



CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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**Scoping study for a national
not-for-profit regulator**

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the consultation paper, *Scoping study for a national not-for-profit regulator* (the consultation paper).

Chartered Secretaries Australia (CSA) is the independent leader in governance, risk and compliance. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency. Our Members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, and not-for-profit (NFP) and public sector organisations. Many of our Members serve as officers of NFP organisations, or work for or are involved with companies limited by guarantee (the legal form chosen by a great many NFP organisations). CSA itself is a company limited by guarantee, formed to serve the interests of its members, who are governance professionals. We have drawn on their experience in the formulation of our submission on the matters canvassed in the consultation paper.

General comments

CSA welcomes the consultation as part of a scoping study for a national NFP regulator. Although corporate law reforms for the private sector have been introduced over the past decade or so, CSA believes that more needs to be done for the NFP sector, given its importance to Australia. After many years of a dual NFP regime, with state and territory-based associations' legislation co-existing with the national regulation of companies, it is time for serious reconsideration of the regulation of NFP bodies generally.

CSA has responded to previous reviews and inquiries noting that the NFP sector requires a national, dedicated regulator. We therefore commend the government for turning its attention to this question and seeking feedback from those affected by any regulation relevant to the NFP

sector on the goals and scope of national regulation and the functions and form of a national regulator.

Benevolent charities are not the entirety of the NFP sector

CSA has concerns that the consultation paper at times addresses the issues it wishes to examine as if the NFP sector consists solely of benevolent charities. CSA would like to emphasise in the strongest possible terms that the charity sector is not coextensive with the NFP sector. Benevolent charities form part of the NFP sector, but that sector also comprises associations (CSA is one such association), hospitals, community services, universities, sports clubs, religious groups, day care centres, recreation clubs, environmental groups, job-training centres, family counselling agencies, and many more. According to the Productivity Commission's *Contribution of the Not-for-Profit Sector* report, the sector generates approximately \$43 billion to GDP. It is unknown how much of this is generated by charities and how much by other organisations within the NFP sector. It would be a grave misrepresentation of the sector and its contribution to the Australian community and economy to make any reforms to the regulatory framework based on the particularities of charities alone. The diversity of the NFP sector needs to be kept in mind when proposing any legal and regulatory reform.

Referral of powers

For any regulatory reform of the NFP sector to succeed, it is essential that the sector is granted the same national context as the private sector. The existing two-tiered regulatory system (state/territory-based incorporated associations and a federal company law regime) is inefficient, costly and does not meet the needs of small or large NFPs. Harmonisation of state and territory laws will not provide the legislative reform that is required to support the sector.

A referral of powers in relation to state and territory-based incorporated associations laws is the necessary basis for any regulatory reform of the NFP sector. Such a referral has already been successfully undertaken with company regulation. Given that the precedent exists (the Corporations Act), it is our view that the NFP sector should benefit from the same approach provided to the private sector, and should not have to suffer the less favourable outcomes that would be attached to a harmonisation process and, in effect, be treated as a second-class sector.

Future NFP legal structures

There is a myriad of legal structures under which NFP organisations currently operate (incorporated association, company limited by guarantee, proprietary company, trust, cooperatives, Royal Charter, special Act of Parliament, indigenous corporations). This introduces confusion as to compliance obligations, inefficiencies in regulatory compliance, considerable duplication and does not assist the central objective of ensuring that the legal form supports the objects of the organisation.

The implementation of a national regulatory regime would in turn provide for a review of the existing legal structures used by NFP organisations, and this could lead to the introduction of a single, specialist NFP legal structure. Any new structure should meet the needs of both small and large NFP organisations. It is also important that any conversion from existing legal structures to a new legal structure should be as simple as possible and should not impose additional costs on NFPs.

Again, a precedent exists. Indigenous corporations have a different legal structure from other corporations, one that recognises that governance frameworks, directors' duties and reporting and disclosure obligations need to be tailored to ensuring accountability and transparency of provision of services rather than financial investment.

The introduction of a dedicated national regulator will be facilitated by the provision of a specialist NFP legal structure. Indeed, CSA Members doubt that the government's goal of a 'one-stop shop' regulator can be met without introducing a specific NFP legal structure, given the wide range of NFP organisations and their attendant wide range of reporting obligations.

The United Kingdom has introduced a regulatory framework specific to the NFP sector. CSA believes that the Australian Government should examine the work undertaken in the United Kingdom and the framework it has implemented as part of its process of regulatory reform of the NFP sector.

ASIC is the most appropriate short-term National NFP regulator

Importantly, the national regulator should have a broad role that includes registering NFP organisations; educating the sector and encouraging compliance; educating the public about the role of NFP organisations; and developing and maintaining an accessible, searchable public information portal.

CSA notes that the Australian Securities and Investments Commission (ASIC) already has experience in many of these functions. CSA supports ASIC continuing to regulate NFP companies in the short term, but notes that it needs to develop expertise in the NFP sector in order to provide an educative as well as compliance role. Moreover, ASIC is currently in the process of upgrading its technology, which should facilitate its taking on the great number of NFP organisations currently regulated under state-based legislation. Its new technology platform, which will provide for a searchable, accessible database, is due to go live in 2011.

ASIC's technology upgrade will be able to take account of such issues as:

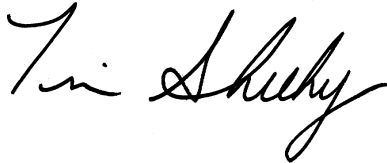
- a vast increase in the number of companies regulated by ASIC
- the capacity for ASIC to provide simple online forms for NFPs to fill out to facilitate their provision of financial reporting and governance disclosures
- the capacity for anyone to search for the financial reports and governance disclosures of each and any NFP organisation in Australia, at no charge, so that information on the sector is available to all stakeholders. This would greatly assist in enhancing the transparency of the sector.

The Australian Taxation Office (ATO) is set up for purposes other than to regulate companies (its purpose is to administer taxation legislation, which is only one part of any company's regulatory framework). The ATO is an inappropriate regulator of the NFP sector, given its expertise is in one aspect of company regulation alone. The historical circumstances that have held the ATO responsible for determining, under taxation legislation, if an organisation satisfies the definition of not-for-profit are insufficient reason to continue with the ATO as the regulator of the NFP sector as a result of regulatory reform. The NFP sector deserves to be regulated by a body with expertise in directors' duties, governance frameworks, and financial reporting obligations, rather than by one with expertise in administering taxation legislation.

Despite our recommendation that ASIC is the most appropriate regulator in the short term, CSA Members are strongly of the view that a separate, dedicated national NFP regulator should be established in the long term, in order to foster the objectives and aims of the NFP sector.

Our views on the specific questions raised in the consultation paper are set out on the following pages. We have articulated our views on those issues on which CSA Members can speak with expertise, but have not responded to all questions. We have left it to other bodies to speak on those issues where CSA Members do not claim expertise.

Yours sincerely

A handwritten signature in black ink that reads "Tim Sheehy". The signature is written in a cursive, flowing style with a large initial 'T' and a long, sweeping underline.

Tim Sheehy
CHIEF EXECUTIVE

Goals of a national regulator

CSA notes that the essence of good governance is stewardship, accountability, transparency and integrity. Any reform of the regulatory regime for the NFP sector must balance the reasonableness of compliance requirements and any additional costs attached to altered compliance requirements, particularly for smaller companies, with the need to ensure that stakeholders continue to have confidence in the governance of such companies.

CSA believes that it is important to assess what is meant by governance, to ensure that any regulatory reform of the NFP sector is undertaken in the context of understanding. CSA believes that governance means the method by which an organisation is run or governed, over and above its basic legal obligations. It has four critical elements:

- **transparency**, which entails a true dialogue with a range of stakeholder groups. The starting point is transparency of purpose, clarifying why the organisation exists, what its objectives are and what the measures of achievement are. It also means transparency of process so that all stakeholders understand how things are done as well as why
- **accountability** — this means asking the questions: Who is responsible and to whom? What are they responsible for? What are the consequences if the rules are violated? It is a normal part of the exercise of responsibility. It is a reporting mechanism enabling those conferring responsibility to monitor its exercise
- **stewardship**, which involves a clarity in all organisational decision-making so that those controlling the destiny of an organisation do so not for their own benefit, but rather for the benefit of the range of individuals and groups who have an interest in the affairs of the organisation, that is, the stakeholders
- **integrity** — developing a culture committed to ethical behaviour. That culture should be about carrying out the responsibilities required by the charter, legislation or constitution in a manner open and apparent to all stakeholders; being accountable for those actions; acknowledging that the good of others overrides any benefit to oneself; and acting ethically.

CSA therefore believes that the need for confidence in the governance of NFPs is essential. Governance is not restricted to 'for-profit' companies. However, it is important to note that the legal and regulatory framework currently in place is devised for 'for-profit' companies and does not assist the information needs of stakeholders in the NFP sector. The members of NFPs (and their stakeholders) want to know the financial position of the organisation, that the organisation is being managed prudently, and that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution. The current legal and regulatory framework is designed to facilitate shareholder management and to assist investors to examine the accounts to ascertain the deployment of and return on their investment.

Consultation questions

Q1 Are these goals appropriate and adequate for national regulation? Which of these are most important? Q2 Are there any other goals for national regulation?

CSA supports the goals for national regulation set out in the consultation paper. The goals are interrelated and CSA is of the view that they cannot be implemented in a staggered fashion or with a view that one goal should take precedence over another.

Scope of the national regulator

Many NFP organisations do not receive tax concessions. As noted in the paper, with 600,000 entities in the sector, of which 400,000 may access Commonwealth tax concessions, this means that one-third of NFP organisations do not access tax concessions. Some of those NFP organisations are very large.

Other NFP organisations receive tax concessions, but do not receive government funding. For example, CSA receives tax concessions in the form of fringe benefit tax and payroll tax concessions, but it does not receive any funding from any level of government. Equally, a local Rotary Club does not receive any government funding.

CSA is therefore of the view that the scope of the national regulator should be to regulate all NFP organisations, regardless of size, whether they receive government funding, or whether they access tax concessions.

As with the private sector, all organisations would be regulated, but the extent of the regulation could differ according to the size of the organisation and entitlement to receive government funding and/or tax concessions.

Consultation questions

Q3 What should the scope of a national NFP regulator be? What types of entities should be regulated by a national NFP regulator? Q4 Should some legal forms be treated differently? If so why?

CSA recommends that the scope of the national regulator should be to regulate **all** NFP organisations, regardless of size, whether they receive government funding, or whether they access tax concessions.

CSA also recommends that where possible legal forms should be treated the same. However, CSA acknowledges that given the broad variety of legal structures at present some legal forms may have to be treated differently in the short term.

CSA Members reiterate that the implementation of a national regulatory regime would in turn provide for a review of the existing legal structures used by NFP organisations, and this could lead to the introduction of a single, specialist NFP legal structure. CSA Members doubt that the government's goal of a 'one-stop shop' regulator can be met without introducing a specific NFP legal structure, given the wide range of NFP organisations and their attendant wide range of reporting obligations.

Charitable trusts

Consultation question

Q5 Should the supervision of charitable trusts be moved from the state Attorney-General's to a national regulator?

CSA leaves it to other bodies to respond to the consultation questions on this issue.

Incorporated associations

As noted in the consultation paper, the choice of the structure of company limited by guarantee by NFP organisations is usually based on the organisation being a 'national or multi-state organisation'. The scale of trading activities, which is an area of debate and variation in the state and territory-based associations' regime, also makes the company limited by guarantee structure attractive. NFP organisations perceive 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.

CSA notes that advances in technology have facilitated the establishment of a national regulator. Online interaction means that state-based offices are not required, as in the past, to facilitate registration and lodgement of reports. To fully support the NFP sector, a referral of powers, as has occurred with the Corporations Act to facilitate private sector registration, reporting and trading, is also essential, and in turn reduces the role of the states in regulating the NFP sector.

CSA is therefore of the view that the regulation of incorporated associations (including reporting and governance) be moved to a national regulator.

CSA does not believe that the states should have any residual role in regulating incorporated associations. This would be regressive, and condemn NFP organisations to being treated as second class citizens, without recourse to a 'one-stop' national regulator, as is currently enjoyed by the private sector.

Consultation question

Q6 Should regulation of incorporated associations (including reporting and governance) be moved to a national regulator? Should there be a residual role of the states in regulating incorporated associations?

CSA strongly recommends that the regulation of incorporated associations (including reporting and governance) be moved to a national regulator.

CSA recommends strongly against the states having any residual role in regulating incorporated associations.

CSA notes that ASIC currently maintains state offices so that there is a local point of contact should any member of the community wish to deal personally with ASIC, and that this model would continue in relation to any national regulation of the NFP sector.

Functions the national regulator may undertake

Access to taxation concessions

CSA notes that many NFPs are under-resourced and have difficulty in understanding and complying with the provisions covering assessment, granting and monitoring of concessional tax treatment. Therefore any initiative that streamlines and simplifies the process is likely to improve understanding and reduce dependence on consultants and reduce compliance costs.

Consultation questions

Q7 What impacts would simplifying and streamlining mechanisms for the assessment, granting and monitoring of concessional tax treatment have on the NFP sector? In particular, what impacts would this have on small and new NFP entities? Q8 What are the likely compliance cost savings from improvements to taxation arrangements? Q9 Does the current complexity of the

taxation framework discourage entities from applying to access tax concessions? If so, what elements of the framework are most problematic?

CSA leaves it to other bodies to respond to the consultation questions on this issue.

Regulation and supervision

It is common for the directors of NFP organisations to come from backgrounds which carry no experience in organisational administration, financial administration or business management in general. For them, it makes fulfilment of their legal responsibilities as directors that much more difficult. A failure to know those responsibilities is not an acceptable defence after something goes wrong.

It is in the manner of the exercise of their responsibilities in supervising employed managers and staff that directors are most likely to fall into breach of those responsibilities. This can occur not through deliberate intent, or through reckless disregard, but most likely from inadequate reporting, both financial and operational, which equates to inadequate supervision of managers and use of inappropriate administration procedures. The more limited the knowledge and experience of individual directors in these matters, the greater the risk of misadventure.

The key concepts of transparency, accountability, stewardship and integrity remain the cornerstones of governance. On this basis, CSA does not believe that any reform of the regulatory regime for NFPs should be based on any failure by directors or employees to understand their duties and responsibilities or disclosure requirements, or implement systems to provide for such disclosure. Whether a board is driven by the bottom line or by a deep-rooted ethical mission, CSA believes that it remains the board's collective responsibility to ensure that the organisation is fit for purpose and to provide strategic direction to enable it to attain its stated goals.

CSA is therefore of the view that any national regulator of the NFP sector must have an educational as well as a compliance and enforcement role. The value of the educational as well as the compliance initiatives managed by a new national regulator is critical to the success of a dedicated regulatory regime for the NFP sector.

However, CSA also notes that the national regulator need not be the only source of education for the NFP sector. Currently ASIC provides a wealth of information for the private sector in relation to company and officer obligations, but a range of professional associations also provide education and training to the private sector. For example, CSA provides education and training on subjects ranging from directors' and officers' duties and financial analysis for officers and directors to meeting ASIC requirements and how to deal with minutes and meetings of directors and members. The ASIC letter welcoming new office holders to their position notes that office holders should ensure they are cognisant of their duties and refers to bodies such as CSA, among others, as a source of such education and training. This can be continued with letters sent to office holders of NFP organisations.

Consultation question

Q10 What value would educational and compliance initiatives managed by a new national NFP regulator provide to NFP entities?

CSA recommends that any national regulator of the NFP sector must have an educational as well as a compliance and enforcement role. The value of the educational as well as the compliance initiatives managed by a new national regulator is critical to the success of a dedicated regulatory regime for the NFP sector. Such educational initiatives should take into account that most NFPs have limited resources and technical expertise.

Reporting

Report-once, use-often

Consultation question

Q11 What benefits would a 'report-once, use-often' model of reporting offer?

CSA is of the view that a 'report-once, use often' model of reporting will assist in part in streamlining reporting obligations, but that in itself it will not solve the problems that beset the NFP sector and its myriad range of reporting obligations.

Financial and governance reporting: Q12 What information do NFP entities currently provide to government agencies? Do these include general purpose financial reports and fundraising reports? What other reports are currently required? What do the reporting requirements involve? What information is required for the purposes of grant acquittals?

Financial reports are the primary source of information for users seeking to make an assessment of a company's financial position. For disclosing entities disclosure in financial reports must include the financial statements of the company (balance sheet, profit and loss statement, cash flow statement and statement of recognised income and expense/statement of changes in equity), the notes to the financial statements and a directors' declaration about the statements and the notes. The financial report is required to be prepared in accordance with applicable accounting standards and audited by a registered company auditor in accordance with auditing standards.

The content of the financial report is governed by the accounting standards. The range of accounting standards that apply will depend on whether the company meets the definition of reporting entity in the accounting standards. If the company meets the definition of reporting entity, it must comply with all the requirements in the accounting standards. If it does not meet the definition, it is only required to comply with the recognition and measurement requirements, not the disclosure requirements.

A great many NFP companies can select not to be reporting entities and therefore need only produce 'special purpose accounts' with reduced reporting requirements. Following the passing of the *Corporations Amendment (Corporate Reporting Reform) Act 2010*, a new three-tiered differential financial reporting framework was established, reducing the financial reporting and audit requirements for companies limited by guarantee under the *Corporations Act 2001*. Under the Act companies with revenues of less than \$250,000 and no deductible gift status are exempt from reporting and audit requirements. Companies with revenues between \$250,000 and \$1 million need only prepare a streamlined directors' report and annual report and may elect to have an audit review by any practising certificate holder rather than a full audit. Companies with revenues in excess of \$2 million may prepare a streamlined directors' report and annual report to shareholders, subject to full audit. In June 2010 the AASB introduced new accounting standards reflecting the reduced disclosure regime.

CSA notes that many not-for-profit companies, particularly larger ones, choose to produce full accounts for a variety of reasons (frequently related to the desire to be transparent and accountable) and therefore classify themselves as reporting entities. The important issue is that NFP companies currently have the option to select 'special purpose accounts' and the level of reporting required and consequential potential for savings is directly proportional to the size of the company.

Disclosure requirements for incorporated associations vary from state to state. The extent to which incorporated associations are required to comply with accounting standards varies between the jurisdictions. CSA is of the view that disclosure requirements for incorporated

associations should not be more onerous than for companies limited by guarantee and should be simplified, streamlined and consistent from state to state.

CSA believes that maintaining proper financial records and making adequate financial disclosure to key stakeholders is essential to ensuring good governance and an understanding of risk management. and that the new reduced disclosure regime strikes a balance between the need for financial accountability and the desire to keep compliance costs at an acceptable level.

Acquittal of grants: Q13 How significant is the compliance burden imposed by requirements for acquittal of grants? Where could these be simplified?

NFP organisations that receive grants need to report to the funding body or grantor against a set of conditions attached to the grant. The NFPs usually need to show that they have fulfilled the conditions of the grant, or achieved a set of key performance indicators upon which the grant rests.

There can be disquiet within NFPs, particularly within the benevolent NFPs, at the level of expense incurred in administration functions in the financial recording and reporting functions attached to the receipt of government or other donor grants. The more diverse and numerous the sources of funding, the greater is the amount of work required to account to donors and benefactors for the expenditure of those funds. This is not always a simple task and is generally very time-consuming. The employment of competent financial staff can be a considerable organisational cost. The cost of computer-based accounting systems must also be considered. It is usual that, where adequate accountability is not provided to the donors/benefactors, then those funds would need to be repaid. This is the case in most circumstances with government grants. Failure to report correctly can see not only a request for repayment but also discontinuance of future funding.

However, CSA notes that each government department currently has different reporting requirements. This introduces an extraordinary level of complexity into the disclosure regime of NFPs, particularly charities. Such complexity does not assist either the delivery of services, given the allocation of scarce resources to fulfilling reporting obligations, or stakeholder information needs, as comparability is ineffective.

CSA notes that even though the reporting requirements have been simplified to provide for a reduction in financial reporting by small NFPs, with this reform will be effectively negated if the government funding agreements at both the state and Commonwealth level are not also simplified and made consistent. The current lack of consistency continues to place an unreasonable financial reporting burden on NFPs.

CSA suggests that Treasury, in conjunction with the new Office for the Not-for-Profit Sector, could facilitate harmonisation on this front with other government departments to implement the government's commitment to smarter regulation, reduced red tape and improved transparency and accountability of the sector.

Consultation question

Q13: Where could the requirements for the acquittal of grants be simplified?

CSA recommends that government funding agreements at both the state and Commonwealth level need to be simplified and made consistent. The current lack of consistency places an onerous financial reporting obligation on NFPs.

NFP sector information portal: Q14 What benefits would the establishment of a NFP sector information portal have for the public, the sector and governments? What information should be available on the portal?

CSA is of the view that a NFP sector information portal is essential to the health of the sector.

NFP organisations have a multiplicity of often complex stakeholder relations to consider (for example, members, volunteers and grant makers — government, private foundations, corporate, the general public). CSA believes that members and stakeholders of all NFP organisations should be able to have access to information that allows them to know the financial position of the organisation, that the organisation is being managed prudently, that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution, as well as who constitutes the governing body and what processes are in place to ensure the personal interests of directors do not override the interests of the organisation.

On this basis, CSA believes that all NFP organisations should continue to be required to maintain proper financial records and accounts; and all NFP organisations should be required to report to an external regulator because of the public nature of their purpose.

However, CSA believes that such accountability could be fostered by requiring a short-form report from all NFPs, with further disclosure and reporting required of some NFPs according to size. This short-form report could be a one or two-page document.

This minimum standard of governance disclosure should be publicly available so that any person seeking to engage with the NFP organisation in any capacity has access to the information. Every NFP organisation, no matter where it is registered in Australia, should apply the same rules and every not-for-profit organisation should be treated in the same manner in relation to this short-form report. CSA notes that, currently, financial and governance information about the private sector can be accessed from ASIC (although CSA notes that fees apply) and the availability of such information should be extended to the NFP sector.

Above this minimum standard of public governance accountability, CSA believes that the current differential financial reporting obligations based on size are desirable.

Consultation question

Q14: What information should be available on the portal?

CSA recommends a mandatory, short-form report for all NFP organisations, which would be publicly available, free of charge to any searcher, that would cover:

- statement of objectives of NFP organisation
- the amounts and sources of funding the activities that the fundraising supports
- the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support, expenditure and staff and volunteers
- details of directors and secretary(s) and their remuneration (including information on whether non-executive board members are paid and whether there are board committees or equivalent)
- disclosure of all related-party interests.

Above this minimum standard of public governance accountability, CSA believes that the current differential financial reporting obligations based on size are desirable.

CSA supports the reduction in audit obligations for small to medium NFPs. While our members believe that audits help ensure that companies remain transparent and accountable to all stakeholders, it is not appropriate to ask all NFPs to undertake a full audit, as this would represent an onerous compliance burden on smaller NFPs.

Q15 What information might need to be provided to a national regulator but not made public through a NFP information portal?

CSA is of the view that all of the information listed above should be made publicly available.

Q16 What benefits would be provided by the application of SBR to the NFP sector, following the implementation of the SCOA so as to minimise any additional compliance costs? Q17 Given its voluntary nature, are many NFP entities likely to use SBR? What barriers, such as preferences for providing reports in paper form or reluctance to upgrade accounting software, might reduce usage of SBR by NFP entities?

CSA notes that particular software is required to be able to apply SBR and believes that having to purchase such software (and have a person trained to use the software) would be a considerable burden on small NFP organisations.

Consultation question

Q15 What information might need to be provided to a national regulator but not made public through a NFP information portal?

CSA recommends that SBR be available to NFP organisations but that its use not be mandated. NFP organisations should be provided with the choice of reporting in other ways.

Governance, disclosure and compliance: Q18 Are the suggested core rules and regulatory framework adequate? Q19 What powers does the regulator require to improve governance and regulatory oversight?

While the core set of rules set out in the consultation paper are a useful means of approaching a regulatory framework for the NFP sector, CSA notes that they are problematic in many ways.

First, the central concept of a fiduciary duty, that is the duty to act in the best interests of the organisation, is missing. This is very different from a duty of care. CSA notes that many NFP organisations can be bedevilled by conflicts of interest, which frequently manifest as conflicts of loyalty. For example, while the most easily recognisable form of conflict of interest arises when a director obtains direct financial benefit, the conflicts of interest that can arise in NFP organisations can include:

- indirect financial interests (when a close relative of a director benefits from the NFP)
- non-financial or personal conflicts (where a director receives no financial benefit but continues to be influenced by external factors, such as influencing board decisions on service provisions to their own advantage, perhaps because they use the NFP's service themselves or care for someone who does, or they award contracts to friends)
- competing loyalties (where they owe a primary duty to the NFP but see themselves owing a primary duty to some other body such as a local authority or funding body or local community interests).

Ensuring that a fiduciary duty exists in any set of rules provides a context for those governing a NFP organisation to assess decisions to ensure that conflicts of interest are being managed.

Second, the suggested core set of rules lack any recognition of risk management. The processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support, expenditure and staff and volunteers is central to a governance framework. Not all aspects of this can, or should be, legislated and regulated, but risk management needs to be considered.

Third, CSA questions why a set of 'rules' should include a model decision-making framework. Decisions are taken in different ways, according to the requirements of the situation, and it is highly prescriptive to impose one decision-making framework on all NFP organisations. Such a model decision-making framework could be included in any guidance issued by a national NFP regulator, to assist NFP organisations, but has no place in a set of rules. Decision-making itself is not a matter for black letter law, although it is central to how fiduciary duties are managed, and a fiduciary duty encompasses good decision-making.

CSA suggests that the aim is to promote a frame of mind focused on accountability, transparency and stewardship, rather than a compliance mindset that seeks to ensure compliance is met for form's sake. CSA is of the view that encouraging organisations to inhabit the spirit of the intention of compliance requirements is the objective, rather than box-ticking. CSA points to the model of the ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* as a means of promoting a mindset geared to sound governance practice. These operate on an 'if not, why not' approach, where recommendations as to sound governance practice are offered, and companies have to report as to why they have taken a different approach if they have not followed the recommended practice.

CSA therefore suggests that the national regulator could consider an equivalent version of the Principles and Recommendations to use as an education tool to assist NFP organisations develop a governance mindset. However, CSA does not recommend reporting to the regulator against such guidelines.

Consultation questions

Q18 Are the suggested core rules and regulatory framework adequate? Q19 What powers does the regulator require to improve governance and regulatory oversight?

CSA recommends that the core rules include the concept of fiduciary duty for those governing the organisation the risk management processes, to ensure the proper management of all fundraising, activity support, expenditure and staff and volunteers.

CSA recommends that a model decision-making framework be deleted from the core rules, as it is overly prescriptive to legislate how decision making is to proceed in all organisations.

Fundraising

Consultation questions

Q21 What problems arise from the complex interrelationship between Commonwealth, state and territory responsibilities in this area? Q22 What might be the implications of the different approaches of referral of powers or harmonisation of legislation?

CSA strongly recommends that the statutory obligations relating to the Charitable Fundraising Acts in different states must be standardised, and should be under the remit of the national NFP regulator. Again, when comparing the current state of affairs for the NFP sector, which has to comply with inconsistent regulation in six states when seeking to raise funds, to the private sector, where capital raising is regulated under one piece of legislation, the Corporations Act, administered by ASIC, the NFP sector comes off at present as very much a second-class citizen. There is no strong argument for not standardising fundraising legislation and bringing it under the administration of the national NFP regulator.

Establishing a national NFP regulator

Q21 What problems arise from the complex interrelationship between Commonwealth, state and territory responsibilities in this area? Q22 What might be the implications of the different approaches of referral of powers or harmonisation of legislation

CSA leaves it to other bodies to respond to the consultation questions on this issue.

However, **CSA recommends** that, for any regulatory reform of the NFP sector to succeed, a referral of powers in relation to state and territory-based incorporated associations laws is necessary. It is essential that the sector is granted the same national context as the private sector. The existing two-tiered regulatory system (state/territory-based incorporated associations and a federal company law regime) is inefficient, costly and does not meet the needs of small or large NFPs. Harmonisation of state and territory laws will not provide the legislative reform that is required to support the sector.

Such a referral of powers has already been successfully undertaken with company regulation. Given that the precedent exists (the Corporations Act), there is no strong argument that can be put forward as to why the NFP sector should not benefit from the same approach provided to the private sector, but should have to suffer the less favourable outcomes that would be attached to a harmonisation process and, in effect, be treated as a second-class sector.

The form of the national regulator

In the short term, CSA strongly recommends that the national regulator be initially established within, but structurally separated from, ASIC. CSA also recommends that a timeline be set for when the separate unit within ASIC would become independent.

Equally strongly, CSA recommends against establishing a national regulator within the ATO. ASIC is already familiar with administering legislation relating to organisational governance and reporting, as well as directors' duties and responsibilities. The ATO is set up to administer the taxation legislation. While, historically, the decision as to whether an organisation attracts a tax concession has been undertaken by the ATO, which in turn has seen the ATO make decisions as to whether an organisation meets some definitions of not-for-profit status, the history of how Australia has defined NFP organisations should not automatically translate into a new regulatory framework. The aim is to ensure that the national regulator is best placed to administer registration and decisions as to legal structure, reporting obligations, and directors' duties, both from an educational and compliance perspective. A better role for the ATO would be to administer the taxation system based on tax status decisions made by a dedicated regulator.

CSA notes that an organisation should be able to lodge an application for tax-exemption status with the national regulator as part of its registration process. Clear rules would ensure that the national regulator could make decisions in a great many cases as to whether the NFP organisation met the criteria for tax-exempt status. In those cases where such clarity was lacking, the national regulator would refer the case to the ATO for decision. It should not be left to the NFP organisation to make the application where it was unclear if it met the criteria.

However, in order to ensure that that ASIC is able to regulate NFP companies in the short term, ASIC needs to develop NFP expertise, including the capacity to provide assistance to NFP companies struggling to understand their compliance obligations. It would be useful for ASIC officers within the specialist unit to receive training about the particular needs of NFP organisation stakeholders and to issue a plain-language guide for NFP organisations.

CSA notes that a clear precedent exists for ASIC being able to take on a new role with new responsibilities requiring different staff skills. In 2010, the regulation of equity markets moved

from the Australian Securities Exchange to ASIC. To facilitate this, ASIC offered employment to many of the staff at ASX working in this area. This in turn ensured that ASIC commenced its new role with a complement of highly skilled staff suited to purpose. In just such fashion could existing ATO staff with experience and expertise in dealing with NFP organisations move to a new national regulator established within ASIC as a separate unit.

Consultation questions

Q23 What form of the national regulator best meets the objectives of simple, effective and efficient regulation of the NFP sector? Q24 Would a Commonwealth only regulator provide sufficient benefits to the sector? Q25 Are there benefits from establishing an interim regulator through an existing Commonwealth regulator, to undertake immediate reform?

CSA strongly recommends that the national regulator be initially established within, but structurally separated from, ASIC. Equally strongly, CSA recommends against establishing a national regulator within the ATO.

CSA also recommends that a timeline be set for when the separate unit within ASIC would become independent.

CSA recommends that, in the long term, a new national regulator be created.

Sector-specific regulation

Q26 What would be the advantages and disadvantages of incorporating the functions of ORIC and the proposed housing regulator into a national regulator? What alternative approaches are available to avoid duplication? Q27 What benefits could flow from a national regulator maintaining a dedicated subsection focusing on Indigenous corporations and/or housing?

CSA leaves it to other bodies to respond to the consultation question on this issue

Options for funding regulator

CSA is of the view that it is reasonable to require NFP organisations to pay a small fee as a contribution to the costs of the national NFP regulator, with Treasury reviewing the fee annually. Provision should be made for reduced fees to be paid by small NFPs.

CSA repeats that any information on a national NFP regulator portal about the NFP sector should be able to be accessed for free. CSA is of the view that the best way to ensure that NFP organisations remain focused on service delivery is to have information on them made freely available.

CSA notes that, currently, the fees that ASIC charges for registration, reporting and accessing information go into general revenue. That is, ASIC generates revenue for the government. CSA is strongly of the view that it is inappropriate to have the national NFP regulator generate revenue for the government.

Consultation questions

Q28 What level of contribution should NFP entities make to the cost of the national NFP regulator? Q29 Should there be a differential cost for smaller NFP entities?

CSA recommends that a small fee be payable by NFP organisations which could form a contribution to the costs of the national NFP regulator, with Treasury reviewing the fee annually. Provision should be made for reduced fees to be paid by small NFPs.

Definitional issues

Q30 Would a statutory definition of charity achieve the goals of greater certainty and administrative efficiency in relation to the determination of charitable purpose, particularly in relation to determining access to taxation concessions and across different jurisdictions and laws? Q31 Is Parliament a more appropriate body to define charitable status than the courts, given its ability to be more responsive to changing community needs and expectations?

CSA leaves it to other bodies to respond to the consultation question on this issue