
“Not-for-profit” motivation in a “for-profit” company law regime – national baseline data

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This article reports the findings of a recent survey of companies limited by guarantee. For the first time, national, large-scale profile data on this group of companies has been collected. This data provides a solid baseline for future reform and comparison. Understanding this data is a necessary first step in considering the particular (and often overlooked) needs of not-for-profit companies. Three key questions are explored in relation to the data – (1) why is a company limited by guarantee chosen as the legal structure rather than, say, an incorporated association and has it been suitable for these not-for-profit organisations? (2) what information should be available to the public and other stakeholders about these organisations? and (3) who is the most appropriate regulator for this group?

1. THE SURVEY

As part of a funded research project,¹ a questionnaire addressed to the Chief Executive Officer (CEO) was mailed to every company limited by guarantee (except those recorded as superannuation trustee companies). The questionnaire was divided into six main parts – (A) general company profile, (B) legal structure, (C) stakeholders, (D) board composition and experience, (E) board structure and procedures, and (F) regulatory framework. The questionnaire was sent to the registered office of these companies as recorded on the national register maintained by the Australian Securities and Investments Commission (ASIC), as at 1 March 2002.

The principal aim of the survey was to obtain empirical evidence as to whether existing companies regulation was perceived by not-for-profit² (NFP) companies (or at least the predominant

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Preliminary findings (based on the first 1,000 completed responses) were presented as a conference workshop, “Unpaid but still exposed – practical problems arising from a ‘for-profit’ company law regime” at the “Building Better Boards – a dialogue on nonprofit governance” conference, Nonprofit Governance & Management Centre, Sydney, 13-14 July 2002. A seminar on the full results (1,736 completed responses) was given as a seminar for The Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, Brisbane, 17 September 2002. This article expands on those presentations.

¹ A grant for the project was received from the Australian Research Council (Strategic Partnerships with Industry) – the Industry Partner is Philanthropy Australia Inc.

² In this article the term “not-for-profit” is used to cover the broad range of organisations that operate for social or community purposes such as providing charity, recreation, advocacy, art or religion. The main characteristic of such organisations is that funds or profits are used by the organisation solely to further its social/public purpose, rather than being distributed to members or officers (known as the non-distribution constraint). The term is intended to be much broader than the traditional, legal definition of a “charity”, which has been limited to the relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community. The term “not-for-profit” has been preferred to “non-profit” because it more explicitly recognises that these organisations, and indeed the sector, often make (substantial) profits, even though they are not distributed to members. The independent Charities Definition Inquiry recommended the use of the term “not-for-profit” rather than “non-profit” for similar reasons: *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) pp 91-96, especially 93-94 recommendation 1 (Charity Definition Inquiry) available at <http://www.cdi.gov.au>.

group of them) as adequately meeting their needs, particularly in terms of structural suitability, disclosure and accountability requirements. This article reports some of the principal findings from the survey in the context of these issues. Some suggestions for law reform are raised but, within the confines of one article, it is not possible to develop these suggestions in any detail. Further analysis of the data and consideration of reform proposals in the United Kingdom³ is continuing. A detailed research report on the project is in preparation (estimated completion is the end of 2003).

2. CONTEXT

2.1 Importance of NFP Sector

Official estimates suggest that NFP institutions contribute almost \$21 billion or 3.3% of Gross Domestic Product (GDP) (1999-2000). When imputed wages for volunteer services are included, the contribution of NFP institutions increases to 4.7% of GDP. They also make a significant contribution to employment, accounting for 6.8% of total employment in 1999-2000. In comparative terms, NFP institutions add more to GDP than the mining industry. Even without an imputation for volunteer services, the NFP sector is larger than both the communications sector and the utilities sector.⁵ Increasingly the sector's importance is being recognised worldwide, but in Australia there has been only limited research into NFP companies.⁶

2.2 Legal structures within the NFP sector

The legal nature of NFP organisations is even more varied than in the “for-profit” sector. This complexity has important implications for accountability, governance and regulation of the NFP sector.

Many, particularly smaller organisations, are incorporated under State-based associations legislation⁷ – this is not an option available to a “for-profit” organisation. By contrast, many of the large welfare organisations are church-sponsored and have no clearly defined identity of their own. They receive their legal status by Acts of Parliament that allow their sponsoring denomination to hold property. In order to determine the exact legal nature of each organisation within a church's umbrella, it is often necessary to work through a complex (and largely confidential) combination of legislation, trusts, incorporated associations and companies.⁸ It is not even possible to identify the total number of NFP companies in Australia. ASIC's records do not separately identify this group. Neither the Australian Nonprofit Data Project⁹ nor the recently released ABS Satellite Accounts¹⁰ distinguish the number of NFP companies from other forms of organisation. However, it seems their number is on the increase – even if only very gradually.¹¹ First, the Industry Commission (now known as the

³ See n 23.

⁴ The author would welcome comments on this article generally and, in particular, on the suggestions for reform. Susan Woodward – Faculty of Law, University of Melbourne, Melbourne, Vic 3010 or s.woodward@unimelb.edu.au.

⁵ See “Non-profit Institutions Satellite Account”, ABS Cat No 5256.0 released 28 November 2002. See also earlier figures from the Australian Nonprofit Data Project (a collaborative project between the Centre for Australian Community Organisations and Management (University of Technology (Sydney) and the Australian Bureau of Statistics) as reported in Lyons M and Hocking S, *Dimensions of Australia's Third Sector – Report of the Australian Nonprofit Data Project*, Centre for Australian Community Organisations and Management (CACOM) University of Technology, Sydney, 2000, especially p 81.

⁶ Earlier research has not been so large scale and not specifically restricted to companies: see n 57.

⁷ For example, *Associations Incorporation Act 1984* (NSW) and *Associations Incorporation Act 1981* (Vic).

⁸ See Industry Commission 1995, *Charitable Organisations in Australia*, Report No 45 (AGPS, 1995) Appendix C, pp 10-13, 16-17 and 204. A general insight into the relative distribution of organisations by form of legal entity was given by the Industry Commission in this report: see p 17 and Appendices C and D. See also Charity Definition Inquiry, n 2, p 278.

⁹ Lyons and Hocking, n 5.

¹⁰ Non-profit institutions are defined as “legal or social entities created for the purpose of producing goods or services whose status does not permit them to be a source of income, profit or other financial gain for the units that establish, control or finance them”: see ABS “Non-profit Institutions Satellite Account” n 5, Glossary p 43.

¹¹ The growth in the number of incorporated associations is much greater, eg, in Queensland alone the average number of new incorporations is between 600 and 1,000 per annum. By way of contrast, the rise in companies limited by guarantee is much slower – there were 6,571 such companies registered in 1985 and 10,198 in 2002 (these figures were provided by Professor Michael Adams, University of Technology, Sydney – they no longer appear in ASIC's Annual Report).

Productivity Commission) in its report *Charitable Organisations in Australia* noted a trend towards the use of companies limited by guarantee as the preferred legal structure for newer organisations, even for those within the church-sponsored group.¹²

Second, several of the State Associations Incorporation Acts have given the Registrar of Incorporated Associations power to direct associations incorporated under the Act to instead register as companies limited by guarantee under the *Corporations Act*.¹³ In Victoria at least, many associations have received such a direction.¹⁴

Third, there are a variety of legislative provisions which effectively require certain NFP organisations to incorporate as companies, either to obtain grants or for licensing – for example, the *Aged Care Act 1997* (Cth),¹⁵ the *Aged or Disabled Persons Care Act 1954* (Cth)¹⁶ and the *Registered Clubs Act 1976* (NSW).¹⁷

Finally, in addition to companies registered as companies limited by *guarantee* (which have been assumed to be NFP companies),¹⁸ there is a significant group of other companies (that is, companies limited by *shares*) that also fall within the general term, NFP companies. For example, it is increasingly common to find NFP organisations that have trading offshoots – these offshoots are companies limited by shares that operate as “for-profit” subsidiaries of the NFP, parent organisation.¹⁹ But, as mentioned earlier, ASIC statistics do not identify the number of NFP companies on the register, whether they are companies limited by guarantee or companies limited by shares.

While there is evidence to suggest that the number of NFP companies is increasing gradually, NFP companies still represent a small proportion of all registered companies.²⁰ This fact, combined with the absence of a strong sector lobby group, means that the particular needs of NFP companies have often been overlooked.²¹ The particular needs of NFP organisations together with concern to ensure greater donor and community access to essential information about NFP companies, underlies the Industry Commission’s recommendation that a special form of incorporation under the *Corporations Law* (now *Corporations Act 2001* (Cth)) should be introduced for community social welfare organisations.²² More recently, there has been debate on this issue in the United Kingdom. In its detailed report titled *Private Action, Public Benefit – A Review of Charities and the Wider Not-for-Profit Sector* (September 2002), the United Kingdom Cabinet Office notes 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 organization, nor the devotion of assets to a public purpose; that the Company

¹² Industry Commission 1995, n 8, Appendix C, p C11.

¹³ See Sievers A S, *Associations and Clubs Law in Australia and New Zealand* (The Federation Press, 1996) pp xvi, 100-101.

¹⁴ The survey highlighted some examples. One respondent stated that the “GST pushed [an] earlier Incorporated Association ‘over the line’”: response no 731. Another stated that the Victorian Government “was pushing larger incorporated associations from the state jurisdiction”: response no 210. In New South Wales, the Department of Fair Trading advised one organisation that it was unable to be an incorporated association due to the scale of its turnover: response no 185.

¹⁵ Section 8(1).

¹⁶ Section 7(3)(c).

¹⁷ Section 10(1)(b).

¹⁸ See McGregor-Lowndes M, “Australia” in Silk T (ed), *Philanthropy and Law in Asia: A Comparative Study of the Non-Profit Legal Systems in Ten Asia Pacific Societies* (1999) p 69.

¹⁹ See also Charity Definition Inquiry, n 2, pp 93-97.

²⁰ There are over a million proprietary companies limited by shares compared with just over 10,000 companies limited by guarantee.

²¹ See Sievers A S, “The Honorary Director: The Obligations of Directors and Committee Members of Non-Profit Companies and Associations” (1990) 8 C&SLJ 90; Woodward S, “Not-for-Profit Companies – Some Implications of Recent Corporate Law Reforms” (1999) 17 C&SLJ 390. The formation in June 2002 of a National Not-for-Profit Round table (initially called the “Third Sector Round Table”) may mean that, in the future, there is a sector group that is able to represent the needs of NFP companies in the way that organisations like the Business Council of Australia represents “for-profit” interests: “Non-Profit Groups Link up to Present United Front” *Financial Review*, 26 June 2002, p 11 and Cham E, National Director Philanthropy Australia Inc, “A New Focus for Australia’s Non-Profits” (2002) 50 *Australian Philanthropy Journal* 3.

²² Industry Commission 1995, n 8, pp 217-219.

Limited by Guarantee does not allow access to equity; and that the company “brand” is almost exclusively associated with profit-making.²³

The UK Report recommends the establishment of two new types of company – the “Community Interest Company” and the “Charitable Incorporated Organisation”.²⁴ The “Community Interest Company” is intended as a legal structure “suitable for use by small scale community-based not-for-profit social enterprises familiar with the company form”. The report sets out the characteristics this new type of company should have. These include protection of assets against distribution to members or shareholders and a requirement to have an objects clause in the constitution; ability to choose the limited by guarantee or by shares format; increased requirements in terms of transparency and accountability; and ability to issue preference shares with a fixed rate of return (this applies to both the limited by guarantee and limited by shares models).²⁵

The other type of company recommended in the UK Report is the “Charitable Incorporated Organisation”. This type of company is specifically designed for the small subset of NFP organisations that are registered as “charities” by the United Kingdom Charities Commission. The characteristics for this type of company are primarily aimed at overcoming the burden this group face because of dual registration, regulation and reporting between the Charities Commission and the United Kingdom Companies Office, and the uncertainties about exactly how the duties imposed on directors by company law overlap with the duties imposed on trustees by charity law.²⁶

These recommendations warrant serious consideration in the Australian context. As an important first step in the consideration of any such company law reform, the survey reported in this article has obtained feedback from those working for NFP companies about how an essentially “for-profit” regime is, or is not, working in practice.

2.3 Some legal issues affecting accountability and governance of NFP companies

2.3.1 Directors’ duties

The *Corporations Act* and the general law impose duties on directors and officers of all companies, regardless of whether they are NFP or “for-profit” companies. It is clear (at least since the important decision of *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; 9 ACLC 946 that being an honorary director will not, of itself, be sufficient to exonerate a director from liability. In that case, Tadgell J stated:

There is nothing in the Code [now *Corporations Act*] to suggest that the standard to be expected of a part-time non-executive director of a company not for profit is different from the standard expected of any other director of a profit-making company: both are required ... to exercise a reasonable degree of care and diligence in the exercise of their powers and the discharge of their duties.²⁷

One can easily appreciate the policy reasons for this approach. There should be a high degree of accountability for directors of NFP organisations that receive donations from the public and/or government funding (as was the situation in the *Friedrich’s case*).²⁸ Directors’ legal duties are one accountability mechanism. Indeed, their importance is arguably greater in the context of a NFP

²³ United Kingdom Cabinet Office, Strategy Unit Report, *Private Action, Public Benefit – A Review of Charities and the Wider Not-for-Profit Sector* (2002) para 5.20 (available at <http://www.piu.gov.uk/2002/charity/report/index.htm>) (UK Report).

²⁴ See n 23 recommendations 8 and 17.

²⁵ See n 23 paras 5.19-5.31.

²⁶ See n 23 p 58 Box 5.3.

²⁷ *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 197. Although the court was not prepared to use its discretionary powers under s 535 of the *Companies Code* (now s 1318 of the *Corporations Act 2001* (Cth)) to relieve the non-executive director in that case (Mr Eise) from liability, Tadgell J did treat the voluntary nature of his position as a relevant factor.

²⁸ *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 198. See also McGregor-Lowndes M, “Nonprofit Corporations – Reflections on Australia’s Largest Nonprofit Insolvency” (1995) 5 AJCL 417.

company because many of the other accountability mechanisms (for example, stock exchange regulation, dividends/returns to members and the influence of institutional investors) do not apply.²⁹

In order to gather some data about this issue, the questionnaire sent out for the survey asked respondents (who were, in the majority of cases, CEOs who were not members of the Board)³⁰ about the level of Board awareness of personal liability as directors.³¹

2.3.2 Board selection

NFP companies may experience difficulty in attracting on a *voluntary basis* both:

- people with the financial, legal and corporate management expertise that is required for the organisation to operate successfully in a funding environment that emphasises a corporate management framework and accountability standards; and
- people who have experience or skills with the service provided by the company – government and non-government grant makers often make it a condition of their grants that the recipient has “client” or “consumer” directors on its board.

In order to test theories about NFP board selection, the questionnaire also asked how board members were chosen – for example, whether board elections were usually contested, how many of the current board were appointed by members and how many by the existing board or an outside organisation etc.

2.3.3 Multiple accountability

The voluntary nature of NFP boards combined with their multiple and complex accountability foci (for example, their accountability to grant makers, members, clients and regulatory bodies), have been identified by several socio-legal academics as significant impediments to good corporate governance practices in NFP organisations.³² It is common practice for board members to be recruited to maximise one particular type of focus, for example, to consumers. While that board member may possess characteristics uniquely suited to maximising that focus, it has been argued that the capacity for NFP companies to recruit and retain board members possessing the characteristics to address *all* types of accountability is severely limited.³³

In this regard, the questionnaire asked both about any stakeholder tensions and difficulties with recruitment and retaining of board members.³⁴ It also asked about the skills and experience of the board as a group.

2.3.4 Conflicts of interest

Board members of NFP companies may be appointed as nominees for sectional interests (for example, clients or, in the case of a peak body, State or divisional groups). Such nominee directors may find themselves in a position of conflict – a conflict between the interests/concerns of their nominators and their legal duties to the company.³⁵

²⁹ See DeMott DA, “Self Dealing Transactions in Nonprofit Corporations” (1993) 59 *Brooklyn Law Review* 139.

³⁰ See heading 3.1.

³¹ The question read: “Do you believe that the Board members understand that, under the Corporations Act, they can be personally liable – for example, if they act without sufficient care and diligence or if they allow the company to continue to trade when it is unable to pay its debts?” Respondents were asked to tick “all Board members aware”, “most of the Board members are aware”, “only some of the Board members aware”, or “none of the Board members aware”. Space was also given for comments. The results indicated that 79% of respondents (the majority of whom were not themselves directors, see heading 3.1) said that “all Board aware” and only 0.2% (n = 4) said that none were aware.

³² For example, Leat D, “Voluntary Organizations and Accountability: Theory and Practice” in Anheier HK and Seibel W (eds), *The Third Sector: Comparative Studies of Nonprofit Organizations* (Walter de Gruyter, New York, 1990). For a summary of the arguments see McDonald C, “Board Members’ Involvement in Nonprofit Governance” (Working Paper No 16, Program on Nonprofit Corporations, Queensland University of Technology, 1993). See also Twaits A, “The Duties of Officers and Employees in Non-Profit Organisations” (1998) 10 *Bond Law Review* 320.

³³ See McDonald, n 32, p 3.

³⁴ See heading 5.14.

³⁵ The duties of nominee directors raise complex legal issues. See, eg, Redmond P, “Nominee Directors” (1987) 10 *University of New South Wales Law Journal* 194; Sievers S, “Finding the Right Balance: The 2GB Case Revisited” (1993) 1 *Australian*

The statutory provisions are more onerous for public companies than private companies³⁶ thus, bearing in mind that a company limited by guarantee is a public company,³⁷ the issue of compliance with these statutory provisions will be pertinent to NFP companies. However, any concerns NFP companies have will not necessarily be consistent because, even within the category of companies limited by guarantee, there is differential treatment. In particular, companies limited by guarantee that hold a licence to omit the word “limited” from their name³⁸ (a name licence) are not bound to comply with the related party transaction provisions contained in Ch 2E.³⁹

On this issue, several questions in the questionnaire were about nominee directors – whether any of the directors were appointed to represent the interests of suppliers of goods or services to the company, by a donor or by any particular stakeholder.

3. METHODOLOGY

3.1 Sample

The details of the registered office of all companies limited by guarantee were obtained from ASIC’s records as at 1 March 2002. The only companies limited by guarantee that were excluded were those recorded as superannuation trustee companies and those that were in external administration. A 10 page (yellow) questionnaire with an explanatory covering letter was posted on 13 March 2002 to all 9,817 of these companies. The covering letter was addressed to the CEO and a reply paid envelope was enclosed. The reverse of the covering letter had instructions for completion as well as space for contact details (for a copy of the results of the survey and/or willingness to participate in future focus groups, should they be held). On this page, all respondents were also asked for their company name and number – simply to ensure that a follow up letter did not get sent to those that had already completed it. The first page (covering letter and instruction sheet) was perforated and removed on receipt of the questionnaire. These “first” pages were stored separately from the rest of the questionnaire to ensure confidentiality. In this way, no re-identification of the first page (with the company name and number) and the completed questionnaire was possible.

While the questionnaire collected primarily quantitative information, qualitative data was also collected. The quantitative data was collected through: (a) closed questions that sought numeric ratings (for example, using a scale of 1 to 4, with a “don’t know” option where appropriate); (b) forced choice items (for example, “Yes” or “No”); and (c) multiple response options (for example, a list of possible documents that the respondent thought should be lodged with ASIC from which one or more could be chosen). Qualitative data was collected through open-ended questions that sought written comment or clarification. A draft questionnaire was piloted with a trial group of eight CEOs/retired CEOs. Their (very useful) comments were taken into account in the final version.⁴⁰ Comments on an earlier draft were also kindly given by fellow academics and practitioners (legal, accounting and management) with experience in the field.⁴¹ The survey was promoted as

Journal of Corporate Law 1; Crutchfield P, “Nominee Directors: The Law and Commercial Reality (1992) 20 ABLR 109; Companies and Securities Law Review Committee, *Nominee Directors and Alternate Directors* (Report No 8, 1989).

³⁶ See, eg, *Corporations Act 2001* (Cth), s 194 (replaceable rule, proprietary companies) compared with s 195 (public companies) on the issue of a director voting on matters involving a material personal interest.

³⁷ See *Corporations Act 2001* (Cth), s 112(1).

³⁸ See *Corporations Act 2001* (Cth), ss 150-151.

³⁹ This follows from para (b) of the definition of “public company” contained in the *Corporations Act 2001* (Cth), s 9.

⁴⁰ The author would like to thank Ms Barbara Hocking (Schizophrenia Australia Foundation), Ms Lyn Roberts (National Heart Foundation of Australia), Ms Lynette Moore (Alzheimer’s Association Victoria), Mr Paul Geyer (Central Bayside Division of General Practice), Mr Lindsay McMillan (MS Society of Victoria Ltd), Ms Robyn Cowie (Vic Raid/Active Property Service Management Ltd), and Mr David Chalker for acting as a trial group of CEOs.

⁴¹ The author would like to thank Assoc Prof Myles McGregor-Lowndes (QUT), Prof Mark Lyons (UTS), Prof Ian Ramsay, Prof Richard James, Mrs Sally Sievers and Ms Lesley Alway (University of Melbourne), Dr Virginia Lewis (La Trobe University), Mr John Emerson (Partner, Freehills, solicitors), Mr Robert Wright (Solicitor), Mr Tony Lang (Barrister), Ms Elizabeth Cham (National Director, Philanthropy Australia Inc), Ms Catherine Brown (Consultant) and Mr David Gibbs (Partner, McInnes, Graham & Gibbs, chartered accountants) for their thoughtful comments on the draft questionnaire.

widely as possible throughout the sector, on a variety of email lists, electronic bulletin boards and flyers.⁴²

Of the responses received, 59% of respondents were in fact the company's CEO. Questions were also asked about whether the CEO was a director of the company in order to ascertain if the perspective was that of a person who was a member of the board or an observer of the board – an “insider” or an “outsider”. The results showed that 58% of respondents were “outsiders”. This is in contrast to the earlier, smaller study by Steane and Christie in which their questionnaire was directed to the Chair (that is, an “insider”).⁴³ The questionnaire used in the present study was directed to the CEO rather than the Chair because it was thought that the CEO was the person most likely to be able to complete the questionnaire with the least amount of effort. In contrast, the Chair would be more likely to be a volunteer who would need to consult the CEO for some of the information in any event. It was also an opportunity to obtain a different perspective to the Steane and Christie study.⁴⁴

3.2 Response rate

The initial number of responses was about 1,000. After a follow-up letter was sent on 11 April 2002, further responses were received until mid-August 2002. The total number of returns was 2,089, with 1,736 of those being completed questionnaires, 355 being “returned to sender” and one being uncompleted but returned in the reply paid envelope. Of the completed questionnaires, a small number did not have the company name or number on the perforated first page – these responses were still included in the data set.⁴⁵

From the 300 or so people who rang or emailed after they received the follow-up letter and from the subsequent follow-up telephone survey that was conducted,⁴⁶ it is clear that there was a very high non-receipt rate. Similar non-receipt rates have been experienced in earlier studies and are not uncommon when there is reliance on a public register.⁴⁷ When this non-receipt rate is taken into account, the response rate is estimated to be 39%.⁴⁸ Getting about a third of companies responding was very pleasing given the length of the questionnaire (10 pages), the detailed knowledge of the organisation required to complete it and the fact that the majority of NFP companies rely on

⁴² Notices were placed in “Philanthropy Alert”, Issue 11, 28 February 2002 and Issue 14, 29 April 2002; the internal email bulletin for Research and Evaluation Network, Department of Family and Community Services; “Current Issues” section on the Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology website (<http://cpns.bus.qut.edu.au/>); “Community News” section of the weekly email bulletin “Community Building News”, produced by Infoxchange (<http://www.infoxchange.net.au/>); “Dramatic Online” (<http://www.dramaticonline.com/>); ProBono Australia E-newsletter, 18 April 2002 (<http://www.probonoaustralia.com.au/>); Centre for Corporate Law and Securities Regulation website, The University of Melbourne (<http://cclsr.law.unimelb.edu.au/>); one-page flyer sent with “Impact”, March edition, Australian Council of Social Service magazine and email bulletins by some of the State Councils for Social Service; March edition of the email newsletter by Australian Federation of Homeless Organisations; and the March edition of the email newsletter for the Australian Council on Disability (National). The author would like to thank these organisations for allowing the notice to be placed in their respective publications/websites.

⁴³ Steane P and Christie M, ‘Nonprofit Boards in Australia: A Distinctive Governance Approach’ (2001) 9 *Corporate Governance* 48 at 51.

⁴⁴ Steane and Christie, n 43.

⁴⁵ On the basis of phone calls received from some of these respondents when they did receive the follow up letter, it seems that the details were omitted from the first page because of a concern about confidentiality. There was, therefore, no need to exclude these responses from the data set.

⁴⁶ See heading 3.3.

⁴⁷ See McGregor-Lowndes, n 28 at 420: “After the collapse of the NSC [National Safety Council], the Victorian Corporate Affairs Commission wrote to all Victorian companies with section 66 licences [licence to omit the word “limited” from company name] to request a copy of their audited financial statements ... The Commission could only make contact with 62% of the companies on their register.” See also results of a similar study conducted by McGregor-Lowndes of companies listed on the Queensland register to which 35% replied: McGregor-Lowndes M, *Regulatory Compliance of Two Forms of Nonprofit Enterprise* (unpublished LLM thesis, Griffith University 1989) p 91.

⁴⁸ The lower bound estimate was 33%, the upper bound was 47%. The calculations for these estimates are available on request from the author (see n 4).

volunteers.⁴⁹ The response rate is similar to earlier studies, including that conducted by Steane and Christie,⁵⁰ and is common for mail-out surveys.⁵¹

3.3 Non-response and sample bias

In order to explore whether there were any systematic differences between those organisations who participated in the study and those who did not (that is, to check if the sample was in any way biased), a follow-up telephone survey was conducted in August 2002 (prior to this replies were still coming in). A random sample, stratified by State, of non-respondents was drawn.⁵² As is invariably the case, it was difficult to contact people and get their cooperation. The final sample comprised 57 non-respondents. While there is obviously a limit to what information can be obtained from such a sample, no evidence of bias was found – the non-respondents contacted were from both large and small NFP companies spread across a range of activities similar to our respondents.⁵³ Of the telephone sample, 49% said they were “too busy”, 42% said they “did not receive it”, 5% said it was “not relevant to them”, 2% did not want to give the information requested and 2% had actually returned the questionnaire but had done so anonymously.⁵⁴ It is noteworthy that there was substantial heterogeneity in the sample in terms of company size, reported income, assets and liabilities (see heading 5.6). This heterogeneity did not indicate any markers of sample bias.

Information about non-respondents was also obtained from the many phone calls and emails prompted by the follow-up letter. It seems that many did not get the initial questionnaire but did (eventually) receive the follow-up letter. Non-receipt was often because it had gone to the company’s registered office, which was different from its postal address (typically a post office box).⁵⁵

As a general comment, people were very positive about the need for the questionnaire and many took the trouble and expense of ringing STD to ask for another copy so that they could complete it. Indeed, some of the people were from incorporated associations, wanting to extend the sample to this group.

4. SIGNIFICANCE OF SURVEY RESULTS

The survey has netted important profile data – the first national, large-scale snapshot of the nature of this group of companies. It is important data for three reasons:

- (a) since the company law simplification reforms,⁵⁶ ASIC does not have data on the nature of the business conducted etc – ASIC’s records cannot tell us if all companies limited by guarantee are NFP organisations;
- (b) other NFP data collection exercises,⁵⁷ including large-scale ones such as the Australian Nonprofit Data Project,⁵⁸ have not distinguished the legal nature of the organisations; and

⁴⁹ 86.6% of respondents had one or more volunteers and 26.1% had no full- or part-time employees.

⁵⁰ See the Victorian Corporate Affairs mail out and the McGregor-Lowndes survey, n 47. The response rate for the Steane and Christie survey (n 43, pp 51-52) was 34% (118 responses received from a total sample of 350) – note, this study did not rely on a public register for addresses.

⁵¹ Neuman WL, *Social Research Methods: Qualitative and Quantitative Approaches* (2nd ed, Allyn & Bacon, Boston, 1994).

⁵² Details about the conduct of the telephone survey are available on request from the author (see n 4). The author would like to acknowledge the assistance provided by Michael O’Neill (Research Assistant) in conducting this aspect of the survey.

⁵³ Of the sample of 57 non-respondents, 37 were prepared to give an indication of their company’s income over the telephone – of these 37 companies, 68% had income of less than \$3 million, 24% had income between \$3–5 million and 8% had income of more than \$5 million.

⁵⁴ That is, they had not completed the company name and number section on the first page but, in fact, their response was already included in the 1,736 completed questionnaires.

⁵⁵ A company’s registered office cannot be a post office box: *Corporations Act 2001* (Cth), ss 3, 100, 142, 144, 145, 173 and Pt 1.5 para 3.7; *Corporations Regulations 2001* (Cth), reg 1.0.14. The ASIC register that is open to the public does not disclose a company’s postal address.

⁵⁶ *First Corporate Law Simplification Act 1995* (Cth) and *Company Law Review Act 1998* (Cth).

⁵⁷ For earlier Australian studies see McDonald, n 32 (a study that involved the analysis of 242 questionnaires collected from 1,218 NFP organisations registered under the *Collections Act 1966* (Qld) but the legal nature of the organisations was not discussed); Radbourne J, *Recruitment and Training of Board Members for the 90’s and Beyond* (Working Paper No 24,

- (c) an understanding of the nature of the group being regulated is essential before deciding how and by whom they should be regulated.

While there have been extensive consultations with business groups about law reform proposals,⁵⁹ this survey can be regarded as the first real attempt to obtain the views of NFP users – to identify difficulties they may have in navigating the company law regulatory regime. What follows is a report of some of the major survey findings (space constraints do not permit the results for all survey questions to be reported).

5 PROFILE DATA

5.1 Are they all NFP organisations?

It has generally been assumed that companies limited by guarantee are NFP organisations⁶⁰ because, without working capital, they are not suitable for commercial enterprises. While some respondents (2%) were clearly confused about the legal status of their organisation,⁶¹ the vast majority of respondents (98%) indicated that they were an NFP organisation.⁶² There were 48 respondents (out of 1,736) that said that they were “for-profit” and, therefore, did not complete the rest of the questions. The following analysis is based on responses from 1,688 NFP companies.

5.2 Nature of activities

The questionnaire asked respondents to tick the (one) box⁶³ that best reflected the company’s principal activity – 48 options were given based largely on the categories used by the Australian Nonprofit Data Project,⁶⁴ modified as a result of comments from the trial group.⁶⁵ The main headings of activity were (i) community services, (ii) health, (iii) education and education related, (iv) other human services, (v) philanthropic, (vi) arts and culture, (vii) sport and recreation, (viii) interest groups (including peak bodies) and (ix) other.⁶⁶ There was a good spread amongst the respondents – some for every one of the 48 options. Table 1 shows the percentage of responses for each of the main categories.

Program on Nonprofit Corporations, Queensland University of Technology, 1993) (a study that involved surveys, interviews and observations of board meetings of 13 Queensland arts organisations – the organisations “were selected randomly and represented a variety of art forms and legal structures”, p 7); and Steane and Christie, n 43 (a study that involved the analysis of 118 questionnaires collected from 350 NFP organisations, but again there was no distinction as to the legal nature of the organisations).

⁵⁸ Lyons and Hocking, n 5.

⁵⁹ For example, the Business Regulatory Advisory Group that has given input on reforms proposed as part of both the Simplification Program and the Corporate Law Economic Reform Program. This group is comprised of representatives of peak business (ie, “for-profit”) groups such as the Australian Institute of Company Directors, the Australian Stock Exchange and the Business Council of Australia.

⁶⁰ McGregor-Lowndes, n 18.

⁶¹ Out of n = 1688 NFP responses, about 26 seemed confused about their legal status.

⁶² Question 1 on the questionnaire was: “Is the company a not-for-profit organisation? (Note: a not-for-profit organisation may make profits and have surplus funds, but its constitution prohibits the distribution of any profits to its members).” Despite this explanatory note, it appears that many of the 48 respondents who answered “No” to this question were, based on the nature of their main activity, in fact, NFP companies, ie, they thought that because they made a profit they were not an NFP organisation.

⁶³ While the question asked for only one box to be ticked, some respondents ticked more than one box or no box at all. In this case, the rule adopted was to read ahead and where possible choose the most appropriate option. If this was not possible, the response was given a separate error code. After applying this rule, there were only 36 respondents for whom their principal activity was not classified.

⁶⁴ Lyons and Hocking, n 5.

⁶⁵ See heading 3.1.

⁶⁶ For a discussion of the main activities of the sector see also Charity Definition Inquiry, n 2, pp 48-50.

Table 1: Nature of NFP company’s principal activity

| Nature of principal activity | % of respondents (in descending order of prevalence) |
|---------------------------------|--|
| sports and recreation | 20 |
| community services | 17 |
| education and education related | 15 |
| other (not otherwise specified) | 12 |
| religious | 9 |
| arts and culture | 6 |
| health | 6 |
| interest groups | 6 |
| other human services | 4 |
| philanthropic | 3 |
| environment | 2 |
| TOTAL | 100 ⁶⁷ |

5.3 Whom do they serve?

Respondents were asked if the company’s primary purpose was to serve its members and supporters (what is known as a “member-serving” organisation or sometimes as a “self-help” or “mutual” organisation), or to serve the public. An example of a member-serving organisation would be a sports club and a public-serving organisation would be a public hospital. More than half (56%) of NFP companies reported that their primary purpose was to serve their members. This information is relevant to a discussion on what information should be available to the public and other stakeholders.⁶⁸

5.4 Tax status

To profile the tax status of companies, several tax status markers were examined. Figure 1 combines answers to a series of questions on the company’s taxation status: “Is the majority of the company’s income exempt from income tax?”; “Are donations to the company (or any fund administered by it) tax deductible?”; “Is the company a ‘charity’ (in the narrow, legal sense)?”; and “Is the company a ‘Public Benevolent Institution’ (PBI)⁶⁹ for taxation purposes?”.

Respondents were given a “don’t know” option for the last two of these questions which many chose (12% and 17% respectively). This is not surprising given the complex taxation regime that

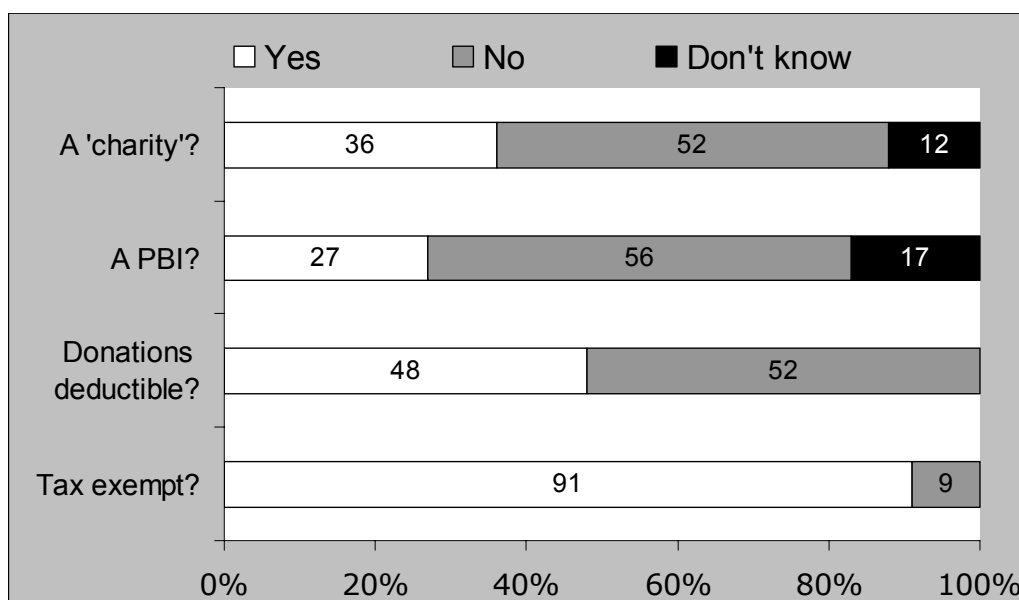
⁶⁷ n = 1,648 (namely, 1,688 but excluding 4 missing cases and 36 indeterminate cases).

⁶⁸ See heading 7.

⁶⁹ Public Benevolent Institution is not a term defined in the *Income Assessment Act 1936* (Cth) but there is a substantial body of case law on its meaning. For a clear summary of the meaning of the term see Charity Definition Inquiry n 2, Appendix B.

applies to NFP organisations. The majority of respondents were not “charities” or PBIs. While almost half (48%) enjoy tax deductibility status, the vast majority believe their income is tax exempt (91%). Again, this figure is relevant when considering what public reporting obligations should exist for these organisations. If you have (as a minimum) the privilege of income tax exemption, what should your corresponding disclosure/reporting obligation be and to whom?⁷⁰

Figure 1: Tax status



5.5 Name licences

Under s 150 of the *Corporations Act 2001* (Cth), a company limited by guarantee can, subject to certain restrictions,⁷¹ obtain a licence to omit the word “Limited” from its name. Historically, a name licence was seen as important – it distinguished “charities” from business. Without such a licence, the fear was that donations would dry up. To a very large extent, since the introduction of ACNs and ABNs, this is no longer an important consideration.⁷² Respondents reflected that the name licence group is no longer the majority of companies limited by guarantee – 25% said they held a name licence, 54% did not have such a licence and 21% “didn’t know”. This last figure is somewhat alarming given that there is a significant penalty for failing to use the company’s correct name on public documents – \$1,000 and/or three months’ imprisonment.⁷³

⁷⁰ See heading 7.

⁷¹ The restrictions state that the company’s constitution (a) requires the company to pursue charitable purposes only and to apply its income in promoting those purposes; (b) prohibits the company making distributions to its members and paying fees to its directors; and (c) requires the directors to approve all other payments the company makes to directors.

⁷² See McGregor-Lowndes M and Levy K, “Name Licences: the Company Name You Have When You are Not Having a Commercial Company Name” (1996) 4 *Current Commercial Law* 12 and Woodward S, “Not-For-Profit Companies – Some Implications of Recent Corporate Law Reforms” (1999) 17 *C&SLJ* 390 at 393.

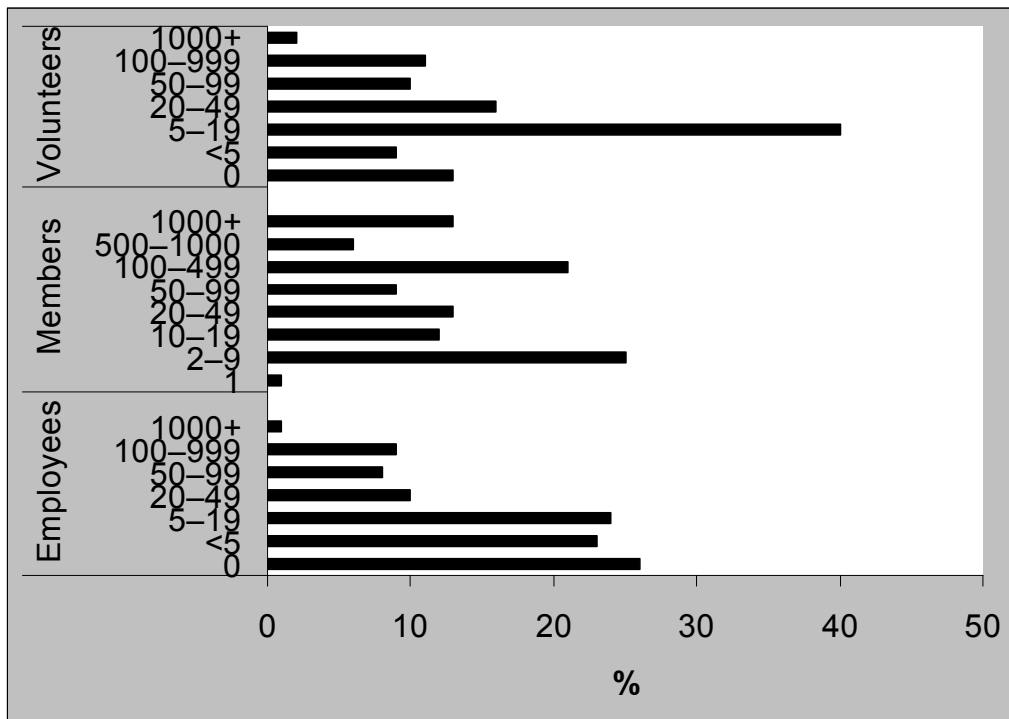
⁷³ If there is no name licence, *Corporations Act 2001* (Cth) s 148(6) makes it a strict liability offence not to include the word “Limited” in a limited public company’s name. See also *Corporations Act 2001* (Cth), Sch 3, item 14.

5.6 Size

5.6.1 Employees, volunteers and members

Figure 2 shows the responses to questions about the size of the company in terms of the number of members,⁷⁴ employees⁷⁵ and volunteers.⁷⁶ There was a good spread of respondents ranging from very small organisations (no employees) through to large NFP’s (more than 1,000 employees) as well as both small and large membership bases. While the spread was large, the majority of NFP companies limited by guarantee were at the smaller end: 72% of respondents had less than 20 employees, 62% had less than 20 volunteers and 60% had less than 100 members. It is also worth noting that there was no clear relationship⁷⁷ between the number of employees and the number of members or volunteers. For example, a large membership base did not necessarily mean a large number of volunteers/employees.

Figure 2: Employees, volunteers, and members



⁷⁴ Question 2.1.1 asked: “How many members did the company have at 1 March 2002? (We mean ‘members’ in the legal sense, that is, those people or organisations named in the register of members kept by the company pursuant to its obligations under the Corporations Act.)” A range of response options were offered: 1; 2-9; 10-19; 20-49; 50-99; 100-499; 500-1,000; and more than 1,000.

⁷⁵ Question 2.2 asked: “How many employees (whether full or part-time) did the company have at 1 March 2002?” A range of response options were offered: none; less than 5; 5-less than 20; 20-less than 50; 50-less than 100; 100-less than 1,000; and more than 1,000.

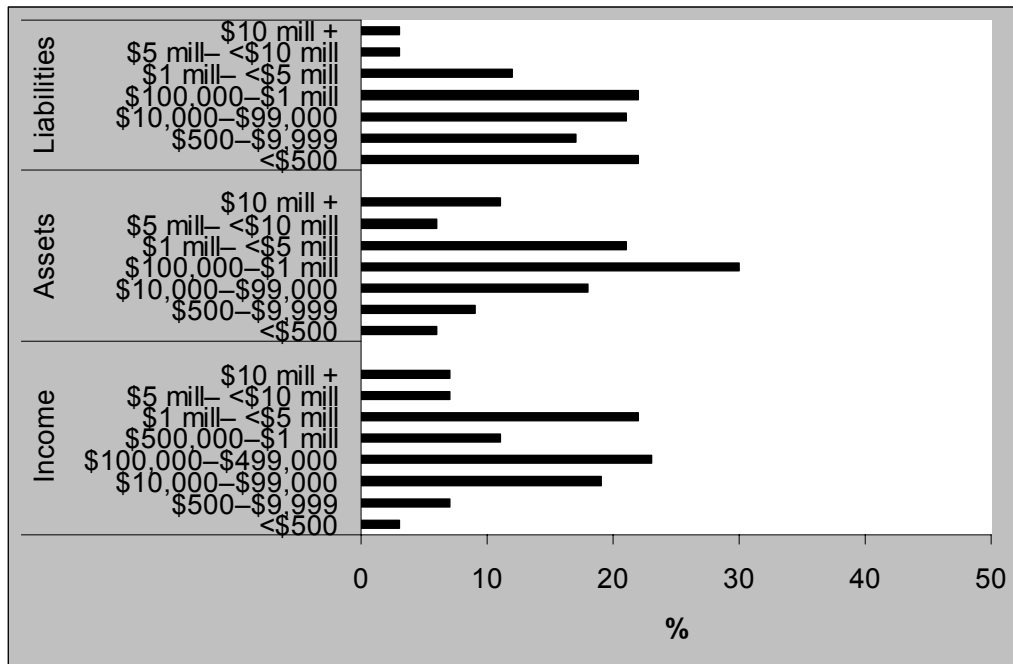
⁷⁶ Question 2.3 asked: “For 2001, estimate the total number of volunteers (whether full or part-time and including volunteer Board members) that provided assistance to the company.” A range of response options were offered: none; less than 5; 5-less than 20; 20-less than 50; 50-less than 100; 100-less than 1,000; and more than 1,000.

⁷⁷ Spearman’s range from 0.1 to 0.2.

5.6.2 Income, assets and liabilities

Figure 3 shows the responses to questions about the size of the company in terms of the income,⁷⁸ assets⁷⁹ and liabilities.⁸⁰ Again, there was a good spread of respondents ranging from very small organisations (annual income of less than \$500) through to large NFP’s (income of more than \$10 million and assets of more than \$10 million). Unlike the correlation between members, employees and volunteers (see heading 5.6.1), there was a strong relationship⁸¹ between the size of the respondent company’s income, assets and liabilities. Namely, a NFP company that had higher income typically also had greater assets and higher liabilities. In relation to the source of income,⁸² 59% said that they received no income from government sources. This is a relevant factor to take into account when considering the issue of accountability and disclosure.⁸³

Figure 3: Income, assets and liabilities



⁷⁸ Question 3.1.1 read: “As at the end of the company’s last financial year, please indicate gross income from all sources (where relevant, please include fundraising, government funding, fees for service, subscriptions, commercial sales, interest income, bequests, philanthropic grants, corporate sponsorship and any other non-government grants).” A range of response options were offered: less than \$500; \$500-less than \$10,000; \$10,000-less than \$100,000; \$100,000-less than \$500,000; \$500,000-less than \$1mil; \$1mil-less than \$5mil; \$5mil-less than \$10mil; and \$10mil or more.

⁷⁹ Question 3.2 asked: “As at the end of the company’s last financial year, please indicate the total value of the company’s assets”. A range of response options were offered: less than \$500; \$500-less than \$10,000; \$10,000-less than \$100,000; \$100,000-less than \$500,000; \$500,000- less than \$1mil; \$1mil-less than \$5mil; \$5mil-less than \$10mil; and \$10mil or more.

⁸⁰ Question 3.3 asked: “For the company’s last financial year, please indicate the company’s total liabilities”. A range of response options were offered: less than \$500; \$500-less than \$10,000; \$10,000-less than \$100,000; \$100,000-less than \$500,000; \$500,000-less than \$1mil; \$1mil-less than \$5mil; \$5mil-less than \$10mil; and \$10mil or more.

⁸¹ Spearman’s correlation ranging from 0.7 to 0.8.

⁸² Question 3.1.2 asked: “What percentage of income would you estimate comes from government sources?”

⁸³ See heading 7.

5.6.3 Observation

In order to determine how many of the NFP companies in the sample fell within the *Corporations Act* definition of “small” (proprietary limited company), the test for a small proprietary company in s 45A(2) of the *Corporations Act*⁸⁴ was applied to the survey data. While the wording of the questions relating to size in the questionnaire did not exactly match the wording of s 45A(2), they were considered sufficiently similar for general comparison purposes. In particular, the questionnaire used options that matched in terms of dollar values (for example, in terms of assets, the multiple choice options in the questionnaire could readily be collapsed to show those responses of less than \$5 million, being the amount referred to in s 45A(2)(b)).

When the s 45A test was applied to the survey data, it showed that 88% of NFP companies in the sample would (for their last financial year) have been classified as “small”, assuming of course, that they were a proprietary company (limited by shares) rather than a company limited by guarantee (for which there is no equivalent “small” and “large” dichotomy).

It is, however, important to remember that in the NFP sector there may be a different notion of “large” and “small” than that reflected in the s 45A definition.⁸⁵ Many would think that an NFP organisation that had, say, 45 employees, assets of \$4 million and revenue of \$9 million would be a medium if not large organisation, especially if it had a large volunteer base. Thus, it is not that the application of the s 45A definition necessarily provides an accurate description of the size of the respondent companies. Rather, the finding shows that if the vast majority of NFP companies limited by guarantee were proprietary companies, because of their size, they could avoid certain company law disclosure and other requirements. In particular, as “small” proprietary limited companies (under the s 45A definition), they would not be required by the *Corporations Act* to have their accounts audited or to lodge them with ASIC.⁸⁶ This reflects the underlying policy that small proprietary companies have, in relative terms, the most minimal reporting and disclosure obligations compared with public companies (which include companies limited by guarantee). This finding is relevant when one considers why a company limited by guarantee is chosen as the legal form,⁸⁷ and what disclosure and reporting obligations are appropriate.⁸⁸

5.7 Group structures

While group structures are par for the course in listed public companies and even in medium size businesses, they were uncommon among our sample NFP companies. The data showed that only 14% were part of a group structure⁸⁹ 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.

⁸⁴ 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.”

⁸⁵ Even among “for-profits” there has been contention about the definition – concern about those companies that fall somewhere between those that are clearly “small” or “large”: see generally Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on Aspects of the Regulation of Proprietary Companies* (2000) available at www.aph.gov.au/senate/committee/corporations_ctte/propcom/propcom.pdf.

⁸⁶ Unless requested by ASIC (*Corporations Act 2001* (Cth), s 294) or by the requisite number of members (s 293) or if they are controlled by a foreign owned company (s 292(2)(b)).

⁸⁷ See heading 6.

⁸⁸ See heading 7.

⁸⁹ Question 5.1 asked: “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).”

5.8 Board size

The survey responses were compared with those of a survey of the “top 100” listed (for-profit) companies conducted by Stapledon and Fickling in March 2001.⁹⁰ Although these “for-profit” companies are unlike the survey group in many obvious ways (including size),⁹¹ the comparison was thought to be of interest given that both groups should arguably have a high degree of public accountability and a high standard of corporate governance. The comparison showed that, in terms of board size, the average number of directors on the boards of the respondent NFP companies was eight,⁹² which was similar to the “top 100” average of nine.⁹³ There were, however, some significant differences at either end of the spectrum. Only one of the “top 100” boards had the legal minimum of three directors,⁹⁴ compared with 6% of the NFP boards. At the other end of the spectrum, the largest “top 100” board had 15 directors,⁹⁵ but 4% of the NFP group had more than 15 directors, including one respondent with 40 and one with 45.

5.9 Smaller management group

Anecdotally, a smaller management group within the board seems to be a distinguishing feature of NFP boards. While not the majority (46%), the data does support this suggestion.⁹⁶ The data showed that if the board is larger than the average of eight directors, they are more likely to have a smaller management group. One would, however, wonder about the position of those directors who are not part of the smaller management group – do they still keep themselves sufficiently informed about the company’s affairs?⁹⁷

5.10 Executive/non-executive split

The typical pattern for the “top 100” companies is a majority of non-executive directors and one or two executive directors.⁹⁸ Only one of the “top 100” had a board comprised entirely of non-executive directors and this was due to the resignation of the CEO just prior to the sample date.⁹⁹ By way of contrast, 77% of NFP respondents had boards comprised entirely of non-executive directors. This was a higher figure than that found in the earlier Steane and Christie study¹⁰⁰ and may reflect a trend towards greater use of non-executive directors. The NFP survey data also showed that 18% of NFP companies in the sample had a mix of executive and non-executive and only 5% comprised solely of executive directors.

5.11 Director gender, age and ethnicity

Nearly three-quarters (74%) of NFP respondents had at least one female director on their board. The sample NFP group covered 14,159 directors. However, only 26% of these directors were female.¹⁰¹ When compared to the “top 100” group, this was a significantly higher proportion – the “top 100” had only 7%.¹⁰²

⁹⁰ Stapledon G and Fickling J, *Board Composition and Pay in the Top 100 Companies* (Paper presented to the CMSF Conference, Institutional Analysis Pty Ltd, March 2001) (available at <http://www.institutionalanalysis.com>). The “top 100” companies were ascertained by reference to their market capitalisation.

⁹¹ See heading 5.6.

⁹² This result was different to that found in the earlier Steane and Christie study which found an average board size of 12.5: n 43, p 54.

⁹³ Stapledon and Fickling, n 90, pp 8-9.

⁹⁴ Stapledon and Fickling, n 90, pp 8-9.

⁹⁵ Stapledon and Fickling, n 90, pp 8-9.

⁹⁶ Question 9.1.1 asked: “Does a group of directors, or a board committee, deal with management matters on behalf of the Board?”

⁹⁷ See generally *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, especially at 125-126 and 197.

⁹⁸ Stapledon and Fickling, n 90, p 18.

⁹⁹ Stapledon and Fickling, n 90, p 18.

¹⁰⁰ Steane and Christie found 55% of boards were comprised exclusively of non-executive directors: n 43, p 54.

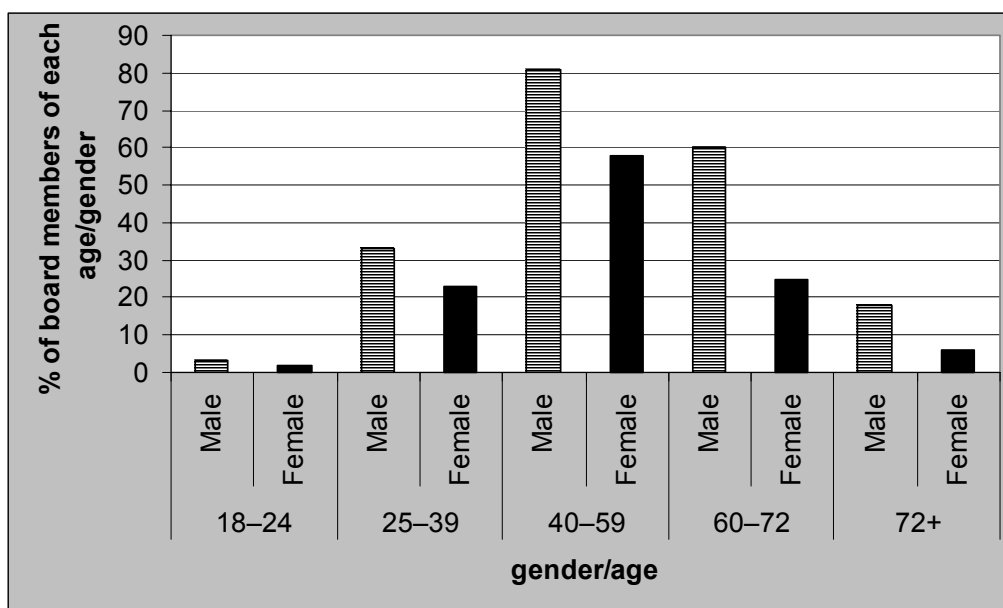
¹⁰¹ Compared with Steane and Christie who found that 40% of the 1,405 directors covered by their study were females: n 43, p 54.

¹⁰² Stapledon and Fickling, n 90, p 10.

Figure 4 shows the data for age groupings and gender of directors. With regard to youth representation, only 3% of NFP boards had a male and 2% had a female, aged between 18-24 years.¹⁰³ The males aged 40-72 years (particularly 40-59 years) are overwhelmingly the most represented group. This is consistent with the Steane and Christie study – they reported an average age of respondents as 47 years.¹⁰⁴

With regard to ethnicity, 2% of all female, and 2% of male directors, were Aboriginal, Torres Strait Islander or a descendant.¹⁰⁵ Of all directors whose “first learnt language was not English”, 10% were male and 6% were female.¹⁰⁶

Figure 4 : Board composition – age and gender



5.13 Remuneration of non-executive directors

Among many, it is assumed that all NFP non-executive directors are volunteers. That is, aside from out-of-pocket expenses, they are not paid for their services.¹⁰⁷ However, 8% of NFP companies in the sample said that their non-executive directors received payment in addition to out-of-pocket expenses.¹⁰⁸ While there may well be some response error rate within this percentage,¹⁰⁹ this error is

¹⁰³ This data supports recent papers presented at the first major, Australian NFP sector governance conference, *Building Better Boards – A Dialogue on Nonprofit Governance*, Nonprofit Governance & Management Centre, Sydney, 13-14 July 2002.

¹⁰⁴ Steane and Christie, n 43, p 52.

¹⁰⁵ This is less than Steane and Christie, who reported 6% of directors were “indigenous people”: n 43, p 52.

¹⁰⁶ This is less than Steane and Christie, who reported 18% of directors were “people from non-English speaking backgrounds”: n 43, p 52. Note, this difference may be to do with the different definitions used – the survey reported in this article used “English not first learnt language” compared with Steane and Christie who used the potentially broader definition of people “from non-English speaking background”.

¹⁰⁷ Question 7.2.2 asked “Are any of the non-executive directors paid directors’ fees (other than out-of-pocket expenses) by the company?”

¹⁰⁸ Steane and Christie, n 43 noted that most directors “appear to volunteer their time, with only six chairs indicating that any sort of remuneration was paid for services”, p 54.

unlikely to explain the full 8%. There was a large range in the amount these respondents said that they paid their non-executive directors: from \$100 to \$480,000 (presumably a total for all their non-executive directors), with 20 respondents paying \$80,000 or more. In terms of who is paying their non-executive directors, the data supports anecdotal evidence that there is a growing trend among some of the NFP employment agencies to pay their non-executive directors – 17% of employment agencies (n = 24) said that they paid their non-executive directors, compared with the overall rate of 8%.

The respondents who said that they did not pay their non-executive directors were asked whether they thought non-executive directors should be paid. Of this group, 85% said they should *not* be paid.

With regard to disclosure, 83% of respondents said that if any directors' fees were paid, this was disclosed in the company's annual accounts (n = 645). It should be borne in mind that those companies who hold a name licence under s 150 must have a constitution that prohibits the company "paying fees to its directors". For NFP companies without a name licence, there is no general *Corporations Act* requirement to disclose directors' fees in the annual directors' report – s 300A(1)(c) only applies to listed companies.¹¹⁰ Thus, the majority of respondents who say that they disclose the payment of directors' fees in their annual accounts (83%) are doing so voluntarily, or at least, not because of any *Corporations Act* requirement.

5.14 Recruiting and retaining directors

Nearly a third (29%) of respondents reported difficulty recruiting directors¹¹¹ with further analysis showing "small"¹¹² companies having slightly more difficulty than "large"¹¹³ companies (30% as against 21% respectively). Once people became directors, only 16% of respondents reported difficulty in retaining them, but again "small" companies were more likely to have difficulty than "large" companies (16% as against 9%). There was no obvious link between the nature of the company's activities and difficulty in recruiting or retaining directors.

While it is acknowledged that there was no "for-profit" control group, this data arguably supports the observations made earlier about the difficulty of recruiting directors on a volunteer basis.¹¹⁴

5.15 Conclusions – profile data

To generalise, the typical respondent was a CEO of an NFP company that:

- was member serving
- was income exempt
- did not hold a licence to omit the word "Limited" from its name
- had at least one volunteer
- was not part of a group structure
- was small to medium in size, and
- had a board comprised of eight unpaid, non-executive directors.

While accepting this proto-typical profile as a broad generalisation, it is useful profile data to bear in mind when considering the questions of disclosure and accountability.¹¹⁵

¹⁰⁹ That is, respondents who, despite the wording of the question, answered "Yes" even though all that they in fact pay is reimbursement of expenses reasonably incurred in, say, attending a board meeting held interstate.

¹¹⁰ Note: (a) s 300(1)(d) requires share options granted to directors as part of their remuneration to be disclosed in the annual directors' report; and (b) there is a general requirement for all companies (s 202B(1)) that directors' remuneration must be disclosed if those members with 5% or more of the votes, or 100 or more members, pass a resolution requiring the disclosure.

¹¹¹ Question 7.8.2 asked: "Has there ever been difficulty *recruiting* Board members?"

¹¹² For the purpose of this analysis "small" means those companies that fell within the s 45A definition.

¹¹³ For the purposes of this analysis, "large" means all those respondents that did not fall within the definition of "small".

¹¹⁴ See heading 2.3.2.

¹¹⁵ See heading 7.

6. WHY CHOOSE TO BE A COMPANY LIMITED BY GUARANTEE AND HOW SUCCESSFUL IS THIS CHOICE?

6.1 Relevance of profile data

In the light of this profile data, the first key question to be considered is why did respondents choose a company limited by guarantee as the legal form of organisation, rather than either an incorporated association or proprietary limited company? In relation to the proprietary limited company option, there are a few points to bear in mind from the profile data:

- (a) 88% of companies in the sample could be said to be within the s 45A definition of “small”¹¹⁶ – thus, they could, from a company law point of view, have chosen to be a proprietary limited company and because of their size they would have had minimal reporting obligations (for example, no requirement to prepare and lodge audited accounts);¹¹⁷
- (b) since 1998, to seek a name licence the company must be a company limited by guarantee with charitable objects.¹¹⁸ However, from the profile data, the majority (at least 54%)¹¹⁹ do not appear to hold a name licence. Therefore, the name licence issue does not explain the choice of structure for the majority of respondents; and
- (c) the majority (56%) say that their primary role is to serve their members. Thus, it is legitimate to question why these organisations take on a structure that requires greater disclosure to the public than that required for a (small) proprietary company.

Before examining the answers that respondents gave as to what factors were important in their choice of structure, it is necessary to provide an historical backdrop to the interpretation of the data.

6.2 Historical context

It is important to remember that the 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.¹²⁰ It is worth noting, therefore, that cost and organisational difficulty are factors likely to have prevented existing NFP companies from changing to the incorporated associations’ regime.

Initially, companies limited by guarantee had preferential treatment – for example, they enjoyed exemptions from lodging changes to directors and annual reports. Since 1982, these exemptions have been removed, but again it may not have prompted existing companies limited by guarantee to change their legal structure.

Prior to this, a name licence was obtained fairly easily and it gave a “halo” of respectability.¹²¹ However, since 1991¹²² all companies (even those holding a name licence) have been required to include their ACN on public documents.¹²³ As mentioned earlier, this requirement has significantly eroded one of the main reasons for applying for a name licence,¹²⁴ namely that without such a licence potential donors may be discouraged because of an (incorrect) assumption that a company necessarily

¹¹⁶ See heading 5.6.

¹¹⁷ See n 86.

¹¹⁸ See n 71.

¹¹⁹ Possibly higher assuming that some of the 21% who “did not know” whether or not they held a name licence do not, in fact, hold such a licence.

¹²⁰ 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.

¹²¹ See McGregor-Lowndes, n 28, pp 428-434; McGregor-Lowndes and Levy, n 72.

¹²² Amendment to s 219(3) contained in Sch 2 of the *Corporations Legislation Amendment Act 1991* (Cth).

¹²³ Australian company number: see *Corporations Act 2001* (Cth), s 153.

¹²⁴ See para PS 50.4 of ASC (now ASIC) Policy Statement 50, *Omission of “Limited” from Company’s Name*, issued 29 March 1993.

implies “for-profit” motives.¹²⁵ If it can be said, therefore, that holding a name licence is not the incentive it was, then again why continue (or choose) to be a company limited by guarantee?

6.3 Factors behind choice of legal form

The questionnaire asked respondents to rank the importance of various reasons why a company was chosen as the legal structure, rather than, for example, an incorporated association or a cooperative. The rankings were (1) “not at all important” through to (4) “very important” and (0) “don’t know”.¹²⁶ There was also space given for writing “other important reasons”. The reasons given for selection were based on those that the author believed to be relevant considerations.¹²⁷ Table 2 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).¹²⁸

Table 2: Respondents’ reasons for choosing company structure

| Reason why company structure chosen | % of respondents who agreed was an important factor (in descending order of prevalence) |
|---|---|
| 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 |

¹²⁵ See McGregor-Lowndes and Levy, n 72; Woodward, n 72.

¹²⁶ It was necessary to give a “don’t know” option on this question because the respondent may not have been with the organisation at the time of incorporation.

¹²⁷ The author sought the views of a range of advisors to NFP organisations: see n 41.

¹²⁸ The collapsed chart did not result in any distortion of the refined patterns.

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. It is suggested 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 supports anecdotal evidence that 'serious' or 'more sophisticated' NFP organisations use the *Corporations Act* rather than incorporated associations legislation.

From further analysis, "large"¹²⁹ companies were more likely than "small"¹³⁰ companies to consider an organisation's size (58% vs 37%) and the scale of its trading activities (54% vs 38%) as important in their choice of structure. By contrast, "small" companies saw national or multi-State (36% vs 22%) as important – so, although "small" in size, it seems that they decided they needed to use the *Corporations Act* rather than State-based legislation because of the interstate nature of their activities.

6.4 Success of a company legal structure

Respondents were asked:

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

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

Space was given for "other comments" and the respondents were asked to rank each statement from (1) "strongly disagree" through to (4) "strongly agree" and (0) as "can't say". Table 3 shows the results. Again the "can't say" responses were excluded and the results were collapsed to "agree" and "disagree".¹³¹

Table 3: Respondents' view on 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 <p>majority (76%) agreed</p> | <ul style="list-style-type: none"> • has caused difficulties <p>majority (76%) disagreed</p> |

¹²⁹ That is, all respondents who could not be said to be within the s 45A definition of "small".

¹³⁰ That is, all respondents who could be said to be within the s 45A definition of "small".

¹³¹ The collapsed chart did not result in any distortion of the refined patterns.

| | |
|--|--|
| <ul style="list-style-type: none"> is readily understood by the company's members <p>majority (56%) agreed</p> | <ul style="list-style-type: none"> has added significant expense <p>majority (59%) disagreed</p> |
| <ul style="list-style-type: none"> is readily understood by those dealing with the company (such as funding bodies) <p>majority (73%) agreed</p> | <ul style="list-style-type: none"> has added a lot of paperwork <p>majority (51%) agreed</p> |
| <ul style="list-style-type: none"> involves manageable reporting obligations to members and ASIC <p>majority (76%) agreed</p> | |
| <ul style="list-style-type: none"> has been sufficiently flexible to meet the organisation's needs over time (eg, if a merger has been necessary) <p>majority (72%) agreed</p> | |

There was no clear evidence of any overall dissatisfaction with the structure. The dissatisfaction that was expressed was about the expense¹³² (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, members, and those dealing with the company and that it has been a flexible structure with manageable reporting obligations.

6.5 Observations – choice of structure

The vast majority¹³³ of *incorporated* NFP organisations are either incorporated associations or (to a lesser extent) companies limited by guarantee. It is suggested that after more than a decade of a dual regime, State and Territory based associations’ legislation and regulation of companies on a national basis, it is an opportune time to reflect on the regulation of NFP bodies corporate generally.

While the survey did not cover incorporated associations, there are certain findings that are relevant to such a reflection. For example:

- (a) 35% 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”¹³⁴ organisations, that is, organisations that one could assume might otherwise have been better suited to the cheaper associations’ regime. In addition, it is likely that this factor was very relevant to the advice given by legal and other advisers, even if not specifically identified by the respondent;¹³⁵
- (b) 40% of respondents indicated that the “scale of trading activities” was an important factor, which is an area of debate and variation in the associations’ regime.¹³⁶ Again, this factor is

¹³² For a comparison between modes of incorporation and costs see Fletcher K, “Developing Appropriate Organisational Structures for Non-profit Associations” in McGregor-Lowndes M, Fletcher K, Sievers AS (eds), *Legal Issues for Non-Profit Associations* (LBC Information Services, 1996) p 1, especially pp 9-10.

¹³³ That is, aside from those that are bodies corporate because they come under the auspices of a church or are incorporated by Royal Charter or a special Act of Parliament.

¹³⁴ That is, all respondents who could be said to be within the s 45A definition of “small”.

¹³⁵ See heading 6.3.

¹³⁶ See Sievers AS, *Associations and Clubs Law in Australia and New Zealand* (The Federation Press, 1996) para 4.1.4.

likely to have been very relevant to the advice given by legal and other advisers, even if not specifically identified by the respondent. There were also several respondents who 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;¹³⁷

- (c) 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; and
- (d) “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.

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

1. 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);
2. 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
3. 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) that would also enable national regulation by ASIC *and* the possible development of a specialist form of corporate entity for NFP organisations generally.

6.5.1 Uniform incorporated associations’ legislation

Others have already made the call for uniform legislation for incorporated associations.¹³⁸ It is an incredibly logical notion but there seems to have been little push for it. In addition, the survey data as outlined above 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 organisations¹³⁹ 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”.¹⁴⁰ 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*,¹⁴¹ 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.

¹³⁷ See n 14.

¹³⁸ For example, Sievers S, “Incorporation and Regulation of Non-Profit Associations in Australia and other Commonwealth Law Jurisdictions” (2001) 13 AJCL 124 at 142.

¹³⁹ For example, the Nursing Mothers’ Association has State incorporated associations with a small national body that is a company limited by guarantee.

¹⁴⁰ See Industry Commission, n 8, pp 211-212.

¹⁴¹ See, eg, Ford HAJ et al, *Ford’s Principles of Corporations Law* (10th ed, Butterworths, Sydney, 2001) paras 2.230-2.250, 2.306, 2.310, 3.060-3.090; and Tomasic R, Jackson J and Woellner R, *Corporations Law: Principles, Policy and Process* (4th ed, Butterworths, 2002) pp 21-72, especially para 1.8.

6.5.2 Uniform incorporated associations' legislation administered by ASIC

The second option outlined above (retention of the existing dual regime but with both uniform State associations' legislation *and* power over incorporated associations being conferred on ASIC) is the intermediate of the three options, quite like what existed for companies under the *Corporations Law* scheme (that is, 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 regulator¹⁴² 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 shows 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. If this option also facilitated the creation of a specialist unit within ASIC to deal with NFP companies and associations, then NFP expertise could be developed. It is suggested 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, for example, the concern expressed by 54% of respondents that ASIC is "inaccessible to non-business people".¹⁴³ However, this option would presumably raise the same constitutional issues as the *Corporations Law* scheme faced – Federal courts could not exercise enforcement powers under the respective State Acts¹⁴⁴ and breaches could not (at least with total certainty) be prosecuted by the Commonwealth Director of Public Prosecutions.¹⁴⁵

6.5.3 Commonwealth legislation administered by ASIC

The third option of 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 (along the lines of what has been achieved for company regulation) and national regulation by ASIC, would be the most drastic but, it is suggested, the most satisfactory of the three options mooted. Because it is the most drastic, it may also be said to be totally unrealistic. 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 the experience with corporations' powers. Of course, forceful lobbying by the NFP sector itself (for example under the auspices of the newly formed National Not-for-Profit Round Table)¹⁴⁶ 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 incorporated associations 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. Second, because the Federal Government has not adopted the Charity Definition Inquiry's recommendation for an independent administrative body,¹⁴⁷ 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 Commission¹⁴⁸ and the more recent Charity Definition Inquiry¹⁴⁹ have suggested reforms along this line. Finally, this third option would facilitate the introduction of a specialist form of corporate structure available only to NFP organisations.

¹⁴² ASIC also has in place streamlined processes for electronic lodging and searching of documents etc.

¹⁴³ See heading 8.2.

¹⁴⁴ See *Re Wakim: Ex parte McNally* (1999) 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 McHugh J at [56].

¹⁴⁵ See *R v Hughes* (2000) 34 ACSR 92.

¹⁴⁶ See n 21.

¹⁴⁷ 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>.

¹⁴⁸ For example, see Industry Commission, n 8, submission by the Villa Maria Society for the Blind quoted on p 213 of the report.

¹⁴⁹ For example, see Charity Definition Inquiry, n 2, submission by Mission Australia quoted on pp 94-97 of the report.

While there are many overarching provisions in the *Corporations Act* that should apply to all companies (particularly, directors’ duties), the unique issues faced by NFP companies (some of which are described in this article),¹⁵⁰ 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?

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.¹⁵¹ 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.¹⁵² However, there is a strong argument for tailoring the nature of what is disclosed and the fees payable to meet their different needs.¹⁵³ 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.

7. WHAT INFORMATION SHOULD BE AVAILABLE TO THE PUBLIC AND OTHER STAKEHOLDERS?

7.1 Relevance of profile data

The second key question to be considered in the light of the profile data is what information should be available to the public and other stakeholders? Again, there are a few points to note about the profile data:

- (a) 88% of respondents could be said to be within the s 45A definition of “small”¹⁵⁴ – so if they had chosen to be a proprietary limited company they would have had minimal reporting obligations (for example, the public would have no access to their financial reports and audited accounts);
- (b) unlike directors of listed companies, directors of companies limited by guarantee do not, under the general provisions of the *Corporations Act*, have to disclose fees paid to them in their annual report;¹⁵⁵
- (c) the majority (56%) say that their primary role is to serve their members – should these companies have a lesser obligation to disclose information to the public than say, those NFP companies that are primarily public serving? and
- (d) 91% state that their income is exempt from income tax, donations to 48% were tax deductible and 41% receive some income from government sources – with taxation concessions, should there be a corresponding public disclosure obligation?

¹⁵⁰ See heading 2.3.

¹⁵¹ Explanatory Memorandum to the *First Corporate Law Simplification Bill 1995*, paras 3.15, 6.11. See also the general discussion in Parliamentary Joint Statutory Committee on Corporations and Securities, n 85, Ch 2.

¹⁵² 91% of respondents said that their income was exempt from taxation. Information provided to the Charity Definition Inquiry which showed that, at 13 June 2001, there were 40,202 Income Tax Exempt Charities (ITECs): Charity Definition Inquiry, above n 2, 51.

¹⁵³ See UK Report, n 23.

¹⁵⁴ See heading 5.6.3.

¹⁵⁵ See heading 5.13 and n 110 for exceptions.

7.2 Policy considerations

While a strong case can be made for some level of disclosure by NFP companies, the nature of the disclosure and to whom disclosure should be made are more vexed issues. Table 4 shows some of the policy arguments that can be made about disclosure generally.

Table 4: Policy considerations for disclosure by NFP organisations

| For | Against |
|---|--|
| <ul style="list-style-type: none"> the “public” are a stakeholder even in member organisations because tax forgone is “public” money | <ul style="list-style-type: none"> disclosure can add considerable time and expense, especially for organisations that rely on volunteers and/or irregular, limited funding |
| <ul style="list-style-type: none"> donor confidence relies on a high degree of accountability. There cannot be this accountability without disclosure | <ul style="list-style-type: none"> there will always be some ‘bad apples’ and greater disclosure does not prevent this |
| <ul style="list-style-type: none"> there are “for-profit” agencies that charge for access to information databases about NFP organisations¹⁵⁶ – this demonstrates a need for information, not currently being met by statutory requirements | <p>better to rely on grant makers (government and non-government) and sponsors – they can/should insist on, and monitor, disclosure</p> |

7.3 What information should be provided?

Table 5 shows the responses to the question that asked “what information (if any) do you believe should be available to the public about your organisation?” Respondents were given a list of options (as shown in Table 5) and they could chose “no information” or one or more boxes from a list of options (for example, summary financial information, fully audited accounts, copy of constitution etc). There was also a space for specifying “other” information.

Table 5: Respondents’ view on what information should be available to the public

| Type of Information | % of respondents who selected (in descending order of prevalence) |
|----------------------------|---|
| name and registered office | 98 |
| description of activities | 89 |

¹⁵⁶ For example, (1) Australian Management Corporation, who had an advertising supplement in *The Age*, 3 June 2002 that invited NFP organisations to register for the company’s survey and provide details of their financial position and income levels to the company to ensure they were “open and transparent to the public that supports them”. Of the 1,000 organisations that had already been approached in Victoria, 130 had “already accepted” (including several well-known organisations). (2) Walsh Consultants Pty Limited operate under the business name of “Givewell” – their website (<http://www.givewell.com.au>) states “Givewell was formed in 1997 to play a key role in fostering a better culture of giving in Australia. We do this by conducting research on charities and generating ideas on better ways to give. We also believe that more informed and generous giving will lead to a more accountable, efficient and effective charitable sector.” NFP organisations are encouraged to register with them (for free) and subscribers (eg, grant makers) pay to subscribe to their service.

“Not-for-profit” motivation in a “for-profit” company law regime – national baseline data

| | |
|--|----|
| copy of company constitution | 60 |
| summary financial information | 56 |
| fully audited accounts | 39 |
| attendance of directors at board meetings | 37 |
| if total public funding over \$100,000 disclosure of all sources of public funding | 36 |
| specific financial information on remuneration of directors and senior management | 25 |
| marketing expenditure compared with fundraising receipts | 24 |
| no information | 9 |
| other | 8 |

To highlight the main results:

- (a) 9% of respondents thought that no information should be made available by them to the public;
- (b) only 39% agreed that fully audited accounts should be available to the public – that is, only 39% agreed that they should have to disclose what they are currently required by the *Corporations Act* to disclose,¹⁵⁷
- (c) the majority (56%) were of the opinion that summary financial information was sufficient.

Thus, the survey data shows a disparity between the level of disclosure that the majority of respondents believe *should* be available to the public (namely, summary financial information) and the level of disclosure that they are, in fact, *required* by the *Corporations Act* to make (namely, fully audited accounts). Given this disparity, one wonders why those companies that meet the s 45A size requirements have not chosen to be a proprietary companies in order to enjoy the less onerous disclosure required of “small” proprietary companies – a disclosure requirement more in keeping with the majority view expressed in the survey. While a proprietary limited structure may require some “explaining” as it is relatively unusual in the NFP sector, the author is not aware of any overarching taxation advantage or other legislative requirement that the form of company structure be a company limited by guarantee rather than a (small) proprietary limited company.¹⁵⁸

¹⁵⁷ While s 314 of the *Corporations Act 2001* (Cth) allows concise annual reports to be sent to *members*, the full report must be lodged with ASIC and, thereby, made available to the public: s 319(1).

¹⁵⁸ See heading 2.2 – legislation such as the *Aged Care Act 1997* (Cth) requires an approved provider to be a “trading or financial corporation within the meaning of paragraph 51(xx) of the Constitution” but does not specify a company limited by guarantee: s 8.1(1)(b); Sch 1. Similarly the *Registered Clubs Act 1976* (NSW) s 10(b)(i) requires “a company within the meaning of the *Corporations Act 2001* (Cth)”.

Cross-tabulation of the data shows that “large” companies were more likely than “small” companies to be in favour of disclosing fully audited accounts (54% vs 36%).¹⁵⁹ One could surmise that this is because they have greater resources to meet the cost and are more likely to be preparing such accounts anyway (for funding bodies).

Further analysis also showed that respondents whose companies were primarily member-serving,¹⁶⁰ were less likely to believe that fully audited accounts should be available to the public, than those whose company primarily serve the public (32% vs 47%). This is consistent with a policy argument that, for small, member-serving organisations (such as sporting clubs or self-help groups), it is reasonable that they should only be required to disclose summary financial information to the public, rather than having to use precious income from membership fees to pay for the preparation of fully audited accounts. Against this is the policy argument that, as the vast majority of member serving NFP companies say that they receive exemption from income tax,¹⁶¹ this constitutes public (tax) money forgone and, therefore, the public have a right to access fully audited accounts to see how that public money has been used by the organisation. Put another way, a taxation privilege should carry with it a corresponding public disclosure responsibility.

In balancing these competing policy arguments, it is worth noting the UK Cabinet Report comments in favour of a “risk-based” approach to regulation:

Regulation should have clear objectives. It should be carefully targeted and proportionate to risk – both to the risk of abuse and also to the risk of damage to public confidence. In general, this means that regulation of small organizations, where the sums of money involved are modest, should be lighter than regulation of large organizations, which handle large sums and may also have a disproportionate impact on public confidence.¹⁶²

8. WHO IS THE MOST APPROPRIATE REGULATOR?

8.1 Options

The survey data has highlighted certain distinct characteristics of NFP companies. These need to be borne in mind when considering issues such as who is the most appropriate regulator. So what are the regulatory options? Continue as is – ASIC for companies, and State/Territory regulators for incorporated associations. Or develop a specialist unit within ASIC for NFP companies? Have an independent administrative body for NFP organisations (as recommended by the Charity Definition Report)¹⁶³ that works in conjunction with ASIC? Or a new independent body (as recommended by the Charity Definition Report)¹⁶⁴ that replaces ASIC’s role (for example, filing with the NFP administrator would be taken to satisfy the organisation’s obligations under the *Corporations Act*)? A referral of powers such that ASIC was the sole regulator for NFP companies and associations? Some of these options have already been canvassed in this article¹⁶⁵ but the following is a report of relevant survey findings.

8.2 Satisfaction/dissatisfaction with ASIC?

From their experience, the respondents were asked to rank a series of statements about their dealings with ASIC. The rankings were from (1) “strongly disagree” through to (4) “strongly agree” and (0) as “not sure”. There were an equal number of “negative” statements and “positive” statements about

¹⁵⁹ In this context “large” is a reference to those respondent companies that could not be said to fall within the *Corporations Act 2001* (Cth) s 45A definition of “small”, and “small” is a reference to those respondent companies who could be said to fall within that definition.

¹⁶⁰ See heading 5.3.

¹⁶¹ See heading 5.4.

¹⁶² UK Report, n 23, para 3.10.

¹⁶³ Charity Definition Inquiry, n 2, p 294 recommendation 25.

¹⁶⁴ Charity Definition Inquiry, n 2.

¹⁶⁵ See heading 6.5.

ASIC’s role/performance. Table 6, following, shows the results – for the purposes of these results, the “not sure” responses were excluded and the results were collapsed to “agree” and “disagree”.¹⁶⁶

Table 6 : Respondents’ satisfaction with ASIC

| Positive statements about ASIC | Negative statements about ASIC |
|--|---|
| <ul style="list-style-type: none"> provides timely advice if needed <p>majority (56%) disagreed</p> | <ul style="list-style-type: none"> is merely a filing agency <p>majority (56%) agreed</p> |
| <ul style="list-style-type: none"> is concerned to ensure that our company is well run <p>majority (56%) disagreed</p> | <ul style="list-style-type: none"> inaccessible to non-business people <p>majority (54%) agreed</p> |
| <ul style="list-style-type: none"> has an important public information role <p>majority (74%) agreed</p> | <ul style="list-style-type: none"> imposes substantial fees <p>majority (57%) agreed</p> |

Table 6 shows 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).

As mentioned previously, 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.

8.3 A new regulator?

To determine whether respondents wanted a new regulator or not, two questions had to be combined. First, respondents were asked if they agreed with the Charity Definition Inquiry recommendation about the establishment of a new administrative body to oversee charities and related entities.¹⁶⁷ The majority (54%) of respondents said “yes”, 20% said “no”, 24% were “not sure”, and 2% did not respond to the question.¹⁶⁸ But by removing the “not sure” group and non-responses, the proportion in favour of the Inquiry’s recommendation is 74%.

In the second question, respondents were asked if this recommendation was implemented, did they think the new body should “have jurisdiction over corporate regulation of not-for-profit companies instead of ASIC”. The responses were – 33% said “yes”, 25% said “no”, 36% were “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%.

¹⁶⁶ The collapsed chart did not result in any distortion of the refined patterns.

¹⁶⁷ Charity Definition Inquiry, n 2, p 294 recommendation 25.

¹⁶⁸ Further qualitative analysis is being carried out on this question due to the high level of “not sure” answers. Comments written on the survey below this question by the “not sure” group of respondents suggest that most were concerned about additional regulation and even more paperwork. Many were unaware of the exact nature of the Inquiry’s recommendation and wanted more information.

Responses to these two questions 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 response 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. However, “small”¹⁶⁹ companies were more likely than “large”¹⁷⁰ companies to want a new regulator (53% vs 44%). No other significant associations could be found – for example, member-serving companies were only very marginally more likely to want a new regulator (52% vs 51%) and similarly for those with PBI tax status and those without it (48% vs 50%).

Respondents were also asked if they thought “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’?” A majority of 70% answered “yes” to this question. Not surprisingly, those respondents who were taken to want a new regulator (see preceding paragraph) were more likely than respondents who did not want a new regulator 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 8.2.

8.4 Role of a new regulator

Respondents were asked if the Charity Definition Inquiry’s recommendation for the establishment of an independent administrative body was implemented,¹⁷¹ “which of the following roles do you think such an independent body should have?” Respondents could tick one or more from the following list.

Table 7 : Respondents’ view of the role of a new regulator

| Possible role | % who 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 |

¹⁶⁹ That is, all respondents who could be said to be within the *Corporations Act 2001* (Cth) s 45A definition of “small”.

¹⁷⁰ That is, all respondents who could *not* be said to be within the *Corporations Act 2001* (Cth) s 45A definition of “small”.

¹⁷¹ Charity Definition Inquiry, n 2, p 294 recommendation 25.

“Not-for-profit” motivation in a “for-profit” company law regime – national baseline data

| | |
|-------------------|---|
| other | 4 |
| none of the above | 3 |

It is interesting to note 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%). Experience from the United Kingdom (which has had a Charities Commission for over 40 years)¹⁷² 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.¹⁷³

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”.¹⁷⁴ In the Australian context, it may be appropriate for the newly formed National Not-for-Profit Round Table¹⁷⁵ to take on an advocacy role on behalf of the sector, and also for it to auspice a sector body suitably equipped to provide advice and training.

9. CONCLUSIONS

The survey reported in this article has, for the first time, obtained important, national profile data about NFP companies limited by guarantee based on 1,688 completed responses.¹⁷⁶ These findings bring into contrast significant differences in profile between NFP companies limited by guarantee and “for-profits”. The majority of NFPs limited by guarantee are small, member-serving organisations with volunteers that enjoy income tax exemption, but unlike many “for-profits”, are not part of a group structure.

These differences give rise to questions concerning whether it is appropriate that NFP and “for-profit” organisations should be regulated by the same body – ASIC. It is hoped that the data from this survey can be used to engender informed debate on possible reforms. Specific conclusions about the data and some observations on possible reforms have been suggested throughout the article under relevant headings and, because of their number, are not repeated here.¹⁷⁷

¹⁷² See Charity Definition Inquiry, n 2, Ch 32, p 284 and Appendix I, pp 419-427 for a clear overview of the nature and role of the UK Charities Commission.

¹⁷³ 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 (available at http://www.ncvo-vol.org.uk/main/about/does/policy/pdfs/CLR_PIU_submission.pdf).

¹⁷⁴ UK Report, n 23, p 80.

¹⁷⁵ See n 21.

¹⁷⁶ That is, 1736 less 48 who said they were “for-profits”.

¹⁷⁷ In particular, see heading 6.5.

Three major points stand out for further debate:

1. A new NFP company structure under Corporations Law

A company limited by guarantee may not be the most appropriate structure for NFPs.¹⁷⁸ It is time to consider the introduction a specialist form of company structure instead of, or in addition to, incorporated associations. The creation of a specialist organisation has been recommended in both the 1995 Industry Commission¹⁷⁹ and the recent United Kingdom Cabinet Office reports.¹⁸⁰

There are currently different incorporated associations laws in each State, in addition to the company limited by guarantee structure taken up by organisations surveyed in this report. The myriad of legal structures for NFP organisations hampers accountability and regulation which, in turn, have implications for donor confidence in the sector.¹⁸¹ The introduction of a new specialist form (or forms) of NFP company *combined with* referral of powers by the States for incorporated associations, would simplify regulation and provide an opportunity to introduce nationally consistent reporting requirements with a fee structure specifically tailored to NFPs and their stakeholders.

2. Different reporting requirements for NFP companies depending on their size and purpose

There is a strong argument for tailoring the nature of what is disclosed to ASIC by NFP companies depending on factors such as size, whether they are primarily member-serving or public-serving and what their taxation status is. NFPs have different stakeholders from “for profit” organisations and, therefore, it is arguable that their reporting requirements should differ. Like small business prior to the simplification and CLERP reforms,¹⁸² many small NFPs find their company law reporting obligations excessive. Understanding what their obligations are can be difficult – there is no “Small Business Guide” for small NFP companies. However, given that the vast majority (91%) enjoy income tax exemption, there is a strong public policy argument for requiring reasonably rigorous levels of disclosure. These policy considerations need to be balanced – the aim should be to design reporting requirements that meet the specific needs of NFPs and their various stakeholders, and improve transparency and accountability, but without overburdening NFPs by requiring multiple or largely irrelevant reports.

3. A new NFP regulator

Findings on the question of a new regulator were not entirely straightforward. Respondents were not generally positive about the way in which ASIC performs various roles. However, 70% of respondents thought that the *Corporations Act* and the way that is implemented by ASIC is more appropriate for “for-profit” organisations than NFPs. This suggests that it is the fact that ASIC is not a specialist NFP regulator, rather than the way that ASIC carries out its various roles and services, that has created dissatisfaction among NFP companies.

This conclusion is supported by the fact that dissatisfaction with ASIC did not translate into strong support for a new regulator. Indeed, there was a large amount of ambivalence about the formation of a new regulator.¹⁸³ It is suggested that this ambivalence (at least in part) reflects the respondents’ view of the alternatives. Nearly a third (31%) of respondents identified a preference for ASIC over a State regulator as an important factor in their choice of incorporated legal form. Anecdotal evidence suggests that organisations requiring structures outside the model rules have difficulties dealing with State-based incorporated association authorities. Therefore, organisations may not have had a positive experience of a NFP specific regulator. Furthermore, respondents may have been hesitant to provide a strong opinion in favour of a new regulator without a more fleshed out option before them.

¹⁷⁸ In New Zealand, companies limited by guarantee have been abolished: see Farrar J, *Corporate Governance in Australia and New Zealand* (2001) p 379.

¹⁷⁹ Industry Commission 1995, recommendation 8.2, pp 217-219.

¹⁸⁰ UK Report, n 23, recommendations 8 and 17 (available at <http://www.piu.uk/2002/charity/report/index/htm>).

¹⁸¹ See Industry Commission 1995, para 8.4 pp 206-214; See also Charity Definition Inquiry, pp 94-99; “Report: Charities”; “The Give and Take of Charities”, *Choice Magazine*, November 2002, p 20.

¹⁸² CLERP – Corporate Economic Law Reform Program.

¹⁸³ See heading 8.3.

Thus, the findings suggest that change is needed, but further debate about the merits of a specialist unit within ASIC to deal with the particular needs of NFP bodies versus a new, NFP specific regulator is necessary.

Reform of the legal framework pursuant to which NFP organisations can incorporate and by which they are regulated, a tailoring of their reporting obligations, and a specialist national regulator (or at least a specialist division), are necessary in order to properly underpin the NFP sector – a sector that makes a vital contribution to Australian society.