



THE UNIVERSITY OF
MELBOURNE

Submission
Review of the Associations Incorporations Act 1981
VIC

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1 Executive summary

I am making this submission in my capacity as a member of the Centre for Corporate Law and Securities Regulation at Melbourne University. I have recently completed a major, three year research project on accountability and corporate governance in the not-for-profit context. I have enclosed a hard copy of the final research report (S Woodward & S Marshall, *A better framework: reforming not-for-profit regulation*, February 2004) which is also, together with other materials, available on-line <<http://cclsr.law.unimelb.edu.au/activities/not-for-profit/>>.

My two main submissions are that:

- 1. a uniform regulatory regime for incorporated associations should be established by way of a referral of powers to the Commonwealth (to be implemented by extending the scope of the company law referral) (relevant to issue 5); and**
- 2. an independent not-for-profit advisory body should be established to provide a range of support services to not-for-profit organisations in order to underpin and promote improved accountability and governance practices (relevant to issue 27).**

I have also made observations relevant to issues 1, 2, 3, 6, 7, 9 and 11.

The implementation of the first recommendation would:

- ensure nationally consistent financial and other reporting obligations
- remove the considerable difficulties faced by the growing number of (often small) not-for-profits that wish to operate on a multi-State basis (discussed under heading 5)
- meet sector concerns about the complexity and lack of uniformity
- prevent 'forum shopping' (refer heading 4.2)
- remove administrative duplication (refer heading 4.3)
- enable national regulation by a specialist regulator – a specialist unit within the Australian Securities and Investments Commission or a new, independent commission such as that recommended by the Charity Definition Inquiry Report (refer heading 7.3)
- facilitate the introduction of a specialist form of corporate entity and an appropriate fee schedule for not-for-profit organisations generally
- draw on the best features of the incorporated associations experience and ensure that the key aims behind *Associations Incorporation Act 1981 Vic* would continue to be met.

The implementation of the second recommendation would:

- help improve compliance rates, particularly by small not-for-profit's
- support and extend the work already done by peak and other bodies
- provide direct (or, where appropriate, referral) services for the multitude of small to medium sized not-for-profit organisations that do not operate under a peak body
- foster the development of 'a centre of expertise' in the specialised needs of not-for-profits
- provide a model for other States in terms of sector capacity building.

The associations' incorporation legislation has aimed to provide 'a relatively simple mechanism of incorporation' as 'a means of encouraging and promoting the formation and expansion of voluntary organisations in Victoria'. For many years the Act has served this purpose relatively well. However, the nature and needs of many NFP organisations (small and large) have changed, as has the environment in which they operate. The fact that the Victorian review contemplates a nationally consistent framework is to be commended. In order to continue to provide an effective framework to support the important contribution NFP organisations make to the community, it is essential that there is now a uniform approach.

2 Basis for submission

I am making this submission in my capacity as a member of the Centre for Corporate Law and Securities Regulation at The University of Melbourne. This submission is based on research conducted during a major, three year research project on not-for-profit (NFP) accountability and corporate governance (the Project), and previous research experience (refer Appendix 1).

2.1 NFP accountability and corporate governance project

The Project has been a collaborative research project funded by the Australian Research Council and conducted by the Centre for Corporate Law and Securities Regulation at Melbourne University with in kind support from Philanthropy Australia Inc.¹ I have been the principal researcher on the project. The primary aim of the Project has been to examine the appropriateness of existing corporate legal frameworks as they apply to NFP companies. Whilst the Project focuses on NFP organisations incorporated as companies limited by guarantee, its findings have implications for the regulation of NFP organisations generally, including incorporated associations.

The Project involved conducting the first national, large scale survey of NFP companies. During 2002, a detailed survey was sent to the Chief Executive Officer of all registered companies limited by guarantee (for a copy of the survey form used, see Appendix 3 of the Report). Almost 1,800 completed replies were received. Of relevance to this submission, are the questions about:

- organisational size and profile - for example, is it only large NFP organisations that register under the *Corporations Act* ?
- why a company limited by guarantee was chosen as the legal structure rather than an incorporated association?
- has the company structure had been successful?
- what type of information should be disclosed and to whom (in particular, what information should appear on a public register)?
- who is the most appropriate regulator for NFP organisations?

The Project has now been completed. Analysis of data from the survey and recommendations for reform are contained in a final report titled '*A Better Framework: reforming not-for-profit regulation*' (S. Woodward & S. Marshall) (the Report) which was released on 19 February 2004. A hard copy of the Report forms part of my submission (I have indicated relevant cross references) and an on-line version is available at <<http://cclsr.law.unimelb.edu.au/activities/not-for-profit/>>.

3 Background

3.1 Importance of the sector

As stated under heading 3.1 in the *Review of the Associations Incorporation Act 1981* Department of Consumer Affairs' Discussion Paper 24 March 2004 (the Discussion Paper), the Australian NFP sector plays a vital role in our society. To carry out this role, the NFP sector relies on several sources for funding. Accountability is vital for the sector so it can maintain the confidence of both government and non-government grant makers and the public. In 1995, the Industry Commission (in its major inquiry into charitable and related organisations) identified accountability as a key issue for the sector:

"[NFP] supporters and the general public expect and are entitled to information about the finances and operations of CSWOs [community social welfare organisations] in return for their donations, voluntary activities and taxation exemptions and concessions. Improved confidence that funds are being used

¹ Philanthropy Australia is the national membership organisation for grant-making trusts and foundations. Its mission is to promote and protect the interests of family, private, corporate and community giving in Australia. See <http://www.philanthropy.org.au/>

appropriately by CSWOs can potentially increase the overall fundraising resources available to the sector.²

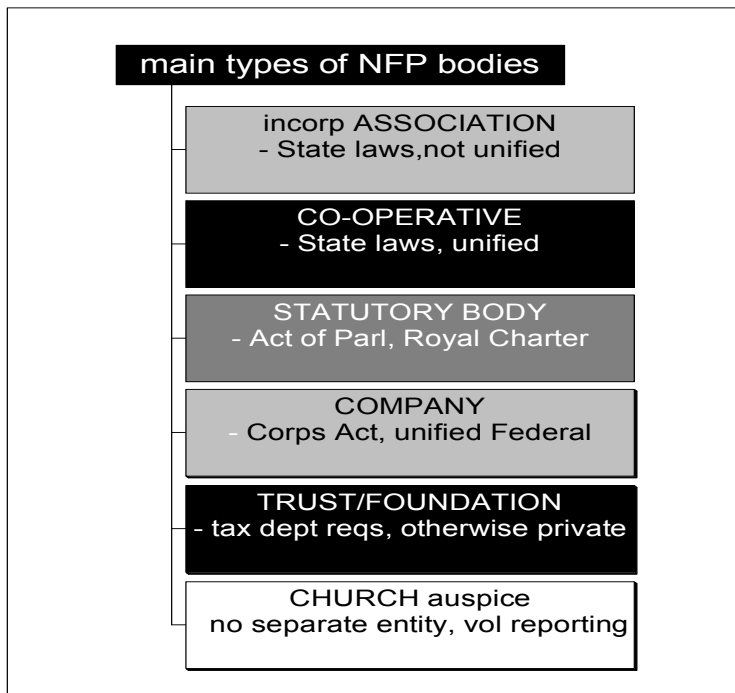
Although much needed reforms for small business have been introduced over recent years, more needs to be done for NFP organisations especially given the importance of the sector. After more than a decade of a dual NFP regime – State and Territory based associations’ incorporations legislation and national regulation of companies – a review is timely. I applaud the Minister for initiating the review and, in particular, for indicating a preparedness to consider the broader issue of a nationally consistent regulatory approach. I am pleased to be able to make a submission based on my recent research.

3.2 NFP regulation

The associations incorporations legislation in each State and Territory has, for largely historical reasons, developed in a haphazard manner, reacting to local events and pressures. This is acknowledged under heading 4.2 of the Discussion paper and is highlighted in more detail in comparative table contained in Appendix 5 of the Report (prepared by my colleague, Ms Sally Sievers). Key provisions of the legislation in each State and Territory can vary greatly, for example, audit requirements. Originally this focus on local and State issues caused relatively few problems because most incorporated associations only operated in a single State or Territory.³ But, as is evident from the ABS statistics mentioned in the Discussion Paper, there has been rapid growth in the NFP sector. There is also increasing commercialisation of many NFP organisations and greater outsourcing of service provision by all levels of government.

In addition to this lack of legislative consistency, the legal nature of NFP organisations in Australia is very varied, as illustrated in Figure 1. The range of possible legal structures (or indeed, the absence of a separate legal structure) is a significant point of difference between the NFP sector and the ‘for-profit’/business sector.

Figure 1: Myriad of legal structures in the NFP sector



² See Industry Commission, *Charitable Organisations in Australia*, Report No 45, 1995, AGPS, Chapter 8.

³ Sievers S, “*Incorporation of Non-Profit Associations: The Way Ahead?*” 18 C&SLJ 311 – 325 at p 316.

In combination, these factors:

- the multiplicity of legal structures,
- a two tiered legislative system (with some organisations incorporated under a federal regime and some under a State/Territory regime), AND
- that the State/Territory regime for incorporated associations is not uniform,

have serious implications for accountability, governance and regulation of the NFP sector. Further, the importance of the regulatory framework is arguably greater in the context of NFP organisations 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.

4 Problems arising from lack of uniformity (refer Chp 4 of the Report)

In terms of uniformity between the States and Territories, I am aware of recent reviews of associations' incorporations Acts being conducted in other States (for example, NSW). However, despite the concurrent nature of these reviews, there would appear to be little coordination between these States. As outlined under heading 3.2, such variations have implications for accountability, governance and regulation of the NFP sector. The following is more detail about the main problems that arise from this lack of uniformity.

4.1 Organisations operating on a multi-State or national basis

There is a dilemma for a NFP organisation that carries on, or hopes that in time it may carry on, operations in more than one jurisdiction. If it wants to take advantage of the associations incorporations legislation, which is said to be specifically designed to meet the goals of simplicity and inexpensiveness, it will have to register a separate association in each State and/or Territory that it wants to operate in. Obviously this will involve duplicating fees, on-going paper work and complexity because of a need to appreciate and keep abreast of the variations (even if only in minor detail) between legislation in the respective States and Territories. (The time and difficulty it took my colleague to prepare the comparative table in Appendix 5 to the Report, has been practical testament of this fact.)

Aside from registration as a company under the *Corporations Act*, the only other option for such an organisation is to register as an association in one State and then, if it 'carries on business' in another State or Territory, also register in that jurisdiction as a Registrable Australian Body under Part 5B.2 of the *Corporations Act*. However, again this involves extra time, expense and paper work. This course also involves many uncertainties, especially about the scope of the concept of 'carrying on business' and how this concept applies to a NFP organisation. A breach for failing to register as such a body under the *Corporations Act* may occur quite inadvertently if, for example, a committee member moves to a different jurisdiction and takes part of the association's administrative structure with them.⁴

Survey data from the Project (see headings 5.1 and 5.2) provides recent, large scale empirical evidence confirming that many small NFP organisations that incorporate as a company limited by guarantee do so because they wish to operate on a multi-state or national basis. I note that concern about this issue was also raised in the Department's preliminary consultations (see heading 4.1 of the Discussion Paper).

4.2 Forum shopping

A lack of uniformity can potentially lead to forum shopping. By choosing the State or Territory of incorporation carefully, it would be possible for unscrupulous associations to avoid any requirement to maintain proper accounting records and comply with appropriate standards of financial reporting. For example, the former Minister for Small Business, Ms Marsha Thomson, has been quoted as saying there have been occasions when a charity has been closed in one State, and has subsequently registered in another State in order to

⁴ Sievers S, "Incorporation of Non-Profit Associations: The Way Ahead?" 18 C&SLJ 311 – 325 at p 319.

fundraise.⁵ Recognition of this potential for abuse also underlies the Minister's media release "Fundraising Laws Examined" (27 February, 2004), in which the need for 'national legislative harmonisation' is recognised as being 'extremely important'.

Public disclosure obligations and financial recording keeping should be consistent across States and Territories. Lessons need to be learnt from the history of company law development in Australia (in particular, from the failure of the 'uniform' company law regime that existed from 1960-1978). A nationally consistent approach based on a well thought out public policy decision about the most appropriate disclosure regime for NFP organisations is imperative in order to promote accountability and good corporate governance.

4.3 Duplication of administration

The need for separate Registrars in each State and Territory results in significant duplication of administrative effort and cost. Yet, as I understand it, there is no significant, net revenue gain for Victoria (and presumably any of the other States and Territories). While I am not aware of the exact budgetary position, I note that, in view of the overall public benefit derived from the operation of NFP organisations, it would be inappropriate for the incorporation of associations to be relied upon as a source of significant (net) revenue.

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

5 Supporting data

5.1 Organisational size

It is generally assumed that the company limited by guarantee form is suitable for larger organisations, whereas smaller organisations choose to incorporate as associations. *However, the data shows that a large proportion of NFP organisations incorporated as companies limited by guarantee are, in fact, small organisations.*

From the survey (total number of respondents to this question = 1,688):

- 11% of respondent companies limited by guarantee had income of under \$10,000 in the last financial year
- nearly a third (30%) had income of under \$100,000
- the majority (53%) had income under \$500,000.

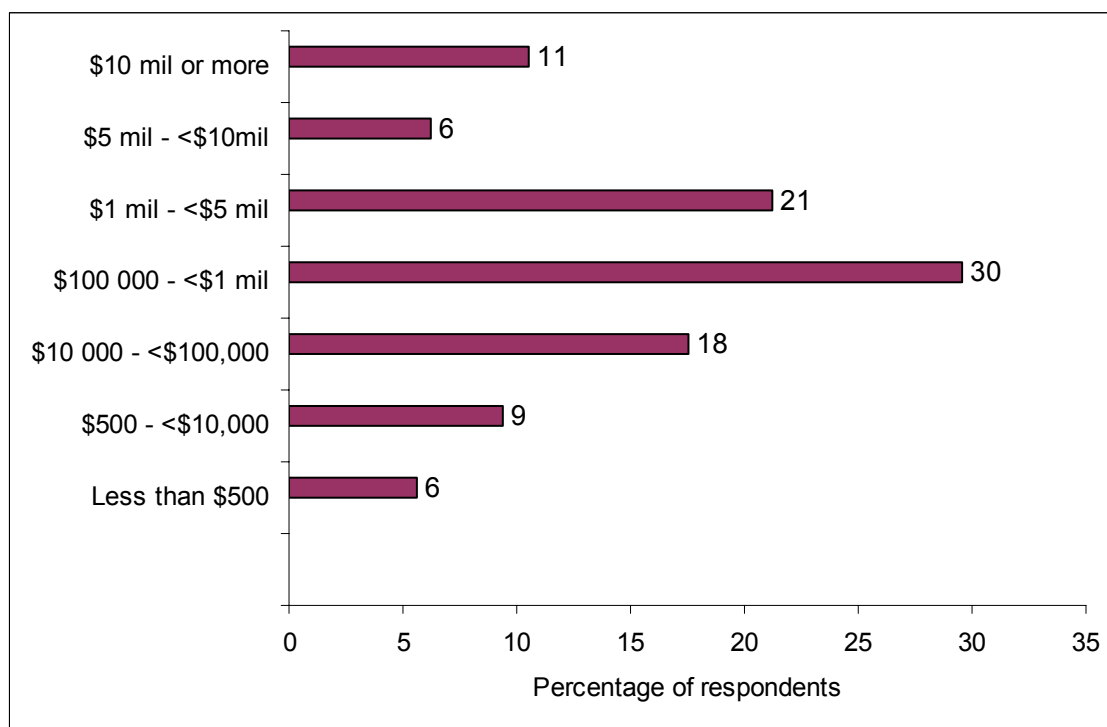
Figure 16, Chp 2, p 40 of the Report summarises the findings in relation to income.

In order to obtain data on the overall size of the organisations that incorporate as companies limited by guarantee, questions were also asked about number of employees and volunteers, and about assets and liabilities. These findings are reported in Chapter 2 of the Report (see headings 7 & 8 and, for the text of the questions, Appendix 3 of the Report).

In relation assets, it is worth noting that a clear majority (62%) had under \$1 million in assets. While the survey did not have a sub-category of less than \$500,000 in assets (that is, a category that would have linked exactly to the Victorian definition of a 'prescribed association'), the survey data on assets (Figure 2) show that the majority of NFPs registered as companies limited by guarantee have fewer (or at least not substantially more) assets than 'prescribed associations'.

⁵ 'Pledge to crack down on "shonky" charities', *The Sunday Age*, News p. 3, 21 November 1999. See also Sievers S, "Incorporation of Non-Profit Associations: The Way Ahead?" 18 C&SLJ 311 – 325 at p 320.

Figure 2: companies limited by guarantee – assets (Fig 21, Chp 2, p 45 of the Report)



5.2 Analysis of data on size (refer Chp 2 of the Report)

In analysing all the survey data relating to organisational size, I also looked at how many of the respondent NFP companies could be said to fall within the *Corporations Act* definition of a ‘small’ (proprietary limited) company under s 45A of the *Corporations Act*.⁶ When the *Corporations Act* 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).

This result is important because it shows that there is a mismatch between what is considered ‘small’ in the NFP/associations context and what is considered ‘small’ in the ‘for-profit’/company law context. As a rough illustration of this point, it is worth comparing the definition of a ‘prescribed association’ as contained in the Victorian *Incorporated Associations Act* with the *Corporations Act* definition of a ‘small’ proprietary company:

- a ‘prescribed association’ if exceeds **\$200,000** in gross annual receipts vs ‘small’ proprietary company if less than **\$10 million** in consolidated gross operating revenue
- a ‘prescribed association’ if exceeds **\$500,000** in gross assets vs ‘small’ proprietary company if less than **\$5 million** in consolidated gross assets.

I would argue that most people would think that an NFP organisation with, say, 45 employees, assets of \$4 million and revenue of \$9 million would be a large (or at least not a ‘small’) organisation, especially if it had a large volunteer base. But under the *Corporations Act* definition, such an organisation would be regarded as ‘small’.

⁶ 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.”

ISSUE 1: Should incorporated associations beyond a certain size as defined by income, assets or level of business activity, be required to become a company limited by guarantee under the Corporations Law?

ISSUE 2: What levels of income or assets, types of activities or other criteria should be used as criteria by the Registrar for rejecting an application for incorporation or issuing a direction to transfer to another form of incorporation?

RESPONSE: For both issues it is important to consider the implications of the definitional mismatch described above (heading 5.2). If the Department's review results in those associations that are currently 'prescribed associations', or those that are regarded as 'large' (because of their income or assets), being required either to:

- registered under the *Corporations Act* rather than under the *Associations Incorporations Act*, or
- transfer from the *Associations Incorporations Act* to the *Corporations Act*

then it will be possible for these organisations to fall within the *Corporations Act* definition of 'small' (which refers to revenue of \$10 million and assets of \$5 million). In this event, certain company law disclosure and other requirements could be avoided. In particular, as 'small' proprietary limited companies,⁷ they would not be required by the *Corporations Act*⁸ to have their accounts audited or to lodge them with the Australian Securities and Investments Commission (ASIC).

ISSUE 6: Should the Act contain different levels of reporting to accommodate associations with different levels of income and assets?

RESPONSE: This approach has limitations, in particular: it would perpetuate the definitional mismatch described under heading 5.2. A preferable approach is for a national regulatory regime for all incorporated NFP organisations within the auspices of the *Corporations Act*. This would enable the issue of graded reporting obligations (dependent for example on size) to be addressed, and would eliminate the ability of an organisation to avoid reporting obligations merely on the basis of its legal structure and/or place of incorporation/registration. This point is discussed further under heading 7.3.

5.3 Why legal structure chosen (refer Chp 3 of the Report)

Respondents to the survey were asked why they chose to incorporate as a company limited by guarantee rather than, for example, an incorporated association.

In relation to implications for the incorporated associations' regime, the most significant findings concerning this question were as follows:

- a) over a third (34%) indicated that being a 'national or multi-state organisation' was an important factor in their choice of a company structure, and significantly more small⁹ organisations said this factor was an important in their choice compared with large organisations (36% of small organisations compared with only 22% of large organisations)
- b) 40% indicated that the 'scale of trading activities' was an important factor
- c) almost a third (31%) identified a preference for ASIC 'rather than State regulator' as an important factor

⁷ There is no taxation or company law requirement that they register as a company limited by guarantee rather than a company limited by shares. In fact, I am aware of several NFP organisations that are registered as proprietary limited companies.

⁸ They would not be required to lodge such accounts unless requested by ASIC (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)).

⁹ To distinguish between small and large NFP respondents, the s 45A *Corporations Act* definition was applied.

- d) 'public perception and status' was important to the majority (52%) of respondents
- e) 39% indicated size as an important factor in choosing to incorporate as a company limited by guarantee.

The findings are summarised in Figure 3 below.

Figure 3: Reason chose to incorporate as company limited by guarantee

(see Report Table 1, Chp 3, p 58)

Reason why company structure chosen	Per cent 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

Space was also given on the questionnaire for comments on why a company structure was chosen. It is worth noting that many of these respondents stated that a company structure was a legislative or government funding requirement (for example, under the *Registered Clubs Act 1976 NSW*) and some said that the company structure was more flexible. Interestingly, there were also comments that the choice was based on the need to have a structure that is understood globally. So, while they may in fact be a very small organisation (such as the Australian 'arm' of an overseas NFP organisation), they need a legal structure that has international compatibility. It is interesting to note that this data supports feedback received from the Department's preliminary consultations (see heading 4.2 of the Discussion Paper).

Further data for the Project was obtained in May 2003 from participants at a conference of Chief Executive Officers of disability organisations who are members of the peak body ACROD (National Industry Association for Disability Services), at which I was invited to deliver a presentation on the Project. Participants were asked to complete a brief feedback form for ACROD. From the 125 responses (out of about 140 who attended the session), the majority (68) were incorporated associations and 46 were companies limited by guarantee. It is worth noting that:

- 84% indicated that they were in favour of a new specialist NFP legal structure
- 95% were in favour of suitable accounting standards for NFP organisations being developed and implemented
- 95% were also in favour of government reporting requirements being streamlined and being made to one specialist government regulator.

5.4 Analysis of data on choice of legal structure (refer Chp 3 of the Report)

Issue 5: Should States move towards a nationally consistent regulatory regime for incorporated associations?

Response: The data from the Project supports the need and sector demand for a nationally consistent framework.

The data (see finding (a), heading 5.3) confirms that the needs of small, but national or multi-state, NFP organisations are not being adequately met by the current incorporated associations' regime. It is also a particular problem for a federated body. I am aware of several organisations that have a small national secretariat incorporated as a company limited by guarantee, but all their member State and Territory bodies are incorporated associations. As explained under heading 4.1, this model increases administrative costs for the organisation. It also makes it difficult to produce educational NFP management material that caters for both the State/Federal regimes and for the variations between the States/Territories in their associations' legislation.¹⁰ With increased use of technology such as email and internet, many organisations have a greater ability to operate on a national basis and, therefore, this is an increasingly important issue for the States and Territories to consider.

The data (see finding (b), heading 5.3) also reflects that the scale of a NFP organisation's trading activities is an area of debate and variation in the incorporated associations' regime.¹¹ There were 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.

The data about a preference for ASIC rather than a State regulator (see finding (c)), supports anecdotal evidence from informal interviews conducted prior to conducting the survey, 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.

Public perception and status (see finding (d)) was (perhaps) surprisingly important to the majority of respondents (52%). However, this data supported anecdotal evidence that 'serious' or 'more sophisticated' NFP organisations are companies rather than incorporated associations.

The ACROD feedback supports the Project survey data and is significant because it provides responses from *a group of incorporated associations* to show that they are even more strongly in favour of a new specialist NFP structure and regulator.

5.5 Has the choice of legal structure been successful? (refer Chp 3 of the Report)

Respondents were asked to respond to several statements about their experience of a company structure and the results are summarised in Figure 4 below.

¹⁰ See this argument made by other academics: McGregor-Lowndes, M *Reforming Queensland's Incorporated Associations Legislation*, 22 *The Queensland Lawyer*, 9-19 and Fletcher K, *Incorporated Associations: Cheap Incorporation – Limited Choices* 22 *The Queensland Lawyer*, 20-24.

¹¹ See Sievers AS, *Associations and Clubs Law in Australia and New Zealand* (The Federation Press, 1996) para 4.1.4.

Figure 4: Success of company structure (Table 2, Chp 3, p 65 of the Report)

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

As can be seen from Figure 4, there was no clear evidence of any overall dissatisfaction with the company structure. The dissatisfaction that was expressed was about the expense and the paperwork. There was no control group of 'for-profit' companies and it is possible that similar dissatisfaction about fees and paperwork would be expressed by such a group. About three-quarters of the respondents believe that the company structure is well understood by directors and those dealing with the company, and that it has been a flexible structure with manageable reporting obligations.

5.6 Analysis of data on success of legal structure (refer Chp 3 of the Report)

The following observations can be made on this data:

- the company structure itself is readily understood, perhaps particularly so in more recent years with the introduction of single director/shareholder companies
- consideration needs to be given to the fees payable where the company is a NFP organisation.

6 Public disclosure considerations (refer to Chp 8 of the Report)

Issue 9: Should small incorporated associations with limited income and assets be exempt from the requirement to lodge annual statements?

Response: Almost all respondents (91%) said that their income was exempt from income tax. Almost half (48%) also enjoy gift deductible status. I submit that with this concessional taxation treatment should come a corresponding public disclosure obligation, even if the organisation is primarily member serving (as 56% of respondents said they were), or even if it is very small. However, I also submit that the public disclosure obligation should be consistent across States and Territories. It should *not* depend on which type of legal structure is adopted (a company or an association), or the States/Territory in which the organisation is incorporated. A nationally consistent approach based on a well thought out public policy decision about the most appropriate disclosure regime for NFP organisations that, for example, makes distinctions based on size and/or taxation status, is long overdue.

Issue 11: What impact, if any, would exempting small incorporated associations from lodging annual financial statements have on associations and/or the communities they serve?

Response: It would lower the overall transparency and public accountability of these organisations and have a flow on effect for the NFP sector generally (see the comments of the Industry Commission mentioned under heading 3.1). Given the taxation concessions even very small organisations receive, and the relationship between accountability and donor confidence, this would be a retrograde step. Rather than removing the public disclosure obligation, what is needed is a streamlining of reporting obligations to overcome existing duplications both between State and Federal governments and between government departments. Further, if my second main submission (the establishment of a new advisory body) is implemented, this additional support, particularly for small organisations that do not have the benefit of a peak body, could see a big improvement in compliance rates.

7 Possible reform options for unified regulation of NFP organisations (refer Chp 4 of the Report)

I submit that uniform regulation of incorporated associations is now essential. An overall strategy is required rather than individual States and Territories tinkering with their own Acts. In relation to how to achieve such uniform regulation, it is suggested that there are three main options that warrant consideration and debate:

- a) retention of the existing dual regime but with uniform State and Territory based associations incorporations legislation (along the lines of what has been achieved for cooperatives);
- b) retention of the existing dual regime but with uniform State and Territory associations incorporations legislation *and* legislative amendments enabling ASIC to assume jurisdiction over incorporated associations; or
- c) introduction of a single, Commonwealth statutory regime for all corporate bodies (that is, ‘for-profit’ companies, NFP companies and incorporated associations) by referrals of power from the States to the Commonwealth (along the lines of what has been achieved for company regulation) that would also enable national regulation by ASIC *and* the development of a specialist form of corporate entity for NFP organisations generally.

7.1 Uniform associations incorporations legislation

Others have already made the call for uniform legislation for incorporated associations.¹² The logic of this proposition is inescapable. In addition, the survey data from the Project provides evidence of problems with an incorporated association as the legal structure for some NFP organisations, even small ones to which the legislation has been primarily directed.

It is worth recalling that the Industry Commission in its final report considered uniform State associations’ legislation as one option to improve accountability. However, the Commission 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”. This report was published in June 1995 so it is possible to surmise that if the Commission

¹² For example, McGregor-Lowndes M and Fletcher K (see note 10) and Sievers S, “Incorporation and Regulation of Non-Profit Associations in Australia and other Commonwealth Law Jurisdictions” (2001) 13 AJCL 124 at 142

had had the benefit of recent experience with the referrals of power for the *Corporations Act*, 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.

7.2 Uniform associations incorporations legislation administered by ASIC

The second option outlined under heading 7 (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 associations incorporations legislation and for the Commonwealth to amend the *ASIC Act*.

It has the advantage of allowing an existing, experienced regulator to take responsibility for the regulation of all bodies corporate (that is, 'for-profit' companies, NFP companies and incorporated associations), while retaining a specialist form of incorporation familiar to the majority of NFP organisations (see also the discussion of ASIC's role under heading 7.3). 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. 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 Acts and breaches could not (at least with total certainty) be prosecuted by the Commonwealth Director of Public Prosecutions.

7.3 Commonwealth legislation administered by ASIC

The third option of the introduction of a single, Commonwealth statutory regime for all corporate bodies 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, I suggest, the most satisfactory of the three options mooted. Because it is the most drastic, it may also be said to be unrealistic. However, unlike business name registrations, regulation of incorporated associations is not (as I understand it) a revenue earner for the States (refer heading 4.3). Indeed it may even be regarded as an administrative burden. Therefore, I would urge Victoria to consult with other States and Territories with a view to a referral of powers, using the *Corporations Act* model.

There are several advantages to this third option:

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

Secondly, because the Federal Government has not adopted the Charity Definition Inquiry's recommendation for an independent administrative body,¹³ State referrals of power may be the most realistic and revenue neutral option. Indeed, some of the submissions by

¹³ 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>

NFP organisations to both the Industry Commission and the more recent Charity Definition Inquiry have suggested reforms along this line.

Thirdly, and perhaps even more importantly, this option would facilitate the introduction of a specialist form of corporate structure available only to NFP organisations. While there are many overarching provisions in the *Corporations Act* that should apply to all companies (particularly, directors' duties), the unique issues faced by NFP companies could be addressed in specialist provisions. A plain language guide for NFP's along the lines of the Small Business Guide could make an enormous difference. At the time that the associations incorporations legislation was introduced, the simplification of requirements and filings for small business had not been introduced into the corporations' regime. The concept of replaceable rules under the *Corporations Act* is not dissimilar to that of model rules under the various State and Territory associations incorporations Acts. In the way that some replaceable rules apply only to public companies, there could be some designed specifically for NFP bodies – picking up the best of the incorporated associations model rules framework.

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

8 New advisory body (refer Chp 4 of the Report)

I note that, while the level of compliance among non-prescribed associations has 'improved considerably in recent years', 23% still had one or more annual statements outstanding. The reasons suggested under heading 4.3.2 of the Discussion Paper are all, to my mind, the most likely reasons for non-compliance.

In view of the Department's experience with non-compliance and the data from the Project, I believe that there is a clear need for NFP organisations to be able to draw on specialist, independent advice on a range of areas. To this end, I submit that an independent NFP advisory body should be established to provide a range of support services for NFP organisations. This would create a centre of expertise in the specialised needs of these organisations. It would also underpin improved accountability and governance practices within the sector by providing support to peak bodies, and direct services to those not covered by a peak. In my opinion this new body should be separate from, and independent of, government and the regulators (including any administrative body established to determine charitable status): see p 89, heading 5.4, Chapter 4 of the Report. The types of services that could be provided at low cost or possibly even 'no cost' to some organisations are:

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

A new NFP advisory body would be able to generate at least some of its funding from fees for service (say, a sliding scale based on size/capacity to pay). One would hope that any shortfall could come from a far-sighted philanthropic source and possibly in part, from

government (at least in the start up phase). I am of the opinion that such a body is needed, whether or not an independent administrative body is established as recommended by the Charity Definition Inquiry. It may be that either the National Roundtable of Nonprofit Organisations or the proposed Not-for-profit Council could auspice such a body.

In my opinion, the establishment of a new, independent advisory body would be of particular benefit to small to medium sized NFP organisations and would serve to strengthen the accountability and capacity of the sector. It is also likely to reinforce the Department's efforts to improve compliance rates.

9 Conclusion

The associations' incorporation legislation has aimed to provide 'a relatively simple mechanism of incorporation' as 'a means of encouraging and promoting the formation and expansion of voluntary organisations in Victoria'. For many years the Act has served this purpose relatively well. However, the nature and needs of many NFP organisations (small and large) have changed, as has the environment in which they operate. The fact that the Victorian review contemplates a nationally consistent framework is to be commended. In order to continue to provide an effective framework to support the important contribution NFP organisations make to the community, it is essential that there is now a uniform approach. The regulatory framework needs to be streamlined to meet the specialist needs of NFP organisations and to avoid the current complexity and duplication. As the corporations' law experience has shown, a nationally consistent approach is best achieved by a referral of powers and an independent, specialist, national regulator. There is also a demonstrated need for greater support services for NFPs to underpin the accountability and good governance, both of which are essential to maintaining donor confidence.

Appendix 1 – Contact details and author information

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Ms Susan Woodward is a lecturer in the Faculty of Law, and a member of the Centre for Corporate Law and Securities Regulation. Ms Woodward was the principal researcher on the Project. She has published substantial articles in refereed journals on the topics of directors' duties and the implications of recent company law reforms on non-profit companies (see, for example, "*Not-for-Profit Companies – Some Implications of Recent Corporate Law Reform*" (1999) 7 *Company & Securities Law Journal*). She is also a co-author (with Mrs Sievers and Ms Helen Bird) of *Corporations Law – in principle* (6th ed, LawBook Co May 2003) and accompanying *Teachers' Resources* which is used widely by law and non-law students throughout Australian tertiary institutions. Previously, in private practice, she acted for several NFP organisations. She has been on several boards of management of community organisations and is currently an (honorary) director of a NFP company limited by guarantee.

In relation to the Project, Ms Woodward has published a comprehensive article "*Not-for-profit motivation in a for-profit company law regime- baseline data*" (2003) 21 *Companies & Securities Law Journal* 102-133, an article "*Not-for-profit organisations: do they fit the company mould?*" *Keeping Good Companies*, June 2003 p 278-283 (*Journal for the Institute of Chartered Secretaries*) and, together with Ms Marshall, "*The more the merrier? Stakeholders in not-for-profit companies*" (forthcoming *Third Sector Review*, 2004). Ms Woodward also made a submission to the NSW associations incorporation review (June 2003) – see <http://cclsr.law.unimelb.edu.au/activities/not-for-profit/>