associations legislation inflexible, and for this reason, chose to register as companies.

Has added a lot of paperwork

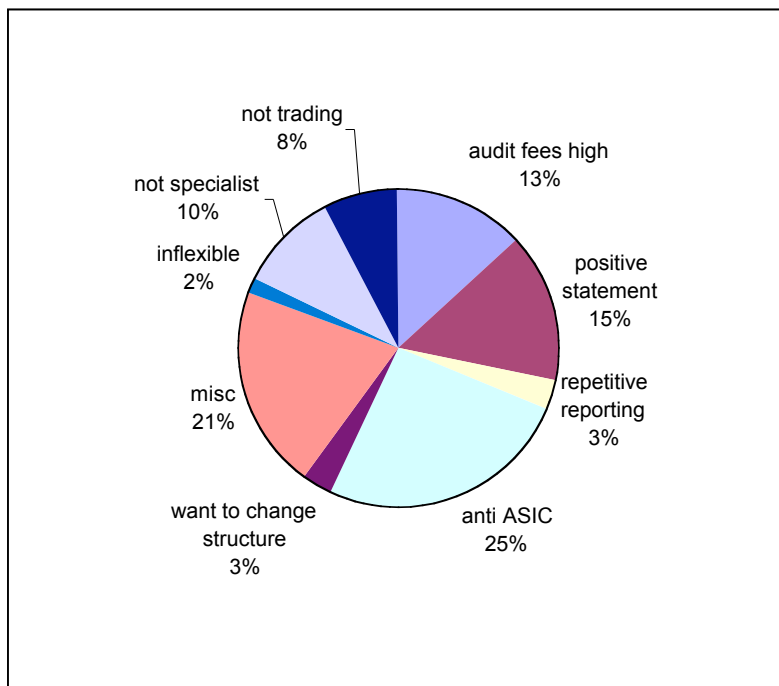
Overall, just over half (51%) of respondents said that the structure had added a lot of paperwork. Reflecting the fact that member-serving organisations were more likely than public-serving organisations to hold this opinion (54% vs 47%), 57% of Sports and Recreation groups and 68% of Religious organisations said that the structure had added a lot of paperwork.

Only 35% of Human Services organisations said that the structure had added paperwork. This reflects, perhaps, their acceptance of high levels of accountability and the fact that, in comparison with the level of accountability required of them by funding bodies and other statutory regimes, the disclosure required to ASIC is minimal.

2.6. Qualitative survey results - success of company legal structure

One hundred and thirty four respondents wrote a comment in the space provided at the end of question 4.2. These comments were analysed and coded and Figure 9 summarises the results. Each category is discussed in the subsequent sections.

Figure 9: Comments re success of structure (n = 134)



2.6.1. ANTI-ASIC: DEADLINES AND FINES

Around 25% (n=34) of those respondents commenting on the success of the legal structure complained about problems with ASIC, not with the structure itself.

Some companies objected to having to provide the same disclosure as large, ‘for-profit’ companies. For example, one Religious organisation objected that:

ASIC requirement are better for large companies but are inappropriate and wasteful and cumbersome for us.

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Likewise, a Business or Professional Interest Group organisation said:

The reporting requirements to ASIC seem quite unnecessary for a Not-for-Profit. ASIC does not give much consideration to volunteer run organisations, where we often cannot meet their deadlines.

Another Business or Professional Interest Group organisation said:

ASIC are inhuman!

2.6.2. NON SPECIALIST NFP STRUCTURE

Fourteen respondents said that the problem with the legal structure stems from the fact that it is not specially designed for NFP organisations.

A medium-to-large Religious organisation with an income of between \$1mil and \$5mil strongly agreed that the company structure 'had added a lot of paperwork'. The comment suggests, though, that they might find this amount of 'paperwork' acceptable if the reporting requirements were more relevant to the needs of the organisation:

The requirements of the Act and the applicable (and ever changing) Accounting Standards are largely irrelevant to meaningful reporting by the company to its members and the board.

A very large organisation (income of \$10mil or more), which provides a range of community, health and education services complained, not so much about the extra costs of compliance, but more about their lack of relevance:

Compliance with Accounting Standards developed for Corporations Law written to protect owners does not allow true provision of important information to major stakeholders.

2.6.3. WANT TO CHANGE BUT TOO EXPENSIVE

Four organisations reported wanting to change from being a company limited by guarantee, but could not due to the legal costs involved or because of perceptions about their legal status.

The comments of one Religious organisation demonstrate that there can be difficulties in migrating from the *Corporations Act 2001* (Cth) regime to an incorporated associations Acts:

We want to cease being a company but (apparently) can only do this by ceasing to trade or having less than \$1000 in assets.

Other organisations, like this Pre-school, simply find the cost of changing legal structures too high:

Would change legal status from company limited by guarantee to incorporated association but legal quote is in the 1000s of dollars.

2.6.4. REPETITIVE REPORTING

Four organisations complained about the duplication of reporting to various agencies and reporting bodies. For example, one medium-sized Disability Services organisation wrote:

Difficulties arise with repetitive explanations of status, eg Funders, Suppliers, Government Agencies, etc.

2.6.5. POSITIVE STATEMENTS

Not all organisations wrote negative comments. Twenty organisations wrote positive statements about the legal structure itself, the reporting requirements and their dealings with ASIC.

A small Industry Association commented that:

Filing and paperwork of no real problem as ASIC are contactable (by phone) and very helpful with advice and assistance.

An Education Related organisation said:

It has been a good arrangement, with minimal paperwork.

A small Community Services organisation responded:

I like the fact that we are accountable and though the yearly audit is expensive, it is a good thing to do because if mistakes are made they are found quickly.

This comment came from a respondent who disagreed that the legal structure 'has added a lot of paperwork':

Our annual audit involves assembling and compiling data from over 50 bank accounts of projects and offices around the country. Experience and in-house training has helped a lot.

A Religious organisation providing community and health services, with between 20–50 employees and between \$500,000–\$1mil in income said:

'We believe the reporting obligations to the ASIC are extremely important. There can be no credibility without accountability.'

2.6.6. AUDIT FEES EXPENSIVE/COMPLIANCE COSTS HIGH

Eighteen organisations complained about the costs of audits and compliance with the *Corporations Act 2001* (Cth) in their comments. The following comments concerning the costs of audits demonstrate that the cost of auditing can be over 10% of an organisation's annual income.

A Sports and Recreation organisation with income of less than \$100,000 said:

For a small organisation the audit requirement is expensive and onerous. Cost \$9300 last year. The fines are also an important fee for a voluntary organisation when non-compliance occurs, as it often does.

A museum with income of less than \$10,000 said:

Audit fees are over \$1200 due to the necessity of a legal 'registered company auditor' not your 'friendly accountant' who will audit for free!!!!

Another respondent, a Community Services organisation with an income under \$10,000 agreed that Audit costs are too high:

Cost of audited returns each year is ridiculous, eg \$1200.

Most would agree that spending over 10% of income on auditors' fees is excessive, and would be difficult to justify to both members and donors. It often is recommended that donors look for organisations that keep their administration fees below 10%. Yet organisations of this size have already spent over 10% on administration fees before they have even begun to administer their core activities.

Along these lines, a Sport organisation with an income between \$100,000–\$500,000, who strongly agreed that the choice of legal structure had 'added significant expense', suggested that the disclosure requirements were a distraction from the core activities of the organisation:

In an organisation (sporting) where members primarily want to play their sport some administrative duties are quite onerous.

A Professional Interest Group with an income between \$500–\$10,000 said that becoming a company limited by guarantee had certain pitfalls:

It added a compulsory audit which is unnecessary for the company's need and the members need.

A Primary School observed that as long as accountants were willing to provide their time as a volunteer, compliance costs could be kept down:

Relatively cheap to administer if you have volunteer accountant - much more costly if you need to hire advice - accountant/auditor \$150–\$500 per hour.

All of these comments highlight the need to balance the goals of accountability and transparency from organisations that are dealing with public money, against the negative effects of high administrative and time costs.

3. GROUP STRUCTURES

3.1. Survey question

5.1 Does the company have any subsidiary companies or related entities? (Note: for the purposes of this question, a division within the company is not a related entity).

- yes
- no

Number of respondents = 1667

If 'yes', please indicate the number of each type:

1.proprietary limited company (Pty Ltd)

Number of respondents = 59

2.public company (Ltd)

Number of respondents = 59

3.trust/foundation

Number of respondents = 83

4.parent company

Number of respondents = 12

5.other (please specify)

3.2. Survey results

While group structures are par for the course in listed public companies and even in medium-size businesses, they were uncommon among NFP companies. The data showed that only 14% were part of a group structure and, even within that 14%, the majority only had one or two related entities (for example, one proprietary company or one foundation). Further, 74% of respondents only had individuals as members and not all peak bodies had organisations as members.

3.3. Significant differences between respondents

Cross-tabulation of the results revealed the following differences between organisations:

- Large organisations were significantly more likely than small organisations to have a subsidiary or related entity (28% vs 12%).
- Philanthropic bodies were most likely to be part of a group structure (29%). Eighty-six per cent of those were trusts or foundations. This is not a surprising result as it is prudent to have a company as the trustee to protect individuals from liability and to have a separate legal entity in whose name the trust assets can be placed.
- Sports and Recreation organisations were least likely (5%) to be part of group structures.

4. IMPLICATIONS FOR INCORPORATED ASSOCIATIONS' REGIME

While the survey did not cover incorporated associations, there are certain findings that are relevant to reflect on after more than a decade of this regime.

4.1. National and multi-state organisations

Thirty-five per cent of respondents indicated that being a 'national or multi-State organisation' was an important factor in their choice of a company structure. This was particularly so for small organisations, that is, organisations that can be assumed might otherwise have been better suited to the cheaper incorporated associations' regime. In addition, it is likely that this factor was very relevant to the advice given by legal and other advisors, even if not specifically identified by the respondent.²⁰

This data confirms that the needs of small, but national or multi-state, NFP organisations are not being adequately met by the current incorporated associations' regime. It is also a particular problem for a federated body. We are aware of several organisations with a small national secretariat incorporated as a company limited by guarantee, but all their member State and Territory bodies are incorporated associations. This model increases administrative costs for those organisations. It also makes it difficult to produce educational NFP management material that caters for both the State/Federal regimes and for the variations between the States/Territories in

²⁰ See Heading 6.3.

their associations' legislation.²¹ With increased use of technology such as email and internet, many organisations are better able to operate on a national basis. Therefore, this is an increasingly important issue for the States and Territories to consider.

4.2. Trading activities

Forty per cent of respondents indicated that the 'scale of trading activities' was an important factor, an area of debate and variation in the associations' regime.²² This factor is likely to have been relevant to the advice given by legal and other advisors, even if not specifically identified by the respondent. Several respondents indicated in written comments that they would prefer to be an association but, because of the actual or likely scale of their trading activities, said they had decided, or had been directed by the relevant registrar, to incorporate as a company.²³

4.3. Size

The *Review of the Associations Incorporated Act 1984 NSW Consultation Paper*²⁴ refers to larger associations as those with 'an annual turnover of \$250,000 or more'. In the consultation paper there is the suggestion that those NSW associations 'with turnover in excess of \$500,000' are required to incorporate as a company.²⁵ Under the s 45 of the *Corporations Act 2001* (Cth) definition, such an organisation would be regarded as small.²⁶ However, we would argue that most people participating in the NFP sector would think that an NFP organisation with, say, 45 employees, assets of \$4 million and revenue of \$9 million would be a large (or at least not a small) organisation, especially if it had a large volunteer base.

It is important to consider the implications of this definitional mismatch. If the NSW Department's Review results in associations that it regards as large being required to registered under the *Corporations Act* rather than under the *Associations Incorporations Act* then it is worth noting that it will be possible for these organisations (those whose annual turnover is, say, in excess of \$500,000) to fall within the *Corporations Act* definition of small (which refers to revenue of \$10 million) if they registered as a small proprietary limited company.²⁷ In this event, certain company law disclosure and other requirements could be avoided. In particular, they would not be required by the *Corporations Act* to have their accounts audited or to lodge them with ASIC.²⁸

A national regulatory regime for all incorporated NFP organisations within the auspices of the *Corporations Act* would enable the issue of graded reporting obligations (dependent for example on size) to be addressed. This would eliminate the ability of an organisation to avoid their reporting obligations merely on the basis of its legal structure and/or its place of incorporation/registration.

4.4. Regulator

Almost a third (31%) of respondents identified a preference for ASIC 'rather than State regulator' as an important factor, supporting anecdotal evidence that many of the State regulators are under resourced and cannot cope easily with organisations that want to have variations to the prescribed model rules.

²¹ See this argument made by other academics: M. McGregor-Lowndes, 'Reforming Queensland's Incorporated Associations Legislation', 22 *The Queensland Lawyer*, pp. 9–19 and K. Fletcher, 'Incorporated Associations: Cheap Incorporation — Limited Choices' 22 *The Queensland Lawyer*, pp. 20–4.

²² See A.S. Sievers, *Associations and Clubs Law in Australia and New Zealand*, The Federation Press, 1996, para. 4.1.4.

²³ See Heading 1.2.1, Chose structure because of scale of trading activities.

²⁴ See *Review of the Associations Incorporations Act 1984 Consultation Paper*, April 2003, Office of Fair Trading, Department of Commerce, NSW, see p. 5.

²⁵ *Review of the Associations Incorporations Act 1984 Consultation Paper*, p. 10.

²⁶ The *Corporations Act 2001* (Cth) s 45A(2) states: 'A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs: (a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than \$10 million; (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$5 million; (c) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.'

²⁷ There is no taxation or company law requirement that they register as a company limited by guarantee rather than a company limited by shares. In fact, we are aware of several NFP organisations that are registered as proprietary limited companies.

²⁸ They would not be required to lodge such accounts unless requested by ASIC (s 294 *Corporations Act 2001* (Cth)) or by the requisite number of members (s 293) or if they are controlled by a foreign owned company (s 292(2)(b)).

4.5. Public perception and status

'Public perception and status' was important to the majority of respondents (52%) and, as stated previously, supports anecdotal evidence that 'serious' or 'more sophisticated' NFP organisations are companies rather than incorporated associations.

5. SPECIALIST NFP STRUCTURE

5.1. Feedback received

Further data was obtained in May 2003 from participants at a conference of Chief Executive Officers of disability organisations who are members of the peak body ACROD (National Industry Association for Disability Services), where Ms Woodward was invited to deliver a presentation on the Project. Participants were asked to complete a brief feedback form for ACROD. From the 125 responses (out of about 140 who attended the session), the majority (68) were incorporated associations and 46 were companies limited by guarantee. Eighty-four per cent indicated that they were in favour of a new specialist NFP legal structure.

A very important point on this issue was made in email feedback we received from the President of a ski club who is also a lawyer:

I found your preliminary findings very interesting. The problem with most clubs is dealing with members who come and go. Small proprietary companies must still have less than 50 members. If the Club was to issue a new share each time a new member joined, the Club would rapidly exceed 50 members. The only other alternative is to have an existing [member] transfer his/her share. This may be difficult to organise at the time. Also the Club may not want shares traded. Frequently members just cease to respond to any correspondence and drop out. It is necessary to delete these members from the companies books to save money.

The *Associations Incorporation Act* is more practical when dealing with members but did not exist when many clubs were incorporated. A special company based on the *Associations Incorporation Act* with an easy transfer from the Clubs present structure would in my view be the way to go.

5.2. UK reforms

In September 2002 the Strategy Unit in the UK Government Cabinet Office produced a Report titled *Private Action, Public Benefit - A Review of Charities and the Wider Not-For-Profit Sector*. The Report recommends a new form of company structure called a Community Interest Company (the CIC Proposal). To quote from this interesting Report:

5.19 The company form is attractive to many social enterprises. Company law is well developed and companies are well understood by professionals such as bankers and lawyers. The company limited by guarantee form in particular is popular, and is used by some very large not-for-profit organisations such as BUPA, the private health provider.

5.20 Against the popularity and strong image of companies, however, must be balanced the fact that the companies legislation was not designed with the needs of smaller scale community-based social enterprises in mind. Problems include the fact that there is no entrenchment of the non-profit-distributing nature of the organisation, nor the devotion of assets to a public purpose; that the Company Limited by Guarantee does not allow access to equity; and that the company 'brand' is almost exclusively associated with profit-making.

5.21 This report therefore recommends the establishment of a Community Interest Company ('CIC'), drawing as appropriate on company law, but with certain additional constraints and features which make it suitable for use by small scale community-based not-for-profit social enterprises familiar with the company form.

The UK Report then outlines the key characteristics of the new form of company, the CIC:

- Protection of assets against distribution to members or shareholders.
- Ability to choose the limited by guarantee or by shares format, with full adherence to UK and European company law and guidelines, including rules on insolvency, accountancy, and governance.
- Ability to issue preference shares with a fixed rate of return (this applies to both the limited by guarantee and limited by shares models).

- Increased requirements in terms of transparency and accountability.
- A requirement to have a clause in the constitution setting out the objects of the company.
- A check at the point of registration that the objects of the organisation are in the public and community interest, with subsequent changes being subject to regulatory approval.

There was wide public consultation on the recommendations contained in this Report between September and 31 December 2002. In July 2003, the Home Office published a Report titled *Charities and Not-For-Profits: A Modern Legal Framework* as the Government's response to the Strategy Unit Report.²⁹ The Department of Trade has published (with the Treasury and Home Office) a series of documents about the CIC proposal. One of those documents summarises the responses received during the consultation period and of 114 responses received about the CIC proposal, 97 endorsed the recommendation.³⁰ On 4 December 2003 the UK government released draft legislation, the *Companies (Audit, Investigations And Community Enterprise) Bill*,³¹ which if enacted, would make the Community Interest Company proposal part of company law.

5.3. Australian context

We believe that the UK Strategy Unit Proposals warrant serious consideration in the Australian context. The finance option of preference shares is novel and is designed to give NFPs the advantages of having some form of share capital as part of their overall financing mix. We agree with the requirement of having non-distribution and objects clauses. We argue that these should be required as a matter of company law rather than just as ATO practise for those with DGR status. However, not all aspects of the Report's recommendations about CICs are relevant to the Australian context. The Report also recommends a new form of legal structure called a Charitable Incorporated Organisation specifically for those organisations registered with the UK Charity Commission. This is intended as a legal structure to better meet the needs of charities, some of whom are not separately incorporated or who currently opt for incorporation as a company limited by guarantee or an industrial society. This distinction between registered charities and other NFPs does not operate in the same way in the Australian context.

Within the constraints of this Project we have not been able to analyse the UK reform proposals in any depth, or to look at other overseas models for NFP legal structures. However, while we continue to have a dual regulatory system of State/territory based incorporated associations and a national companies regime, it does not seem of any real benefit to consider seriously the introduction of yet another type of legal structure. The existing company limited by guarantee model could be reformed to take in some of the UK reforms, but where would this leave the vast majority of existing incorporated associations? In our view, the better approach is to pursue a single regulatory regime and, then (or at the same time) consider a revised structure that might take in some of the UK proposals. Options for a national regulatory framework are canvassed in Chapter 4, Regulatory Framework.

6. SMALL AND LARGE DICHOTOMY FOR NFPs

The regime of small and large proprietary companies was introduced primarily as a result of pressure from the business community to reduce and streamline the regulatory burden on small business. Consideration needs to be given to the position of small NFP organisations. The public policy argument for requiring disclosure from small NFPs is arguably greater than for small 'for-profit' companies because the majority of them enjoy (as a minimum) income tax exemption. However, there is a strong argument for tailoring the nature of what is disclosed and the fees payable to meet their different needs. It is not so much the extent of the disclosure, as its relevance and accessibility to the different stakeholders that NFP organisations serve, for example, the donating public, members and clients rather than shareholders. But to be effective as a mechanism for good corporate governance, disclosure needs to depend on considerations such as size, purpose and taxation status, NOT on jurisdiction and choice of legal structure.

²⁹ The Government's response to the Strategy Unit Report is available at <<http://www.homeoffice.gov.uk/>>.

³⁰ See *Views on Community Interest Companies* available at <<http://www.dti.gov.uk/cics/views.htm>>.

³¹ See <http://www.dti.gov.uk/cld/companies_audit_etc_bill/>

While there are many overarching provisions in the *Corporations Act 2001* (Cth) that should apply to all companies (particularly, directors' duties), the unique issues faced by NFP companies (some of which are described in this Report),³² could be addressed in specialist provisions. A plain-language guide along the lines of the Small Business Guide could make an enormous difference. Capital reductions and share buy-back provisions have no relevance for NFP organisations, so why not make this clear? At the time that the incorporated associations' legislation was introduced, the simplification of requirements and filings for small business had not been introduced into the corporations' regime. The concept of replaceable rules under the *Corporations Act* is not dissimilar to that of model rules under the various State and Territory incorporated associations Acts. If there can be some replaceable rules that apply only to public companies, why could there not be some designed specifically for NFP bodies?

There is a strong argument for tailoring the nature of what is disclosed and the fees payable to meet their different needs.³³ It is not so much the extent of the disclosure, as its relevance and accessibility to the different stakeholders that NFP organisations serve, for example, the donating public, members and clients rather than shareholders.

Recommendation: Modify existing Corporations Act requirements

While the existing company limited by guarantee structure has proved satisfactory in the main, some aspects need reform. These include:

- the fee structure should be revised to provide a sliding scale based on size
- information required for disclosure should be tailored to the needs of NFP stakeholders rather than to 'shareholders', and this needs to be supported by an NFP specific accounting standard
- the requirement to lodge audited accounts needs to be reconsidered for small NFP organisations
- a plain-language guide summarising the provisions/obligations relevant to NFP companies (along the lines of the Small Business Guide contained as Part 1.5 of the *Corporations Act 2001*(Cth)) should be available
- all NFP companies should be required to have an objects clause and the directors should have a duty to pursue those objects
- all NFP companies should be required to have a 'non-distribution' clause
- the remedies available for a breach of the objects clause need to be clarified and strengthened.

The latter three points (objects clauses, non-distribution clauses and remedies) are discussed in detail in Chapter 7, Stakeholders. It is worth noting that at Ms Woodward and Ms Marshall's presentation for Freehills³⁴ there was clear agreement from participants about:

- a compulsory non-distribution clause to prevent distributions of money or assets to members or related parties
- support for a plain-language guide for NFP companies
- support for a sliding scale of fees based on the size of the organisation.

Recommendation: Future NFP legal structures

A national regulatory regime should be implemented. It would be appropriate at that time to reconsider the range of existing legal structures used by NFP organisations. This would be with a view to introducing a single, specialist NFP legal structure. Whilst maintaining some level of choice is desirable, the current myriad of legal structures leads to confusion and inefficiencies in regulation. Consideration should be given to combining the best aspects of the corporations law and the incorporated associations regimes. The work being done by the UK government would be useful to explore. Any new structure should meet the needs of both small and large NFP organisations, and the issue of converting from existing forms should be addressed in a simple and no-cost way.

³² See Heading 2.3.

³³ See UK Report, n. 23.

³⁴ See Heading 6.1 Chapter 4, Regulatory Framework

7. CONCLUSION

There were several interesting findings about why a company limited by guarantee had been chosen as the legal structure. While a significant number were formed at a time when there was effectively no other option (and they have not subsequently chosen to transfer to the incorporated associations' regime), others have chosen the structure because of factors such as public perception and status, the scale of their trading activities and because they are a national or multi-State organisation. While the existing company limited by guarantee legal structure seems to be meeting the overall needs of many NFP organisations, there are many simple ways the structure could be improved within the current regulatory framework. For example, a plain-language guide for NFP users, a sliding fee scale based on size, and more relevant disclosure requirements. The desirability of requiring objects clauses and non-distribution clauses in the constitutions of all NFP companies has also been raised in this Chapter and, together with a discussion of remedies for members, is developed more fully in Chapter 7, Stakeholders.

On a more fundamental level, there are findings in this Chapter that support the need for a single, Commonwealth statutory regime in order to overcome the problems faced by the increasing number of NFP organisations that wish to operate on a national or multi-State basis (this recommendation is made in the following Chapter, Regulatory Framework). Our data (both from this Chapter and Chapter 1, Profile Data) also shows that it is not simply a matter of thinking that small NFPs should be incorporated as associations and large ones should be required to register as companies. If a national regulatory scheme were introduced for all NFP organisations, then it would be possible to bring together the best aspects of the company structure with those of the associations' regime (and possibly some new features) to introduce a single, specialist NFP legal structure.