

CHAPTER 4: REGULATORY FRAMEWORK

Who understands? Who can help?

SUMMARY OF KEY FINDINGS IN THIS CHAPTER

ASIC's performance

- Overall there was dissatisfaction with ASIC's performance as a regulator of NFP companies. For example, 54% of respondents believe it is inaccessible to non-business people.
- Seventy per cent of respondents believe that the *Corporations Act 2001* (Cth) and the way it is implemented by ASIC is more appropriate to 'for-profit' than NFP companies.
- Given both these findings, it seems that dissatisfaction with ASIC is caused by ASIC not being a specialist regulator, rather than the way it carries out its role.

Introduction of a new regulator?

- The majority (54%) were in favour of implementing the Charity Definition Inquiry recommendation about the establishment of a new administrative body. This rises to three-quarters (74%) of respondents when the significant 'not sure' group (36%) are excluded.
- Written comments provided by those in the 'not sure' group indicate considerable concern that the introduction of a new regulator would simply increase the regulatory burden. Many wanted more information before expressing a view.

Role of a new regulator

- Survey data demonstrated a preference for combining both compliance (58%) and determination of charitable status (58%) with advice (86%), sector advocacy (69%) and training (56%). However, additional feedback suggests that this reflects a desire for increased assistance and support, rather than a well thought out preference for a single regulator body.
- Based on experience in the UK, we do not believe that all these roles should be combined in a regulator.

Recommendations

Single regulatory regime

- A single Commonwealth statutory regime should be introduced for all corporate bodies (that is, 'for-profit' companies, NFP companies and incorporated associations) by referrals of power from the States to the Commonwealth, along the lines of what has been achieved for company regulation. Such a referral would enable a national approach to NFP regulation, with responsibility for registration and on-going regulation being conferred on ASIC.

ASIC's role

As long as ASIC continues to regulate companies limited by guarantee, it should take steps to make itself more friendly to NFP users. Such steps might include:

- the establishment of a specialist unit within ASIC to deal with NFP companies, with further training for ASIC officers about the particular needs of NFP company stakeholders
- a sliding fee structure for NFP companies, based on size
- a plain-language guide for NFP companies.

If ASIC assumes jurisdiction over all incorporated NFP organisations, as recommended in this Report, the need for these steps would be even greater.

Establish a NFP advisory body

An independent NFP advisory body should be established to provide a range of support services for NFPs. This would create a centre of expertise in the specialised needs of NFP organisations. It would also underpin improved accountability and corporate governance practices within the sector. The body should be separate from, and independent of, government and the regulators (including any administrative body established to determine charitable status). The types of services that could be provided at low cost or possibly even 'no cost' to some organisations include:

- auditing
- financial and taxation advice
- legal advice
- training
- dispute resolution and mediation services for NFP stakeholders.

CONTENTS

<u>1.</u>	<u>Introduction</u>	79
<u>2.</u>	<u>Burden of regulation</u>	79
	<u>2.1. NFP context</u>	79
	<u>2.2. How can the law facilitate good governance?</u>	80
<u>3.</u>	<u>NFP experiences with ASIC</u>	80
	<u>3.1. Survey question</u>	80
	<u>3.2. Survey results</u>	80
	<u>3.3. Significant differences between respondents</u>	81
<u>4.</u>	<u>A new regulator?</u>	82
	<u>4.1. Survey questions</u>	82
	<u>4.2. Survey results</u>	82
	<u>4.3. Should the new body have jurisdiction over corporate regulation of NFP companies instead of ASIC?</u>	85
	<u>4.4. Two questions combined</u>	85
	<u>4.5. How appropriate is the Corporations Act and ASIC for NFP companies?</u>	86
<u>5.</u>	<u>Role of new regulator</u>	87
	<u>5.1. Survey question</u>	87
	<u>5.2. Survey results</u>	87
	<u>5.3. Significant differences between respondents</u>	88
	<u>5.4. Observation - combination of roles</u>	89
	<u>5.5. Recommendation for an independent advisory body</u>	90
<u>6.</u>	<u>Options for new regulator</u>	90
	<u>6.1. Feedback</u>	90
	<u>6.2. Specialist in NFP issues</u>	91
<u>7.</u>	<u>National regulatory framework</u>	91
	<u>7.1. Options to consider</u>	91
	<u>7.2. Uniform incorporated associations' legislation</u>	92
	<u>7.3. Uniform incorporated associations' legislation with ASIC as regulator</u>	93
	<u>7.4. Commonwealth legislation administered by ASIC</u>	94
	<u>7.5. Feedback</u>	94
<u>8.</u>	<u>Conclusion</u>	95

1. INTRODUCTION

This Chapter considers the regulatory framework for NFP companies. The survey data outlined in the previous Chapters has highlighted certain distinct characteristics of NFP companies - how they differ from 'for-profit' companies, and the groupings that exist within the NFP sector. These need to be borne in mind when considering issues such as the most appropriate regulator and overall legislative framework for these organisations.

What are the regulatory options? Continue as is - the Australian securities and Investments Commission (ASIC) for companies, and State/Territory regulators for incorporated associations. Or develop a specialist unit within ASIC for NFP companies? Create an independent administrative body for NFP organisations (as recommended by the Charity Definition Report)¹ that works in conjunction with ASIC? Or should this body replace ASIC's role (for example, the organisation's obligations under the *Corporations Act 2001* (Cth) would be satisfied by filing with the NFP administrator)? Should there be a referral of powers by the States such that ASIC was the sole regulator for all corporate bodies, including NFP companies and associations? Some of these options have been raised in the previous Chapter, Legal Structure. This Chapter summarises the survey findings about ASIC and a possible new regulator. At the end of this Chapter, the regulatory options for a national scheme are also canvassed.

2. BURDEN OF REGULATION

2.1. NFP context

One of the questions raised repeatedly throughout this Report is whether the burden of regulation is too great for the NFP sector, in particular, for small NFP organisations.

In addition to the effect of the myriad legal structures (outlined in Chapter 1, Introduction), and of taxation laws and fundraising/collection laws in each State, the regulation of NFP bodies varies greatly depending on:

- the nature of the activities of the organisation, and therefore the Acts and regulations that govern their activities
- whether they receive government funding and are, subject to government funding agreements.

With regard to the overall regulatory burden for NFP organisations, the findings in this Report give empirical support to the contention (made mostly recently by Professor Myles McGregor-Lowndes) that, as a consequence of the failure of government (both Federal and State) to consider or be concerned for NFP organisations in their strategy to identify ineffective and inefficient regulation, NFP compliance costs have increased. This increase has been the side effect of those governments focussing on business-oriented reforms.²

To elaborate, problems can arise when regulations are amended or new regulations are introduced. These changes can impose significant compliance costs on voluntary organisations. This can be a particular problem for organisations that depend on government funding. Grants and contracts are rarely amended to recognise the impact of such changes. If government wants NFP organisations to play a role in delivering public services it needs to ensure that regulatory changes do not impose unexpected costs on organisations, or that some compensatory mechanism for NFP organisations accompanies the reforms.³

One of the central questions in this Report is whether regulation is proportionate to risk, and whether regulation could and should be harmonised. By way of example, feedback on the preliminary findings from this Report suggest that many in the sector are of the opinion that the accounting, reporting and monitoring requirements - particularly for government-funded projects -

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 *Report of the Inquiry into the Definition of Charities and Related Organisations*, Charity Definition Inquiry, 2001, available at <<http://www.cdi.gov.au>> Charity Definition Inquiry, p. 294 recommendation 25.

² See M. McGregor-Lowndes, *Regulatory Infrastructure for Nonprofit Organisations*, August 2000, Working Paper No. PONC97, Queensland University of Technology. See also S. Woodward 'Not-for-Profit Companies - Some Implications of Recent Corporate Law Reforms' 17 *C&SLJ* 390, 1999.

³ Similar sentiments were outlined in the UK's National Council for Voluntary Organisations (NCVO), *Response to the Performance and Innovation Unit review of the Legal and Regulatory Framework for Charities and the Voluntary Sector*, December 2000 at <<http://www.ncvo-vol.org.uk>>.

can be excessive. All too often where more than one government funder is involved they all require different information. This is not a matter of regulation, but of good management practice on the part of the government departments concerned. Efforts are being made within government to harmonise funding agreements, however, more could be done. Government departments (and their responsible ministers) ought to review their requirements to ensure that they are proportionate to risk, to be flexible rather than unnecessarily prescriptive in the way information must be presented, and to be aware of any potential overlapping requirements from other government departments or agencies.

2.2. How can the law facilitate good governance?

In the corporate law context, regulation theory is concerned with how to regulate corporations so as to facilitate good internal practices. Disclosure is one way of improving accountability. However, we note that requiring companies (whether 'for-profit' or NFP) to provide regular reports, does not necessarily mean that they become open and transparent. Our colleague, Dr Christine Parker wrote recently:

Despite the dominance of organizations in contemporary social life, law is desperately short of techniques, doctrines and institutions that adequately respond to the social features of organizational entities, their impacts on stakeholders, their internal capacity for self-management, their capacity for diffusion and avoidance of accountability. Lack of corporate social and legal responsibility is not just a failure of corporate management. It is also a failure of legal regulatory institutions to interact with corporate organizations to make them open and permeable.⁴

Parker insists that the role of legal and regulatory strategies is to add the 'triple loop' that forces companies to evaluate and report on their own self-regulation strategies so that regulatory agencies can determine whether the ultimate substantive objectives of regulation are being met. Parker argues that regulators and rule-makers will themselves have to revise and improve their strategies constantly in light of the experience and evaluation of corporate self-regulation.

3. NFP EXPERIENCES WITH ASIC

3.1. Survey question

14.2 The Australian Securities and Investments Commission (ASIC) is the regulator of all companies - 'for profit' and 'not-for-profit'. From your experience, please indicate how much you agree or disagree with the following statements about ASIC:

(1) strongly agree, (4) strongly disagree, (0) not sure

- | | |
|---|---------------|
| - is merely a filing agency | 1..2..3..4..0 |
| - provides relevant and timely advice if needed | 1..2..3..4..0 |
| - is concerned to ensure that our company is well run | 1..2..3..4..0 |
| - is inaccessible to non-business people | 1..2..3..4..0 |
| - imposes substantial fees | 1..2..3..4..0 |
| - has an important public information rule | 1..2..3..4..0 |

Number of respondents = varied between 1619 - 1636 for each option

3.2. Survey results

To find out about dealings with ASIC, respondents were asked to rate a number of statements about ASIC's role/performance. The questions included an equal number of 'negative' and 'positive' statements. Table 1 shows the results. For the purposes of these results, the 'not sure' responses were excluded and the results were collapsed to 'agree' and 'disagree'.⁵

⁴ C. Parker, *The Open Corporation, Effective Self-Regulation and Democracy*, Cambridge Press, 2002, p. 245.

⁵ The collapsed chart did not result in any distortion of the refined patterns. However, 30% of respondents were 'not sure' about the statement that ASIC is 'inaccessible to non-business people'. For all the other statements, the 'not sure' group were 16% or less.

Table 1: Respondents' satisfaction with ASIC

Positive statements about ASIC	Negative statements about ASIC
provides timely advice if needed <i>majority (56%) disagreed</i>	is merely a filing agency <i>majority (56%) agreed</i>
is concerned to ensure that our company is well run <i>majority (56%) disagreed</i>	inaccessible to non-business people <i>majority (54%) agreed</i>
has an important public information role <i>majority (74%) agreed</i>	imposes substantial fees <i>majority (57%) agreed</i>

Table 1 shows overall dissatisfaction with ASIC's performance. The majority of respondents have agreed with only one positive statement, namely that ASIC has an important public information role to play (which, of course, is not even a statement about whether the respondents think ASIC is *performing* that role well).

There was no control group of 'for-profit' respondents, so it is not possible to draw any conclusions about whether or not this level of dissatisfaction is higher among NFP companies than 'for-profit' companies. However, as discussed under Heading 4.5, a significant majority of respondents (70%) thought that the *Corporations Act 2001* (Cth) and the way it is implemented by ASIC is more appropriate for those companies that are 'for-profit', than for NFP's.

3.3. Significant differences between respondents

Overall, there were very few differences between respondents based on any of the key groupings that we have used for cross-tabulation. Only 'ASIC imposes substantial fees' attracted differences in response between respondents.

3.3.1. ASIC IMPOSES SUBSTANTIAL FEES

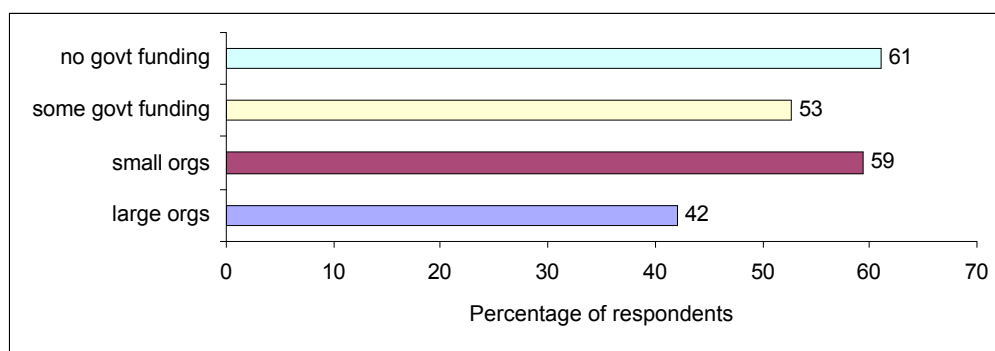
Figure 1 shows that there were significant differences between large organisations and small organisations with respect to views about this assertion. Almost 60% of small organisations thought that ASIC imposes substantial fees, whereas only 42% of large organisations were of this opinion. There were similar differences between those receiving government funding and those that do not. This is likely to be the result of the high correlation between size and the receipt of government funding.

It is logical that a small organisation would find the fees imposed by ASIC more difficult to meet than a large organisation with greater resources. It is also worth noting a recent observation by Professor Mark Lyons:

Several medium sized nonprofits have been bankrupted by fines imposed by ASIC for relatively minor infringements.⁶

These findings support a sliding fee structure based on size for NFP organisations.

Figure 1: ASIC imposes substantial fees, based on key indicators



⁶ M. Lyons *The Legal and Regulatory Environment of the Third Sector, Asian Journal of Public Management* forthcoming 2004, p. 8.

4. A NEW REGULATOR?

4.1. Survey questions

14.3.1 'I agree with the Federal Government Inquiry's recommendation that an independent administrative body to oversee charities and related entities should be established'.

Circle your response.

(1) strongly disagree, (4) strongly agree, (0) not sure
 1 2 3 4 0

Number of respondents = 1652

14.3.2 Do you have any general comments on this recommendation?

Number of respondents = 107

14.3.3 If this recommendation was implemented, should such a body have jurisdiction over corporate regulation of not-for-profit companies instead of ASIC?

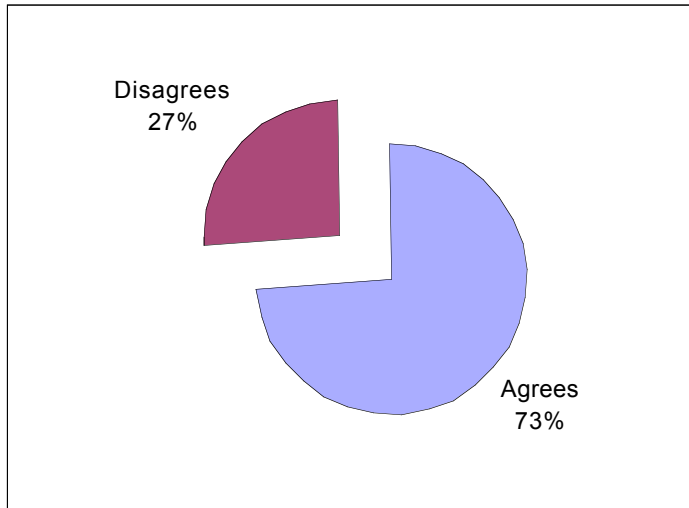
yes, no, not sure

Number of respondents = 980

4.2. Survey results

In answer to the question 14.3.1, about the Charity Definition Inquiry recommendation for the establishment of a new administrative body to oversee charities and related entities,⁷ the majority (54%) of respondents said 'yes', 20% said 'no', 24% were 'not sure', and 2% did not respond to the question. But by removing the 'not sure' group and non-responses, the proportion in favour of the Inquiry's recommendation is 74% (Figure 2).

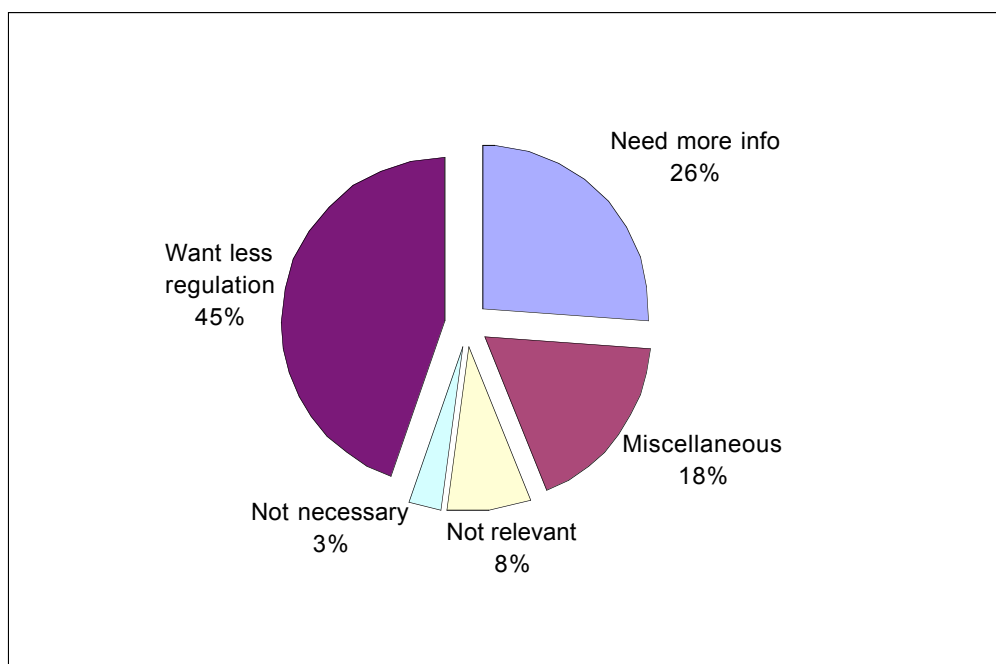
Figure 2: Agree with Charity Definition Inquiry recommendation for new independent regulator



Because such a high proportion of respondents said they were 'not sure' (n=405), analysis was carried out of the comments given under question 14.3.2. We looked at those who answered 'not sure' to question 14.3.1 and those who also provided a written comment under question 14.3.2 (n=107). The comments were coded. The results are shown in Figure 3.

⁷ Charity Definition Inquiry, n. 1, p. 294, recommendation 25.

Figure 3: Respondents' comments who were 'not sure' about the recommendation



4.2.1. 'DESIRE LESS REGULATION / PAPERWORK'

This was the largest category, with 45% of comments falling into it. In this category, they were of the opinion that the recommendation for a new, specialist NFP regulator would lead to excessive regulation or paperwork. In most cases, these comments suggest that the respondent thought that the independent administrative body would be in addition to ASIC.

This view is encapsulated by the following comment:

Worried: just another organisation. Still have to comply with Company Laws etc. Just another layer.

Some comments included suggestions following their concern about excessive regulation:

We do not need additional workloads or bureaucracies forced on companies which rely on small staffs and volunteers. Any new body would have to replace existing reporting requirements and understand the nature of the sector they are dealing with.

Some comments simply suggested concern about more regulation, but appreciated the need for transparency. For example:

Will charities be LESS regulated or MORE regulated? Generally I am for LESS red tape BUT donations and public funds need to be accounted for.

A few respondents said that they had not had a negative experience of ASIC which would lead them to desire an alternative regulatory body. They suggested working with the existing bodies:

There are other options that can be explored or at very least need more discussion about this. For example, ASIC's role and Office of Fair Trading's involvement possibly. ASIC has been very useful to us and would not want another body that may be more complex.

Likewise, other respondents raised concerns about the administrative costs of developing a new regulatory body:

I am somewhat cynical of bureaucracy. Dealing with ASIC for an organisation our size has not been a problem. The fees are minimal. In those circumstances I am not sure what benefits will be derived by creating a new body. My suspicion is that fees will rise to cover the cost of the new body.

Contrary to this view, other respondents stated a desire to avoid regulation by ASIC:

The only benefit that I can see would be to escape ASIC's unfair administration of late lodgement fees and charges for forms not lodged within the unrealistic timeframes they set. It is difficult for me to get the details about directors when they change in time to meet the 14 days required by ASIC - and they give absolutely no leniency on the 14 days.

A number of respondents stated that any new body should replace State-based Office of Charities, and lead to greater streamlining of reporting. For example:

It would depend on what its role and functions are and how it is funded. It should also not be an extra compliance issue, eg will it replace the NSW Office of Charities?

Likewise, another respondent stated:

If the change results in increased reporting it is unlikely we would support it. Charitable organisations already have substantial reporting and accreditation requirements from Governments and Government Agencies at National and State levels. For example, to run a raffle requires approved processes in each State the tickets will be sold as well as some states requiring approval that our organisation is a bona fide charity. In addition to this in Victoria we need to register annually to obtain authority to fundraise from the public.

And:

Unsure about the ramifications. However, the biggest problem is the reporting to each separate state regulatory body - all have different reporting requirements - being able to provide one set of information in the same form - instead of presenting differently for each state - would be time consuming and less onerous.

4.2.2. 'NOT RELEVANT TO OUR ORGANISATION'

Eight per cent of comments stated that the recommendations by the Charity Definition Inquiry did not apply to them, as they were not charities. For example, one respondent said:

We are not a Charity and consequently have no views on this issue.

4.2.3. 'NEED MORE INFORMATION'

Comments falling into this category included any statement expressing a lack of knowledge about the recommendation, or at least too little information to comment. Twenty-five per cent of comments fell into this category. Most respondents in this category wrote something similar to the following comment:

Was unaware of the government's interest in this matter. Therefore, have no knowledge of detail of what is being proposed.

Other respondents were reluctant to support or be against the recommendation without having a clearer idea of the exact powers of the new body:

Who will control this body?

What regulations will they abide by?

What reporting requirements?

Will our company still require an auditor?

Another said:

As I am unsure what I am agreeing/disagreeing to, it would be beneficial to educate consumers on its purpose and services and its impact on our centre.

4.2.4. 'NOT NECESSARY'

Only three surveys fall into this category:

I do not see the necessity for such a body at this time.

I am wary of a new body may be worse than ASIC.

Can't see what the point would be.

4.2.5. 'MISCELLANEOUS' (MAINLY SUGGESTIONS ABOUT CONTENT)

Comments that fell into this category, which accounted for 18% of comments, varied widely in content, but were similar in so far as they provided an opinion about the role that a new independent body could play.

For example, some comments stressed the training role that it could play:

It depends on their Terms of Reference. There is a need for a body that assists not-for-profits with advice - training for directors - a supportive role - not a policing role. See in this respect www.ourcommunity.com for fundraising related info. This is a good idea that could be built on for training, etc.

Other respondents expressed a desire to ensure that any new body was comprised of NFP representatives, not bureaucrats:

If the Government proceeds down this path it should be comprised of people from the industry and not government bureaucrats.

Others included comments about the level of regulation:

The degree of oversight should be related to how much public money they receive and the amount of income spent in wages / salaries etc and the magnitude of the income of the persons in senior positions.

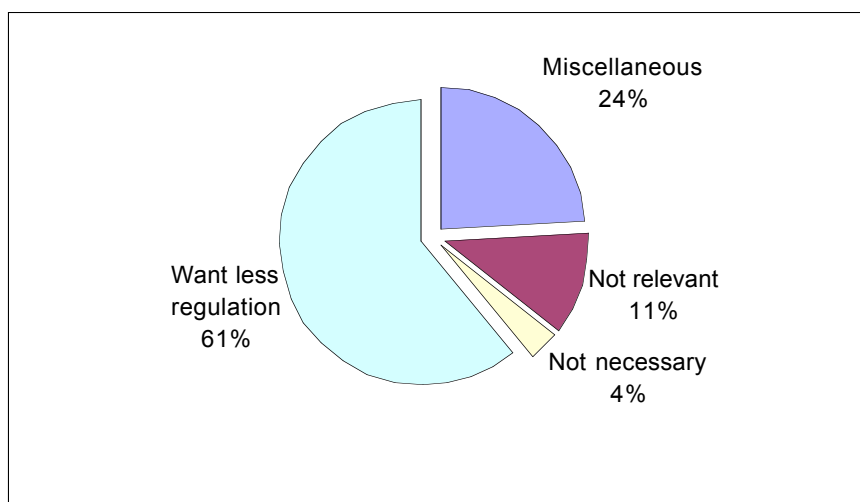
Some respondents were positive about the potential unification of state laws:

There is merit in having one Federal Administrative body to oversee charities rather than have charities registering in each individual state of Australia.

4.2.6. FURTHER DISCUSSION CONCERNING COMMENTS

As only 27% might be thought of as genuinely 'not sure', in the sense that they did not know about the Charity Definition Inquiry or wanted more information, the 'need more information' category was removed (shown in Figure 4). Without 'need more information' category, 'desire less regulation / paperwork' accounts for 61% of all comments.

Figure 4: Respondents' comments who were 'not sure' about the recommendation without needing 'more information'



4.3. Should the new body have jurisdiction over corporate regulation of NFP companies instead of ASIC?

In response to the second question, (question 14.3.3) that is, whether the new body should 'have jurisdiction over corporate regulation of not-for-profit companies instead of ASIC'. The responses were - 33% 'yes', 25% 'no', 36% 'not sure', and 6% did not respond to the question. When the 'not sure' group and non-responses are excluded, the proportion in favour of such a new body taking over ASIC's jurisdiction is 57%.

4.4. Two questions combined

Responses to questions 14.3.1 and 14.3.3 were combined as follows: a positive response to both of these questions (that is, agreed with the Inquiry recommendation and in favour of that new body having jurisdiction instead of ASIC) was taken to indicate a desire for a new regulator (n=446). A negative response to both questions was taken to mean the respondent was not in favour of a new regulator (n=169). Likewise, a negative response and a positive response in tandem (regardless of the question order) was taken to mean the respondent was not in favour of a new regulator (n=245) (total negative responses n=414).

When the responses to these two questions were combined in this way, nearly half (49%, n=828) were 'not sure' about having a new regulator, 26% wanted a new regulator and 25% did not. Refining the responses further by taking out the 'not sure' group, the split is 52% vs 48% in favour of wanting a new regulator. This is obviously a very ambivalent pattern.

4.4.1. SIGNIFICANT DIFFERENCES BETWEEN RESPONDENTS

Small companies were more likely than large companies to want a new regulator (53% vs 44%). No other significant associations were found. For example, member-serving companies were only very marginally more likely than public-serving companies to want a new regulator (52% vs 51%) and similarly for those with PBI tax status and those without it (48% vs 50%).

4.5. How appropriate is the Corporations Act and ASIC for NFP companies?

4.5.1. SURVEY QUESTION

14.3.4 Do you think that the *Corporations Act* and how it is implemented by ASIC is more appropriate for those companies that are 'for-profit' than for those that are 'not-for-profit'?

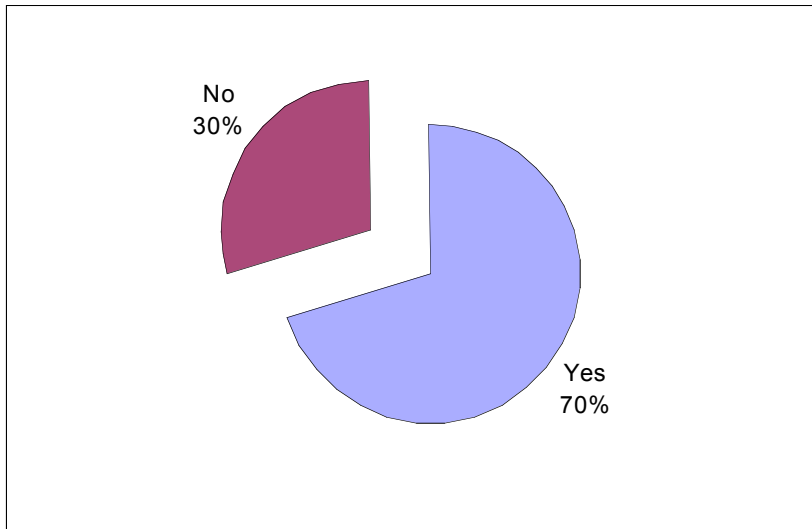
- yes
- no

Number of respondents = 1577

4.5.2. SURVEY RESULTS

A clear majority (70%) answered 'yes', they did think that the *Corporations Act 2001*(Cth) and the way it is implemented by ASIC is more appropriate for those companies that are 'for-profit' than for those that are NFP's. Not surprisingly, those respondents wanting a new regulator (see Heading 4.4) were more likely than respondents who did not to believe that the *Corporations Act* and its implementation by ASIC is more appropriate for 'for-profit' companies than for NFP companies (89% vs 54%). The results for this question suggest that it is the fact that ASIC is not a specialist regulator, rather than the way ASIC carries out its role, that causes the dissatisfaction with ASIC as reported under Heading 3.

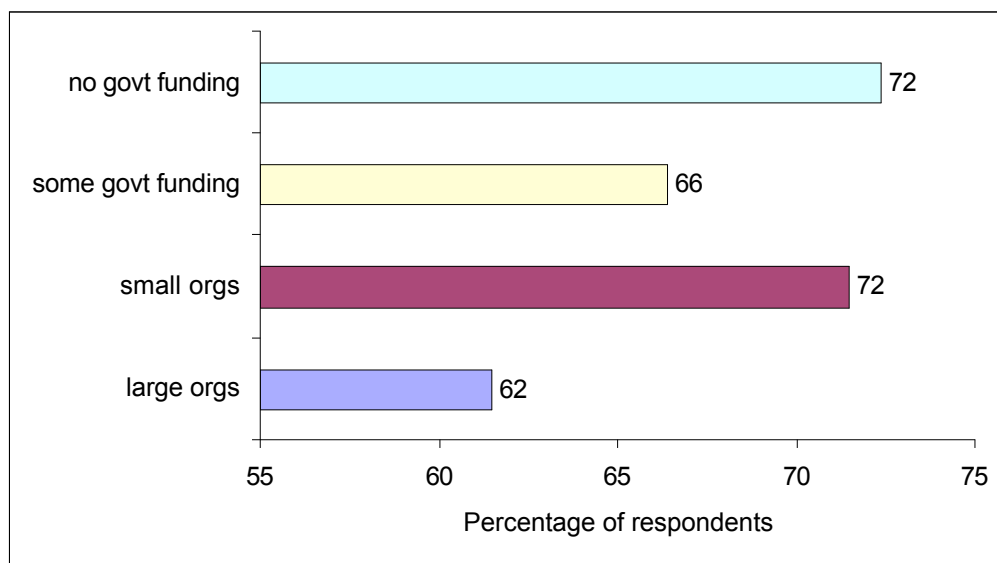
Figure 4: Is the *Corporations Act* more appropriate for 'for-profit' than NFP companies?



4.5.3. SIGNIFICANT DIFFERENCES BETWEEN RESPONDENTS

The only significant differences between respondents concerning their view of the *Corporations Act* and the way it is administered by ASIC was between large and small organisations (difference of 10%), and those that receive government funding and those that do not (difference of 6%). This reflects the consistent pattern that has emerged concerning small NFP companies' experience of the *Corporations Act*, its disclosure requirements and the way that ASIC imposes fees and fines. These results provide further support for differentiation between small and large organisations to be part of any reform of the regulation of NFP organisations.

Figure 5: *Corporations Act* more appropriate for 'for-profit' than not-for-profit companies, based on key indicators.



4.5.4. OBSERVATION

These results are also consistent with ASIC administrative practice. Professor McGregor-Lowndes reports that:

...the standard reply letter with a model company limited by guarantee constitution for NFP organisations [has been replaced] by one that refers the inquirers to the state based incorporated associations regimes. The ASIC region responsible for such companies in Hobart is remote from the major concentrations of nonprofit activity. Thus, the ASIC give the impression of regarding nonprofit companies as not part of their core client focus.⁸

5. ROLE OF NEW REGULATOR

5.1. Survey question

14.4 If this recommendation is implemented, which of the following roles do you think such an independent body should have? (*you may tick more than one box*)

- Advice
- Advocacy on behalf of the NFP sector
- Training
- Determiner of charitable status for taxation and other purposes
- Compliance
- None of the above

Number of respondents = 1577 for each of the options above

- Other (*please specify*)

Number of respondents = 64 for this option

5.2. Survey results

In order to establish the respondents' view of the role of a new regulator, the respondents were given a number of options to choose from. The results are shown in Table 2.

⁸ See McGregor-Lowndes n. 2 at p. 6.

Table 2: Respondents’ view of the role of a new regulator

Possible role	Selected this option (in descending order of prevalence)
advice	86%
advocacy on behalf of the NFP sector	69%
determiner of charitable status for taxation and other purposes	58%
compliance	58%
training	56%
other	4%

5.3. Significant differences between respondents

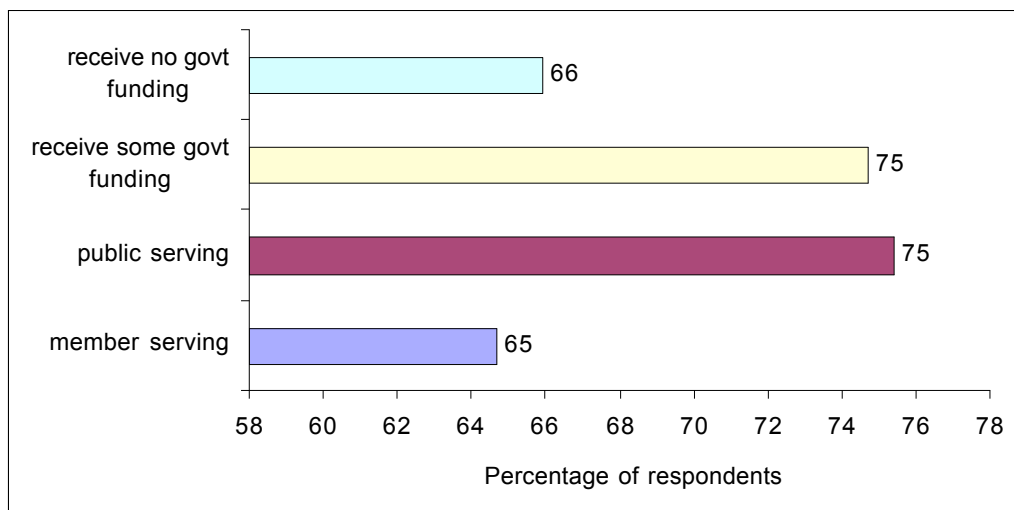
5.3.1. ADVICE AND TRAINING

Eighty-six per cent of respondents said that they wanted a specialist NFP regulator to provide advice. Small organisations were much more likely than large organisations to desire the regulator to play this role (87% vs 80%), and small organisations were also more likely to desire training than large organisations (58% vs 47%). These results point to the difficulties that small NFP organisations have in obtaining timely and accessible advice and training.

5.3.2. ADVOCACY

Public-serving organisations and those receiving some government funding were more likely to think that the new independent regulator should provide advocacy on behalf of the NFP sector, as shown in Figure 6. This may be because those organisations receiving government funding feel that they require independent representation to government that does not threaten their funding position.

Figure 6: Advocacy for NFP organisations, based on key indicators



5.3.3. DETERMINER OF CHARITABLE STATUS

A majority, 58% of respondents, thought that a new specialist regulator should have the power to determine the charitable status of NFP bodies. Public-serving bodies (63%) were slightly more likely than member-serving bodies to think that an independent regulator should play this role.

5.4. Observation - combination of roles

It appears from the data that the majority of respondents were in favour of combining all roles in one, new body. In particular, they were in favour of combining both compliance (58%) and determination of charitable status (58%) with advice (86%), sector advocacy (69%) and training (56%). From general feedback, however, it may be that what respondents have been keen to indicate in this question, is the need for all these services to be provided to the sector, rather than necessarily wanting them to be provided by one body. For example, that 86% of respondents want a body providing advice may be more of an indication of the extent to which many organisations are struggling to navigate the current regulatory framework, than it is a clear indication that they want one body to determine charitable status *and* provide advice.

The apparent keenness for one body may also reflect the frustration many in the sector have expressed to us about having to deal with many government bodies (ATO, ASIC, government funders, activity-based government regulators such as aged care etc.) It should not necessarily be taken to reflect a well thought-out preference for a combination of all these roles. For a sector often trumpeting its independence from government as important,⁹ it may well be that if this question had been expressed differently, the preference would not be to combine the regulatory roles (determiner of taxation status and compliance) with support services and sector advocacy.

5.4.1. ATO VIEW ON COMBINED ROLES

We believe that the dual role of the ATO in determining the charitable status of NFP bodies and revenue-raising gives rise to a conflict of interests. This point was made in the Australian Taxation Office's submission to the Charity Definition Inquiry:

[Para 8] It is our view that the current system of tax concessions provides an unnecessary layer of administrative cost and complexity, and lacks transparency...

[Para 9] Additionally, administration would be better served by a single, independent common point of decision making on definitions leading to conclusions about whether organisations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example. That independent, objective decision making could then serve as the criterion determining the level of funding and/or concession to which an organisation would be entitled. Such a body would of course need to be established and funded accordingly, and could serve as a focus for any direct outlays program.

5.4.2. UK EXPERIENCE

It is important to note that experience from the United Kingdom (which has had a Charities Commission for over 40 years)¹⁰ suggests that combining the roles in this way can create tensions. In particular, the National Council for Voluntary Organisations (NCVO), a major sector body in the United Kingdom, has questioned the United Kingdom Commission's dual role in its submission to a government review of the sector:

NCVO has long had concerns about the dual role performed by the Charity Commission. We believe that the dual role inevitably creates conflicts of interest and that it can cause the Charity Commission to concentrate on one function at the expense of the other. Nor are we convinced by the Charity Commission's arguments that the two are part of a continuum and that their effective functioning would be impaired if they no longer provided an advice service. We therefore consider that the regulatory and the wider advisory functions of the Charity Commission should be separated.¹¹

⁹ The most recent example of this has been the outcry from many NFP organisations regarding advocacy and lobbying activities under the draft *Charities Bill 2003*. See 'Speaking out While They Can', *The Melbourne Times* Issue 35, 10 September 2003, pp. 8–9. Also information contained on the Philanthropy Australia website at <www.philanthropy.org.au/advocacy/draft.htm>.

¹⁰ See Charity Definition Inquiry, n. 1, Ch. 32, p. 284 and Appendix I, pp. 419–27 for a clear overview of the nature and role of the UK Charities Commission.

¹¹ National Council for Voluntary Organisations, *Response to the Performance and Innovation Unit Review of The Legal and Regulatory Framework for Charities and the Voluntary Sector*, 2001, para. 5.1 at <http://www.ncvo-vol.org.uk/main/about/does/policy/pdfs/CLR_PIU_submission.pdf>.

However, the most recent United Kingdom Cabinet Report has recommended, among other things, that the United Kingdom Charities Commission should retain its advisory role although it 'should be more precisely defined and focused on the issues over which it has regulatory responsibility.'¹²

5.5. Recommendation for an independent advisory body

In the Australian context, it is hoped that a body such as the National Nonprofit Round Table¹³ will take on an advocacy role on behalf of the sector. Although still in a fledgling stage and in need of stable funding itself, it could also be appropriate for the National Nonprofit Round Table to auspice a national sector body suitably equipped to provide advice and training. In view of our data, and the observations we have made under Heading 5.4, we believe that there is a clear need for NFP organisations to be able to draw on specialist, independent advice on a range of areas. A new advisory body would be able to generate at least some of its funding from fees for service. One would hope that any shortfall could come from a far-sighted philanthropic source and possibly, in part, from government. We are of the opinion that such a body is needed, whether or not an independent administrative body is established as recommended by the Charity Definition Inquiry.

In our opinion, the establishment of a new, independent advisory body would be of particular benefit to small to medium NFP organisations and would serve to strengthen the accountability and capacity of the sector.

Recommendation: Establish an independent NFP advisory body

An independent NFP advisory body should be established to provide a range of support services for NFP organisations. This would create a centre of expertise in the specialised needs of these organisations. It would also underpin improved accountability and corporate governance practices within the sector. The body should be separate from, and independent of, government and the regulators (including any administrative body established to determine charitable status). The types of services that could be provided at low cost or possibly even 'no cost' to some organisations are:

- auditing
- financial and taxation advice
- legal advice
- training
- dispute resolution and mediation services for NFP stakeholders.

6. OPTIONS FOR NEW REGULATOR

In terms of regulation of NFP companies, it is suggested that there are two main options that warrant consideration and debate:

- a) the creation of a specialist unit within ASIC; or
- b) the creation of an independent, specialist NFP regulator that takes over the regulation of NFP companies from ASIC.

6.1. Feedback

Following the release of our Preliminary Findings,¹⁴ which included an outline of these options, a large amount of correspondence was received about the recommendations. Further workshops were carried out to obtain feedback on the recommendations.

¹² United Kingdom Cabinet Office, Strategy Unit Report, *Private Action, Public Benefit - A Review of Charities and the Wider Not-for-Profit Sector*, 2002, para. 7.48 at <<http://www.piu.gov.uk/2002/charity/report/index.htm>>(UK Report).

¹³ Formation in June 2002 of a National Nonprofit Round Table (initially called the 'Third Sector Round Table'). See 'Non-Profit Groups Link up to Present United Front', *Financial Review*, 26 June 2002, p. 11 and E. Cham, National Director Philanthropy Australia Inc, 'A New Focus for Australia's Non-Profits', 2002, 50 *Australian Philanthropy Journal* 3.

¹⁴ The Preliminary Findings were sent to all the respondents who provided contact details for this purpose. See Appendix 1, Methodology, for further details concerning the way in which feedback on the Preliminary Findings was sought and received.

6.1.1. ACROD FEEDBACK

First, 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), at which 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. It is worth noting that 95% were in favour of government reporting requirements being streamlined and being made to one specialist government regulator. The ACROD feedback supports the Project's survey data and is significant because it provides responses from a *group of incorporated associations* to show that they are even more strongly in favour of a new specialist NFP structure and regulator. Indeed, whether the feedback was obtained from representatives of incorporated associations or companies limited by guarantee, there was general desire (with very few exceptions) for a centralised regulation and place of lodgement for the legal reporting requirements for NFP organisations, including fundraising reports and annual returns.

6.1.2. FREEHILLS SEMINAR

Secondly, Ms Woodward and Ms Marshall were invited to present a seminar about the Project on behalf of Freehills, solicitors, (as part of their pro bono services). This seminar was held in Sydney on 17 June 2003 and was attended by approximately 70 people from a variety of NFP organisations and some advisors to NFP organisations. After a presentation about the Project, people were divided into groups to discuss some of the preliminary recommendations. There was clear agreement from participants that national uniformity was necessary and that there should be a centralised place for lodgement of reports, including fundraising reports.

6.2. Specialist in NFP issues

The feedback received was split as to whether a new specialist NFP regulator should be created to perform these functions, or whether a specialised unit should be created within ASIC. The survey results discussed in this Chapter show that whilst ASIC is not generally thought of as providing a satisfactory service to NFP bodies. This may be because the *Corporations Act 2001* (Cth) and the way it is administered by ASIC are more suited to 'for-profit' companies than NFP organisations. If steps were taken to create a specialised NFP unit within ASIC that was more user-friendly, and understood the particular needs of NFP bodies, this dissatisfaction would be allayed.

Recommendation: ASIC's role

As long as ASIC continues to regulate companies limited by guarantee, it should take steps to make itself more friendly to NFP users. Such steps might include:

- the establishment of a specialist unit within ASIC to deal with NFP companies, with further training for ASIC officers about the particular needs of NFP company stakeholders;
- a sliding fee structure for NFP companies, based on size
- a plain-language guide for NFP companies.

If ASIC assumes jurisdiction over all incorporated NFP organisations, as recommended in this Report, the need for these steps would be even greater.

7. NATIONAL REGULATORY FRAMEWORK

7.1. Options to consider

In terms of regulation of both associations and NFP companies, we suggest that there are three main options that warrant consideration and debate:

- a) Retention of the existing dual regime but with uniform State and Territory-based incorporated associations legislation (along the lines of what has been achieved for cooperatives);
- b) Retention of the existing dual regime, but with uniform State and Territory incorporated associations' legislation *and* legislative amendments enabling ASIC to assume jurisdiction over incorporated associations; or

- c) Introduction of a single, Commonwealth statutory regime for all corporate bodies (that is, 'for-profit', NFP, companies and incorporated associations) by referrals of power from the States to the Commonwealth (along the lines of what has been achieved for company regulation) which would also enable national regulation by ASIC *and* the possible development of a specialist form of corporate entity for NFP organisations generally.

7.2. Uniform incorporated associations' legislation

Others have already made the call for uniform legislation for incorporated associations.¹⁵ It is an appealingly logical notion but there seems to have been little push for it. This point is made by Professor McGregor-Lowndes:

Any reform agenda would have to be led by a federal government with considerable political will to drive through reforms that would involve the co-operation of the states and territories. A similar resolve to that required to achieve the national corporations regimes would be needed over a sustained period. The task of politically managing such a process of reform at present seems difficult given the lack of a peak association for the whole of the sector or a broad coalition of peak bodies that any government could interact with concerning the reform process. Another essential element of the recent reform agendas of both corporations and taxation reform has been a broad community agreement that both areas were "broken and needed fixing". Whether the public perception of a nonprofit regulatory environment in need of reform is present or could be evoked is also not clear. Many powerful and vocal nonprofit organisations would actively oppose the creation of such a perception because it would directly impact upon their trustworthiness in the community and hence their access to donations, sponsorship and volunteers.¹⁶

The survey data as outlined in Chapter 3, Legal Structure, provides some evidence of problems with an incorporated association as the legal structure for some NFP organisations (even small ones). In particular, peak (national) bodies or the national body for a group of State/Territory organisations¹⁷ are often companies limited by guarantee because of the ease of operating under a national regime, but this means one 'group' needs to manage and appreciate both regimes as well as the differences between the various associations' legislation. In its final report, the Industry Commission considered uniform State associations' legislation as one option to improve accountability, but concluded that it was 'not the best way to ensure public accountability for CSWOs [community social welfare organisations]'. The Commission reached this conclusion for two reasons: (a) because of the difficulties of achieving and maintaining uniformity between States; and (b) because not all CSWOs are incorporated associations and therefore making the legislation uniform 'would not encompass all CSWOs and hence would not provide a consistent set of reports for all CSWOs. Nor would it lead to a comprehensive database'.¹⁸ This report was published in June 1995 so it is possible to surmise that if the Commission had had the benefit of recent experience with the referrals of power for the *Corporations Act 2001*(Cth),¹⁹ it would have felt that reason (a) (above) could be overcome, but presumably its conclusion would not have been altered because reason (b) (above) would still apply.

The following is an elaboration of some of the main problems with a continuation of the current State and Territory-based scheme.

¹⁵ For example, S. Sievers, *Incorporation and Regulation of Non-Profit Associations in Australia and other Commonwealth Law Jurisdictions*, 13 *AJCL* 124 at 142, 2001; M. McGregor-Lowndes see n. 2; and M. Lyons *The Legal and Regulatory Environment of the Third Sector*, *Asian Journal of Public Management*, forthcoming 2004.

¹⁶ See McGregor-Lowndes, n. 2, p. 8.

¹⁷ For example, the Nursing Mothers' Association has State incorporated associations with a small national body that is a company limited by guarantee.

¹⁸ See Industry Commission 1995, *Charitable Organisations in Australia*, Report No. 45, AGPS, 1995, pp. 211–12.

¹⁹ See for example, H.A.J. Ford et al., *Ford's Principles of Corporations Law*, 10th edn, Butterworths, Sydney, 2001, paras 2.230–2.250, 2.306, 2.310, 3.060–3.090; and R. Tomasic, J. Jackson and R. Woellner, *Corporations Law: Principles, Policy and Process*, 4th edn, Butterworths, 2002, pp. 21–72, especially para. 1.8.

7.2.1. FORUM SHOPPING

A lack of uniformity can potentially lead to forum shopping. By choosing the State or Territory of incorporation carefully, it would be possible for unscrupulous associations to avoid any requirement to maintain proper accounting records and comply with appropriate standards of financial reporting.²⁰ Public disclosure obligations and financial recording keeping should be consistent across States and Territories. Lessons need to be learnt from the development of company law in Australia. It is imperative to have a nationally consistent approach based on a well thought-out public policy decision about the most appropriate disclosure regime for NFP organisations, in order to promote accountability and good corporate governance.

7.2.2. DUPLICATION OF ADMINISTRATION

The need for separate Registrars in each State and Territory results in significant duplication of administrative effort and cost. Yet, as far as we have been able to ascertain, there is no significant net revenue gain for the States. We note that, in view of the overall public benefit derived from the operation of NFP organisations,²¹ it would be inappropriate for the incorporation of associations to be relied upon as a source of significant (net) revenue.

Further, the Department and the relevant government Minister whose portfolio covers incorporated associations, varies between jurisdictions and, again, adds to the complexity for an organisation that needs to operate in two or more jurisdictions.

7.2.3. DISTINGUISHING BETWEEN ORGANISATIONS ON THE BASIS OF SIZE

A national regulatory regime for all incorporated NFP organisations within the auspices of the *Corporations Act 2001* (Cth) would enable the issue of graded reporting obligations to be addressed, dependent for example on size). This would prevent avoidance of reporting obligations merely because of its legal structure and/or place of incorporation/registration.

7.3. Uniform incorporated associations' legislation with ASIC as regulator

The second option is to retain the existing dual regime but with both uniform State associations' legislation *and* power over incorporated associations being conferred on ASIC. This is the intermediate of the three options, similar to what existed for companies under the *Corporations Law* scheme, prior to the recent referrals of power. It would require each of the States to confer regulatory power on ASIC under their incorporated associations' legislation and for the Commonwealth to amend the *ASIC Act 2001* (Cth). It has the advantage of allowing an existing experienced regulator²² to take responsibility for the regulation of all bodies corporate (that is, 'for-profit', NFP, companies and incorporated associations), while retaining a specialist form of incorporation familiar to the majority of NFP organisations. The survey data in Chapter 3, Legal Structure, showed that almost a third (31%) of respondents identified a preference for ASIC 'rather than State regulator' as an important factor in their choice of incorporated legal form.²³ NFP expertise could be developed if this option also facilitated the creation of a specialist unit within ASIC to deal with NFP companies and associations. We suggest that the development of such expertise is likely to satisfy many of the concerns about ASIC's role as expressed by respondents to the survey. An example of this was the concern expressed by 54% of respondents that ASIC is 'inaccessible to non-business people'²⁴. However, this option would presumably raise the same constitutional issues as the former *Corporations Law* scheme faced - Federal courts could not exercise enforcement powers under the respective State Acts²⁵ and breaches could not (at least with total certainty) be prosecuted by the Commonwealth Director of Public Prosecutions.²⁶

²⁰ A. Sievers, 'Incorporation of Non-Profit Associations: The Way Ahead?' 18 *C&SLJ* 311–25 at p. 320.

²¹ This benefit is acknowledged in *Review of the Associations Incorporations Act 1984 - Consultation Paper*, NSW Office of Fair Trading, April 2003, p. 7.

²² ASIC also has in place streamlined processes for electronic lodging and searching of documents etc.

²³ However, we do not have any substantive data concerning the reasons why organisations chose to incorporate as associations rather than companies limited by guarantee.

²⁴ See Heading 3.2.

²⁵ See *Re Wakim: Ex parte McNally*, 199, 198 *CLR* 511: 'the States have no power, with or without the consent of the Parliament of the Commonwealth, to invest State jurisdiction or judicial power in federal courts' per J. McHugh at [56].

²⁶ See *R v Hughes* (2000) 34 *ACSR* 92.

7.4. Commonwealth legislation administered by ASIC

The third option would be the introduction of a single, Commonwealth statutory regime for all corporate bodies (that is, 'for-profit', NFP, companies and incorporated associations) by referrals of power from the States to the Commonwealth. This is along the lines of what has been achieved for company regulation, with national regulation by ASIC. This would be the most drastic but, it is suggested, the most satisfactory of the three options canvassed. Because it is the most drastic, it may also be the most unrealistic due mainly to lack of political will. However, unlike business name registrations, regulation of incorporated associations is not a revenue earner for the States and, therefore, there may not be anywhere near the resistance to such a referral as was experienced with corporations' powers. Of course, forceful lobbying by the NFP sector itself (for example under the auspices of the newly formed National Nonprofit Round Table) would be essential.

There are several advantages to this third option:

First, a single regulatory body such as ASIC would enable the creation of a specialist unit to meet the particular needs of NFP bodies. While this advantage also exists for the second option (ASIC-enforcement of State associations incorporations legislation), the third option would allow for cross-vesting and the same enforcement regime as provided for under the *Corporations Act*, without fear of constitutional challenge. Given that ASIC already deals with the registration and on-going compliance by over 10,000 NFP companies, this expanded role would not involve ASIC (that is, the Commonwealth) in a completely new regulatory role or a service delivery system. ASIC's established on-line lodgement and searching facilities could be used to streamline the paperwork for, and to enhance disclosure by, incorporated associations.

Second, because the Federal Government has not adopted the Charity Definition Inquiry's recommendation for an independent administrative body,²⁷ State referrals of power may be the most realistic and revenue-neutral option. Indeed, some of the submissions by NFP organisations to both the Industry Commission and the more recent Charity Definition Inquiry have suggested reforms along this line.

Third, and perhaps even more importantly, this option would facilitate the introduction of a specialist form of corporate structure available only to NFP organisations. 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 could be addressed in specialist provisions. A plain-language guide for NFPs along the lines of the Small Business Guide could make an enormous difference. At the time that the associations' incorporations 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 associations' incorporations Acts. In the way that some replaceable rules apply only to public companies, there could be some designed specifically for NFP bodies - picking up the best of the incorporated associations model rules framework.

7.5. Feedback

In addition to the feedback received from the ACROD and Freehills seminars referred to under Heading 6.1 which strongly supported a national regime, we received considerable support for this recommendation after releasing it as a preliminary finding in March 2003. By way of example, an email saying:

I am a registered company auditor who has worked exclusively [in a particular part of the NFP sector] for 25 years. I endorse wholeheartedly your comment [for] the introduction of a single, Commonwealth statutory regime for all corporate bodies (that is, 'for profit' and NFP companies and incorporated associations) by a referrals of power from the States.

Another email from the Executive Officer of peak body:

One important underlying issue, I suggest, is that there should be uniformity within the regulatory regime thereby enhancing public confidence. Ideally a single statutory regime for all corporate bodies should be established under the guise of the Commonwealth government.

²⁷ See Peter Costello, The Treasurer, Commonwealth of Australia, Government Response to Charities Definition Inquiry, Press Release, No. 049, 29 August 2002, available at <<http://www.treasurer.gov.au/tsr/content/pressreleases/2002/049.asp>>.

Recommendation: Single regulatory regime

A single Commonwealth statutory regime should be introduced for all corporate bodies (that is, 'for-profit' companies, NFP companies and incorporated associations) by referrals of power from the States to the Commonwealth, along the lines of what has been achieved for company regulation. Such a referral would enable a national approach to NFP regulation, with responsibility for registration and on-going regulation being conferred on ASIC.

8. CONCLUSION

The regulatory framework underpins accountability, which in turn underpins confidence in the sector. It is a core issue that needs to be considered even before the related issue of disclosure. The particular needs of NFP organisations must be reconsidered. In recent times, these have often been overlooked or inadvertently worsened by changes made at the behest of, or for the benefit of, business.²⁸ Efficiencies and improvements in the legislative regime are long overdue. The existing two-tiered regulatory system (State and Territory-based incorporated associations and a Commonwealth company law regime) is inefficient, costly and does not meet the needs of small or large NFP organisations. A specialist regulator, or at least, a specialist unit within ASIC is also necessary to improve accountability and regulation of NFP organisations in Australia.

²⁸ See for example, M. McGregor-Lowndes n. 2 at p. 7 when he refers to Federal Government policy requiring Regulatory Impact Statements. The definition of 'business' in the guidelines for these statements effectively excludes the need to consider the non-profit making or non-commercial transactions of an NFP organisation.

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