

EXECUTIVE SUMMARY

Context

The not-for-profit (NFP) sector plays a vital role in our society. In economic terms alone:

- s Australians give \$2.8 billion annually to NFP organisations
- s NFPs contribute 4.7% of GDP and account for 6.8% of total employment
- s in comparative terms, NFPs add more to GDP than the mining industry.

The underlying health of the NFP sector is at risk. The regulatory framework that underpins the sector is complex and riddled with inconsistencies. It is time for some preventative medicine. The relevant laws and regulatory bodies need to be fair, consistent and clear in order to promote NFPs that are transparent, accountable and credible. If these fundamentals are 'right', then growth and innovation are more likely to occur.

Currently, there is a myriad of possible legal structures for NFPs – companies, associations, foundations, co-operatives, church auspice, aboriginal corporations, Royal Charter and more. Combined with this is a confusing mix of State and Federal regulation and regulators, and a lack of nationally consistent reporting obligations. These factors provide significant impediments to accountability and could jeopardise donor confidence. Disclosure by NFPs should be directed to the special needs of NFP stakeholders. Regulation should also help entrench a culture of accountability.

While the views of business have been canvassed before any corporate law reforms have been implemented, the views of NFPs have been overlooked. To obtain the views of those involved in a wide range of NFPs, a detailed survey was sent to all of the 9,800 companies limited by guarantee on the public register maintained by ASIC (the Australian Securities and Investments Commission) as at 1 March 2002 (virtually all of which are NFPs). Over 1,700 completed replies were received. The data collected gives, for the first time, a national snap shot of those NFPs that are registered as companies limited by guarantee.

National survey

The survey sought a wide range of information about:

- the organisation's profile - size, principal activity, number of volunteers, member-serving vs public-serving, tax status
- why a company structure had been chosen instead of, say, an incorporated association and whether or not this structure had met the organisation's needs
- who were regarded as the organisation's key stakeholders and what reporting was made to them
- the composition and experience of the Board of Directors – Board size, age, gender and skills, whether fees are paid to non-executive directors, how Board members are chosen, Board independence etc
- the procedures and structures of the Board – what is seen as the organisational role of the Board, frequency and conduct of meetings etc
- whether the current regulatory framework is working – views on what information (if any) should be disclosed to the public, what is the attitude of NFPs to their dealings with ASIC, should there be a new specialist regulator for NFPs.

This Report details the findings of the survey and explores any significant differences between the responses of NFPs based on, for example, their tax status, principal activity or member-serving vs public-serving.

This Report makes several recommendations for reform and identifies some areas for further deliberation. For a summary of these recommendations, together with a summary of some of the supporting findings, see pages 3 -10.

Key findings

- Respondents indicated that they chose a company structure because: it better suits national or multi-state organisations (34% of respondents); the scale of trading activities (40%); a preference for dealing with ASIC rather than State regulators (31%); and public perception or status (52%) (such as the view that 'serious' or 'more sophisticated' NFPs use this structure rather than the incorporated associations' regime). These responses highlight that the State and Territory based incorporated associations regime does not meet the needs of many NFPs, such as peak bodies or small but national organisations.

- On public disclosure, a startling 9% of respondents thought that no information should be made available to the public, while only 39% agreed with fully audited accounts being disclosed (as is currently required by the Corporations Act), and just over half thought summary financial information should be enough.
- Respondents clearly thought that the Corporations Act and the way it is implemented by ASIC is more appropriate to 'for-profits' than for them. The majority were in favour of a new regulator to oversee NFPs, as recommended by the Charity Definition Inquiry, but concerned to avoid duplication. Better regulation, rather than simply more regulation, is the key.
- NFPs and their needs differ from 'for-profits' in several ways, for example
 - s they rely heavily on volunteers,
 - s they enjoy exemption from income tax
 - s they have more stakeholders to consider (members, volunteers, grant makers etc - not just shareholders interested in 'the bottom line').
- Nearly a third of NFPs reported difficulty recruiting directors and for some types of NFPs, the figure was significantly higher.

Recommendations

The particular needs of the NFP sector have been overlooked in the company law reform process, and the dual State/Federal regime is causing problems. Increasingly, even very small NFPs operate on a national basis, and this is not facilitated by the existing State based incorporated associations' regime. After a decade of a dual regime – companies governed by a national scheme and associations governed by varying State/Territory based legislation – it is time to combine the best elements of each of these with new ideas. The sector needs a national regulatory framework based on sound public policy, rather than disclosure requirements that vary vastly depending on jurisdiction and the nature of the legal structure adopted.

Arising out of the data, key recommendations for regulatory reform include:

- a single Commonwealth regulatory regime (this could be achieved by a referral of powers as recently occurred in the company law model)
- ASIC becoming the new regulator for all incorporated NFPs (companies and associations), at least until any new NFP regulator is introduced
- the establishment of a specialist NFP unit within ASIC
- plain language guide and replaceable rules for NFP organisations.

The survey results also demonstrate a need for additional support services for NFPs. A new independent NFP advisory body should be established to meet this need. A range of support services could be provided at low or no cost – for example, auditing, financial and taxation advice, legal advice, training for Board members, dispute resolution and mediation for stakeholders. This body could make a significant difference, particularly for small NFPs. Such an advisory body would be able to generate at least some of its funding from fees for service.

Recommendations are also made about minimum public disclosure requirements and the need for an NFP-specific accounting standard. Even member-serving organisations that do not receive direct government funding typically get income tax exemption, and therefore have the benefit of public funds through tax foregone. The corresponding responsibility needs to be a minimum level of public disclosure. Additional disclosure requirements should apply to larger NFPs. At the moment there is duplication, and often the disclosure that is required does not meet the needs of NFP stakeholders.

If important reforms are to take place, the sector itself will need to lobby for change, through individual NFPs, through peak organisations, and through bodies such as the newly established National Nonprofit Round Table. By getting the underlying regulatory framework 'right', accountability and confidence in the sector generally will be improved, and NFPs will have more time to concentrate on the important services that they provide to the community.

This Report is available (in colour) on-line at <<http://cclsr.law.unimelb.edu.au/activities/not-for-profit/>>