

GOVERNANCE AND NOT-FOR-PROFITS: REGULATORY REFORM

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Significant reform of the regulatory structures applicable to the not-for-profit (NFP) sector in Australia is currently underway. As part of that reform regime the governance expectations placed on NFPs are to be formalised in delegated legislation. While there is clearly a need for effective governance of NFPs, substantial disagreement exists within the industry and government as to the most appropriate way to achieve any necessary increase in standards. This paper reviews the recent regulatory reforms, identifies particular governance risks applicable in the NFP sector, and addresses the current proposed standards on NFP governance. The paper concludes by suggesting that key questions remain unanswered by the reforms and that the work needed to synthesise NFP governance standards is not yet complete.

I INTRODUCTION

Not-for-profit (NFP) regulation has been moving through a period of fundamental restructure in recent years. The last decade has seen a series of reports, inquiries, recommendations and reviews, by the Productivity Commission, Commonwealth Treasury, Senate Committees and the Industry Commission.¹ At the same time the

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¹ Senate Standing Committee on Economics, Parliament of Australia, *Inquiry into Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008); Commonwealth Treasury, *Inquiry into the Definition of Charities and*

importance of the not-for-profit (NFP) sector to the Australian economy is clear, is often under-estimated, and is growing.²

Significant reform of the regulatory structures applicable to the not-for-profit (NFP) sector in Australia is now underway. The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('ACNC Act') was passed in late 2012,³ creating a new central regulator to be known as the Australian Charities and Not-for-profits Commission (ACNC). A key aim of the reforms is to make the new structures applicable to all NFPs; however, at present only charities are brought under the umbrella.⁴ As part of that reform regime the governance expectations placed on NFPs have been formalised in delegated legislation.⁵ This paper considers the recent regulatory reforms, identifies particular governance risks applicable in the NFP sector, and reviews the recently released standards on NFP governance. The paper concludes by suggesting that the current standards and surrounding framework leave many questions unanswered and that the work needed to synthesise NFP governance requirements is not yet complete.

Related Organisations (2001); The Australian Government, Industry Commission, *Charitable Organisations in Australia*, Report No 45, (16 June 1995).

² The nearly 8 percent annual growth experienced by the sector in the period 1999-2000 through to 2006-2007 reflects in part the increased emphasis put by government on service delivery by NFPs, and makes effective regulation of this part of the economy even more important. In total somewhere in the region of 600,000 organisations qualify for classification in this sector, and they contribute approximately \$43 billion to national GDP: Australian Government, Treasury, *Scoping Study for a National Not-for-Profit Regulator*, Final Report (April 2011) 7.

³ No 168 of 2012.

⁴ Australian Government, Treasury, *Development of Governance Standards*, Consultation Paper (December 2012) 7 [2.3.1]. Public funding of charities and accountability for private donations for charities have been major drivers in the reform process.

⁵ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth), made under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

II BACKGROUND

The regulation of NFPs in Australia has historically reflected the complex mix of entities that operate within the sector. Characterised by diversity, the NFP component of the economy ranges from very small sporting clubs to significant national, and even multinational organisations. Regulation has been shared between Commonwealth agencies (principally the Australian Taxation Office) and the States and Territories. The Commonwealth Treasury's 2011 Scoping Study for a national regulator argued that the consequential regulatory environment imposed an unnecessarily high burden on some NFPs while leaving others insufficiently supervised.⁶

The diversity of sources of regulation for NFPs is in part the result of the range of legal structures, and jurisdictions, that NFPs may use. Since creation of a separate legal entity is not compulsory, an association formed for NFP purposes may be unincorporated,⁷ leading to the imposition of legal principles applicable to the entity's individual members. However, an NFP will often choose to incorporate as an association, bringing into play the regulatory system applicable to that form of structure. Each State (or territory) jurisdiction has operated its own *Associations Incorporation Act*.⁸ Further, many NFP organisations have chosen to form companies limited by guarantee, regulated by the *Corporations Act*⁹ while some long-standing or high profile charities are the creations of Royal Charter or individual legislative enactment.¹⁰ In addition to the prevailing external regulatory structure, all NFPs need to ensure

⁶ Australian Government, Treasury, *Scoping Study for a National Not-for-Profit Regulator*, Final Report (April 2011) 3 [18], 7 [35], 13 [74], 19 [113].

⁷ Paul Latimer, *Australian Business Law* (CCH Australia, 31st ed, 2012) [9-630].

⁸ *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Reform Act 2012* (Vic); *Associations Incorporation Act 1987* (WA); *Associations Act* (NT); *Associations Incorporation Act 1991* (ACT).

⁹ *Corporations Act 2001* (Cth) s 9 (definition of 'company limited by guarantee').

¹⁰ For example, the Scout Association of Australia was incorporated by Royal Charter in 1967.

compliance with a set of internal rules (i.e. constitution). Unlike the Replaceable Rules applicable by default to companies registered under the *Corporations Act*,¹¹ there has been no standard set of internal provisions generally applicable to NFPs, further complicating the regulatory picture. In addition, charitable trustees legislation may also be relevant to many NFPs.¹²

Given this complexity, the need for a simplified, national system for regulation of NFPs has been clear for some time.¹³ In 2011, the Federal Government responded to calls for an overhaul of the regulatory system, and Commonwealth Treasury released a Scoping Study in April of that year.¹⁴ Key recommendations of the study were that a single regulator, at national level, be introduced and that the ‘ad hoc, uncoordinated, complex and duplicative’ reporting requirements applying to NFPs be overhauled.¹⁵ The study also noted the significant level of stakeholder support for increased harmonisation of reporting obligations and for a more proportional level of regulation.¹⁶

Following the publication of the Treasury Scoping Study in 2011, and reports from both the Productivity Commission (in 2010) and the report on Australia’s Future Tax System (in 2009), the Federal Government announced the creation of the ACNC¹⁷ and a range of related reforms aimed at overhauling regulation of the sector, and at

¹¹ *Corporations Act 2001* (Cth) s 135.

¹² See, eg, the *Trustee Act 1936* (SA), s 9: The Australian Government, The Treasury, *Development of Governance Standards*, Consultation Paper (December 2012) 7 [2.3.1].

¹³ Australian Government, Treasury, *Scoping Study for a National Not-for-Profit Regulator*, Final Report (April 2011) 7 [37], [38], 8 [39]-[41]. A range of reviews have considered the regulation and the taxation of in the last decade and a half, and have consistently supported the need for simplification and harmonisation of the sector.

¹⁴ *Ibid.*

¹⁵ *Ibid.* 45.

¹⁶ *Ibid.* 1.

¹⁷ Bill Shorten and Tanya Plibersek, ‘Making it Easier for Charities to Help Those Who Need it’ (Media Release, No 077, 10 May 2011).

boosting its ‘governance, transparency and accountability’.¹⁸ Initially scheduled to commence operations in July 2012, the Commission’s start date was then delayed to October 2012, in order to provide more time for the NFP sector to work with the Government to finalise the necessary legislation.¹⁹ Following the expression of significant concern within the NFP community on the details of the new regulatory structure, further delays to elements of the program were announced in May 2012.²⁰ Inherent in this delay was recognition of the complexity of the task required to be undertaken in order to provide for a more streamlined NFP regulatory environment in Australia, and a range of processes were put in place to increase the level of consultation with industry before finalisation of the legislation. At the time of the May 2012 announcement of a further delay in the commencement of the reforms, the Federal Government also announced the referral of the draft ACNC legislation to the House of Representatives Standing Committee on Economics, for an inquiry over the Winter Parliamentary break.²¹ In September a further press release from the Assistant Treasurer gave notice of yet more delays, due, allegedly, to ‘a Coalition filibuster in the Parliament’.²² The ACNC legislation finally passed Federal parliament late 2012 and the ACNC

¹⁸ Australian Government, Office for the Not-for-Profit Sector, *Not-For-Profit Sector Reform* (27 July 2012), <<http://www.notforprofit.gov.au/office-not-profit-sector>>.

¹⁹ Mark Arbib, ‘Gillard Government Listens to Sector on Not-for-Profit Reforms’ (Media Release, No 011, 1 March 2012).

²⁰ David Bradbury and Mark Butler, ‘Staging the introduction of regulatory reform for the not for profit sector’ (Media Release No 032, 17 May 2012). Delayed elements included: governance standards (including external conduct standards) and financial reporting framework not commencing until 1 July 2013, with the first financial reports for medium and large registered entities beginning to fall due after 1 July 2014. The Media Release also confirmed that the ACNC will initially regulate charities only.

²¹ *Ibid.*

²² David Bradbury and Mark Butler, ‘Delay to the commencement of Australian Charities and not-for-profits commission’ (Media Release No 108, 21 September 2012).

commenced operation in December 2012,²³ but is not yet universally accepted as necessary nor desirable.²⁴

III GOVERNANCE STANDARDS FOR NFPS

One area that has attracted repeated mention over the years of NFP regulatory debate has been the establishment of improved governance standards for NFPs. Governance arrangements were highlighted by a Commonwealth Treasury review early in the process of reform leading to the ACNC's creation.²⁵ Treasury defined 'governance' at this time as 'the practices and procedures in place to ensure that an entity operates in such a way that it achieves its objectives in an effective and transparent manner'.²⁶ This definition was carried through to the *Consultation Paper on Development of governance standards* released by the Federal Treasury in December 2012.²⁷ The NFP governance standards are in the *Australian Charities and Not-for-profits Commission Regulations 2013*,²⁸ which became law on 1 July 2013.²⁹

²³ *Australian Charities and Not-for-profits Commission Act, 2012* (Cth), No.168 of 2012.

²⁴ See, eg, G Simpson, Housing Industry Association: 'New charities regulation unnecessary', Letters to the Editor, *The Australian Financial Review*, 8 February 2013, 39.

²⁵ Commonwealth Treasury, *Review of not-for-profit governance arrangements* (8 December 2011), Not- For-Profit Fact Sheets, <http://archive.treasury.gov.au/documents/2252/PDF/FactSheet_NFP_Governance_Arrangements.pdf>.

²⁶ *Ibid.*

²⁷ Australian Government, Treasury, *Development of Governance Standards, Consultation Paper* (December 2012).

²⁸ *Australian Charities and Not-for-profits Commission Regulation 2013*, made under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

²⁹ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 2.

A *Importance of Governance Standards and
Enforcement in the NFP Sector*

Unlike the more stream-lined governance principles that have evolved over time in relation to for-profit corporations, NFP governance has, by virtue of the disparate formats and diversified regulatory system applicable to NFPs, been less standardised. There is not a key set of legislative provisions governing the practices and procedures of NFPs in the way the *Corporations Act 2001* (Cth) controls the vast majority of for-profit entities, nor is there a single body of developed case law dealing with NFP governance. Similarly, the ‘best practice’ corporate governance guidelines that have developed in relation to entities governed by the *Corporations Act 2001* (Cth) have not been mimicked in the NFP sector.

There are fundamental differences between the structure and the operations of NFPs compared with for-profits. These differences indicate that governance is particularly important for NFPs. The same differences also mean it often will not be appropriate to impose for-profit governance measures on NFPs. Not-for-profits control vast resources, but may not be subject to the checks and balances applicable in the for-profit sector, since there may be no equivalent, for example, of stakeholder self-interest such as that exercised by shareholders with voting rights. Further, even if checks and balances were sufficient, there is no single regulator to enforce compliance with those checks and balances. The enforcement of duties of directors of for-profit companies, for example, is not left exclusively in the hands of the shareholders of a company; rather, the public regulator, the Australian Securities and Investments Commission (ASIC), has an important function in ensuring compliance with directors’ duties through the civil penalty regime.³⁰ Previously, the NFP sector did not have an equivalent to ASIC, and it is this role that the ACNC will seemingly fill.³¹

³⁰ *Corporations Act 2001*(Cth) ss 206F, 1317E.

³¹ However, as previously indicated, the ambit of the ACNC is currently limited to charities and it is not clear how or when its operation and functions will be extended to include NFPs that are not defined as charities.

A third aspect that indicates a clear difference relates to structural asymmetries. In the for-profit corporate sphere, a long line of doctrinal advances have attempted to balance the interests of corporate management and corporate owners. These include controls on the calling and conduct of AGMs,³² the establishment of a statutory oppression remedy,³³ and the creation of a shareholder derivative action³⁴ where malfeasant conduct by the directors is unlikely to otherwise be pursued. However the *Consultation Paper: Review of not-for-profit governance arrangements* recognises that governance standards based on the for-profit directors' duties framework may not be appropriate in the NFP context.³⁵ The groups that NFPs are accountable to 'often do not provide the same level of oversight, or have a legal interest in the entity',³⁶ compared with shareholders in a company. Added to this is the structural advantage of a strong financial incentive for shareholders to scrutinise all activity of directors. These factors are either not present, or are to some extent vitiated, in the context of NFPs.

While generalisations are problematic in the diversified NFP sector, a further factor that can contribute to differences between for-profits and NFPs is resource asymmetries. Some volunteers who are involved in an organisation may be sufficiently well-resourced to consider taking action to enforce compliance with obligations by (for example) the board, but many more will not be. This contrasts with the position in for-profits where shareholders may be drawn from a more affluent sector of society, or be represented by managers of large corporate funds. Further, shareholders of a for-profit entity have a financial incentive to pursue an action to enforce compliance with obligations, while volunteers in an NFP may have less motivation. Thus where a group of members of an association feel the committee has not complied with the association's constitution, they may be less likely than for-profit shareholders to institute

³² *Corporations Act 2001*(Cth) pt 2G.2.

³³ *Ibid* s 232(a)-(e).

³⁴ *Ibid* pt 2F.1A.

³⁵ Australian Government, Treasury, *Review of not-for-profit governance arrangements*, Consultation Paper (December 2011) 16 [89].

³⁶ *Ibid*.

indirect governance controls, such as consulting a lawyer for initial advice.

Information asymmetries could also contribute to weaker enforcement of governance standards in the context of NFPs. NFP members and other associated stakeholders (for example, volunteers in NFP environments) may not be commercially experienced, and may well lack the knowledge base to challenge potential malfeasance by those in charge of NFP operations. NFPs, depending on the organisational structure, are also not necessarily subject to statutory disclosure requirements similar to those imposed on corporations, particularly in relation to financial reporting.³⁷

Overall, there is, arguably, a much less developed culture of corporate governance within the NFP sector and less effort is spent on developing governance instruments for this environment. The plethora of governance standards, best practice guidelines and professional body standards that exist in the corporate sphere are not duplicated in the NFP sector, certainly not to the same extent. It is important to emphasise again that generalisations are problematic in the highly diversified NFP environment, and the significance of these factors will vary between different NFPs. However, taken together, these factors suggest there is a need for a strong public regulator in relation to NFPs, in order to compensate for gaps in the governance structures that would otherwise apply.³⁸

³⁷ *Corporations Act 2001*(Cth) pt 2M. 3.

³⁸ Not everybody agrees with this view, however. Recent research undertaken by the School of Accounting at Curtin University, funded by the Australian Institute of Company Directors, sought to clarify those governance challenges that were specific to the NFP sector. The study's reliance on directors as research participants focussed its findings on the challenges facing those in power in NFPs rather than the public interest governance risks. A key governance factor identified by the study was the difficulty of minimising overheads, despite pressure to do so by government and other funders (with flow-on effects on the quality of information prepared for boards and on training). The study concluded there were 'no discernible differences between the governance effectiveness of NFP and FP boards': David Gilchrist, Curtin University, *Directors Social Impact Study 2012-Examining the contribution of directors to Australia's not for profit section* (2012) 7, 16.

B *Governance Standards for NFPs Prior to Reforms*

It is important to note that notwithstanding the lack of a synthesised governance framework for NFPs prior to current reforms, there were governance standards that applied to particular entities, depending on which structure they chose as the vehicle for the conduct of their activities. The breadth and diversity of potentially relevant models has been tabulated by the Federal Treasury as an appendix to its *Development of governance standards Consultation Paper*.³⁹ Without providing an exhaustive list of the potentially relevant sources of governance controls, it is illustrative to consider that NFPs that are companies limited by guarantee are subject to standards under the *Corporations Act 2001* (Cth);⁴⁰ incorporated associations are bound by the relevant *Associations Incorporation Act* of each state or territory;⁴¹ statutory (special purpose) corporations need to comply with their enacting legislation; Royal Charter corporations need to have regard to the relevant charter; cooperatives must consider relevant state-based cooperatives legislation;⁴² Aboriginal and Torres Strait Islander corporations need to have regard to the applicable governing legislation;⁴³ while

³⁹ Australian Government, Treasury, *Development of Governance Standards, Consultation Paper* (December 2012) Appendix 2.

⁴⁰ Public companies limited by guarantee are the most common type of company structure used by charities (and other not-for-profit purposes). Such companies are registered by ASIC and, if used for charitable purposes, registered with the ACNC. Some reporting obligations under the *Corporations Act 2001* (Cth) do not apply to companies that are registered with ACNC: ASIC, *Charities registered with ASIC*, <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Charities+registered+with+the+ACNC?openDocument>>.

⁴¹ *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Reform Act 2012* (Vic); *Associations Incorporation Act 1987* (WA); *Associations Act* (NT); *Associations Incorporation Act 1991* (ACT).

⁴² Historically the relevant legislation has been *Cooperatives Act 1997* (Qld); *Cooperatives Act 1992* (NSW); *Cooperatives Act 2002* (ACT); *Cooperatives Act 1996* (Vic); *Cooperatives Act 1999* (Tas); *Cooperatives Act* (NT); *Cooperatives Act 1997* (SA); *Cooperatives Act 2009* (WA). Pursuant to the *Australian Uniform Co-operative Laws Agreement*, made between all Australian States and Territories, which commenced in February 2012, jurisdictions are developing the *Co-operatives National Law* (CNL) as the new principal uniform legislation to regulate co-operatives.

⁴³ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

unincorporated associations will not be governed by any specific legislation, they will be subject to standards provided for in their constituent documents;⁴⁴ joint ventures that are incorporated will be governed by corporations legislation; and trust vehicles need to comply with trustee legislation,⁴⁵ the trust deed (if any), as well as general trust law principles.⁴⁶

Beyond the sources of governance standards mentioned above, the impact of public expectations of good governance in the NFP sector as a whole should not be under-estimated. In *Australian Securities and Investments Commission v Rich*⁴⁷ an assessment was undertaken of the legal duty of care owed by the chair of a listed public company, in light of current industry standards. Austin J acknowledged the use that could be made of expert opinion, academic writing and other commentary, and noted the court's obligation 'to articulate and apply a standard of care that reflects contemporary community expectations'.⁴⁸ This approach has since received strong support in the *Centro* decision, where Middleton J cited Austin J's comments and confirmed that:

the published materials on matters of corporate governance, in particular those referring to the role of directors in the review of financial statements, are of some assistance in determining the obligations to be imposed on directors.⁴⁹

⁴⁴ For example, the Association's constitution, which may be formal (that is, a written agreement), or informal (based upon a shared understanding or mutual consensus of the group): Government of South Australia, *Community Support – Unincorporated Associations*, <<http://www.sa.gov.au/subject/Community+support/Community+organisations/Set+up+a+community+organisation/Things+to+consider+when+setting+up+a+community+organisation/Types+of+organisations/Unincorporated+associations>>.

⁴⁵ *Trustee Act 1925* (NSW); *Trusts Act 1973* (Qld); *Trustee Act 1936* (SA); *Trustee Act 1898* (Tas); *Trustee Act 1958* (Vic); *Trustees Act 1962* (WA).

⁴⁶ Australian Government, Treasury, *Development of Governance Standards*, Consultation Paper (December 2012), 10 [3.1]-13 [3.2].
⁴⁷ (2003) 174 FLR 128.

⁴⁸ *Ibid* 147 [71].

⁴⁹ *Australian Securities & Investments Commission v Healey* (2011) 278 ALR 618, 662 [192].

While offered in the context of for-profit corporations these judicial views suggest the significance of industry standards to NFP governance, indicating yet another source of materials (some of which may be potentially inconsistent) to which NFPs may need to have regard.

Governance standards applicable to NFPs, prior to the current reforms, could be described as overall lacking in synchronisation. This fact, coupled with the absence of a centralised regulator, have had the potential to impact significantly on the way in which NFPs conduct their operations, and on the amount of public trust in governance of NFPs. The resulting need for reform in this area is not hard to recognise.

Universities make a particularly interesting case study in relation to the governance issues potentially facing NFPs since many such bodies are likely to be regulated by the new reforms. In recent years a trend to increased ‘managerialism’ has been commented on in the context of Australian universities.⁵⁰ This is usually taken to mean a trend to centralise power in those who manage universities (rather than, for instance, to leave decision-making in academic hands) and a tendency to adopt corporate, ‘for profit’ governance styles.⁵¹ Recently, Flinders University of South Australia considered reforms to its governing statute to decrease stakeholder representation and increase the relative power of the university’s Vice Chancellor.⁵²

⁵⁰ Tony Aspromourgos, ‘The managerialist university: an economic interpretation’ (2012) 54(2) *Australian Universities Review* 44.

⁵¹ *Ibid.*

⁵² Pursuant to s 5(3) of the *Flinders University of South Australia Act 1966* (SA), membership of the University’s Council numbers between 20 and 21, depending upon whether the Council exercises its power to co-opt a person: s 5(3)(e). In particular, Council membership includes 2 elected members of the academic staff, 2 elected members of the general staff, and 3 students of the University appointed or elected in a manner determined by the Council: *Flinders University of South Australia Act* ss 5(3)(f)-(h). In an email to all Flinders University staff on 18 September 2012, the Vice-Chancellor advised that following a review of the University’s Council’s structure and operation conducted in 2011, and subsequent Council discussions, it had been proposed to the State Government of South Australia that membership of the Council

The Flinders University of South Australia is created by virtue of its own statutory enactment, *Flinders University of South Australia Act, 1966* (SA). The governance of the University is therefore subject to the structures created by the enabling statute, supported in turn by applicable general law principles relating to statutory corporations, and any relevant aspects of specific legislative provisions (for example, taxation legislation requirements). The University is not, however, subject to the governance regime prescribed by the *Associations Incorporation Act 1985* (SA), as it is not an incorporated association (but rather a special purpose statutory corporation).⁵³ The University's own internal requirements, based on the requirements and the structures created by its constituent legislation, are therefore crucial to the provision of an effective governance regime for the University. The Flinders University, by virtue of its enacting legislation, 'consists of a Council, graduates, staff and students'.⁵⁴ The Act provides for the University's Council to be the central repository of power within the organisation,⁵⁵ making the composition of Council central to the sharing of power between the stakeholders within the University.

should be '... no fewer than 12 and no greater than 20. The current Council's view is that a membership of 14 to 15 will achieve the necessary balance of skills and experience with the perceived benefit of smaller size'. In particular, the email proposed that the revised composition of the Council would include a minimum of one staff member, appointed or elected, and one student member (achieved by the appointment of the President of the Students' Association to Council): Email from Michael Barber, Vice-Chancellor, to all staff at Flinders University headed 'Changing the Flinders University of South Australia Act', 18 September 2012 as quoted in South Australia, *Question Time*, Legislative Council, 19 September 2012, 2197 (Tammy Franks), <http://hansard.parliament.sa.gov.au/docloader/Legislative%20Council/2012_09_19/Daily/Legislative%20Council_C_Daily_DIST_2012_09_19_v9.pdf#xml=http://hansardsearch.parliament.sa.gov.au/isysquery/1035bc1d-5cbe-474f-9125-28df52f34bdf/2/hilite/>.

⁵³ This potential for an NFP to be regulated by a regime completely separate from that applicable to another kind of NFP is one of the major drivers behind the push for NFP regulatory reform, as noted above.

⁵⁴ *Flinders University of South Australia Act 1966* (SA) s 3.

⁵⁵ Section 5 of *Flinders University of South Australia Act 1966* (SA) gives Council power as 'the governing body of the University' to carry out the 'the powers, authorities, duties and functions conferred and imposed on the Council by or under this Act'.

This structure gives rise to a number of questions. What happens, for example, where the mechanisms for some of the University's constituents to participate in the University's governance are reduced, for instance through reduction of places on Council, in whom the majority of powers are vested? In the context of the suggested amendments to the *Flinders University of South Australia Act 1966* (SA) public lobbying of politicians is the only way in which many key stakeholders are able to be involved in the process. This presents a clear contrast to the position in a for-profit environment, where any amendment of the organisation's constitution would normally require a full general meeting and a 75 percent majority vote in favour.⁵⁶ All members (shareholders) would be entitled to vote on the proceeding, and notice requirements would be strict.⁵⁷ The Flinders University example provides a stark reminder of the potential gaps in governance that can arise in the NFP sector, as a consequence of less developed governance mechanisms being in place, and the inapplicability of developed governance structures under, for instance, the *Corporations Act 2001* (Cth).

C *Reforms to Governance Standards for NFPs*

1 *Background*

The Explanatory Materials to the Exposure Draft of the *Australian Charities and Not-for-Profits Commission Bill 2012* recognised the importance of public trust and confidence in the NFP sector and the need for accountability to donors and to the public.⁵⁸ It envisaged that a national regulatory system based on 'good governance, accountability and transparency', would contribute to public trust and confidence in the NFP sector.⁵⁹ The ACNC Act provides for governance standards to be set by regulation⁶⁰ and as mentioned above, standards have been released. The Australian Institute of

⁵⁶ *Corporations Act 2001* (Cth) s 136(2).

⁵⁷ *Ibid* ss 249H, 249HA, 249J, 249K, 249L.

⁵⁸ Explanatory Memorandum, *Australian Charities and Not-for-Profits Commission Bill 2012* (Cth) 8.

⁵⁹ Exposure Draft, *Australian Charities and Not-for-Profits Commission Bill 2012* (Cth) 82, [1.233].

⁶⁰ *Australian Charities and Not-for-profits Commission Act, 2012* (Cth) s 45.10.

Company Directors was critical of the Government's decision to leave detail on this important area to delegated legislation,⁶¹ and amendments during the passage of the ACNC Act have provided for increased Parliamentary oversight of the development of these provisions.⁶²

The ACNC Act delineates eligibility for a not-for-profit (NFP) entity to be registered as a charity⁶³ and sets up a system to allow the creation of minimum governance standards that such entities are required to meet for continuing registration.⁶⁴ Pursuant to the ACNC Act,

those standards may:

- (a) require the entity to ensure that its governing rules provide for a specified matter; or
- (b) require the entity to achieve specified outcomes and:
 - (i) not specify how the entity is to achieve those outcomes; or
 - (ii) specify principles as to how the entity is to achieve those outcomes; or
- (c) require the entity to establish and maintain processes for the purpose of ensuring specified matters.⁶⁵

The object of the system setting up the standards is to provide a minimum level of confidence that registered entities will promote the effective and efficient use of their resources, will meet community expectations about managing their affairs and the use of public money, volunteer time and donations, and will minimise the

⁶¹ David Gilchrist, Curtin University, *Directors Social Impact Study 2012-Examining the contribution of directors to Australia's not for profit sector* (2012) 9.

⁶² Australian Government, Treasury, *Development of governance standards*, Consultation Paper (December 2012) 7 [2.3.1]. However, delegated legislation may provide a mechanism of differentiating between the standards relevant to the broad range of entities active in the sector, potentially supporting the policy aims of the reforms.

⁶³ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ch 2.

⁶⁴ *Ibid* s 45-10(1).

⁶⁵ *Ibid* s 45-10(2).

risk of mismanagement and misappropriation.⁶⁶ The ACNC Act stipulates that the Minister for Social Inclusion must be satisfied that appropriate consultation has been undertaken with the NFP sector, with associated entities having relevant expertise, with the ACNC Commissioner, and with the public, before governance standards may be regulated.⁶⁷ As part of the consultation process, the Treasury released a consultation paper, *Development of Governance Standards*, on 17 December 2012. The Office for the Not-For-Profit Sector in the Department of Prime Minister and Cabinet also administered an online forum on the proposed governance standards. The ACNC furthermore conducted a national Community Presentation Program between 29 January and 13 February 2013 to canvas feedback, inter alia, on the proposed governance standards, further emphasising the degree of consultation necessitated by industry unease with the reforms.

The *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No 1)*, containing the much anticipated governance standards, was released in March 2013.⁶⁸ The governance standards came into effect on 1 July 2013.⁶⁹ Registered entities have 18 months from the date the governance standards came into effect to make any changes (for example, to internal procedures) needed to meet those standards. The steps a registered entity may need to take to comply with these standards will vary according to its particular circumstances, such as its size, the sources of its funding, the nature of its activities, and the needs of the public (including members, donors, employees, volunteers and

⁶⁶ This is in keeping with the over-arching objects of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) which are: '(a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.': *Australian Charities and Not-for-profits Commission Act 2012* (Cth), s 15-5(1).

⁶⁷ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 45-15(1)-(2).

⁶⁸ The Regulation is dated 1 March 2013.

⁶⁹ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth).

benefit recipients of the registered entity).⁷⁰ However, if a registered entity's governing rules need amending, it will have four years from 1 July 2013 to do so.⁷¹

2 Content of Governance Standards

The *Australian Charities and Not-for-profits Commission Regulation 2013* provides for five governance standards.⁷² These governance standards are an amalgam of both statute and general law (including fiduciary duties, trusts law and charity law)⁷³ and are broadly categorised as follows:

Standard 1: Purposes and not-for-profit nature of a registered entity

- Committing a registered entity, and all involved with it, to that entity's NFP purposes and instilling public confidence that that entity is acting to further those purposes.⁷⁴

Standard 2: Accountability of members

- Ensuring the accountability and transparency of a registered entity to its members.⁷⁵

Standard 3: Compliance with Australian Law

- Engendering public trust and confidence by ensuring that a registered entity's on-going operations and safety of its assets comply with Australian laws (including preventing the misuse of its assets).⁷⁶

⁷⁰ Australian Government, Treasury, *Development of Governance Standards* Consultation Paper (December 2012) 30 sub-div 45-B.

⁷¹ Ibid 28 [4].

⁷² *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) regs 45.5, 45.10, 45.15, 45.20, 45.25.

⁷³ For example, see Australian Government, Treasury, *Development of Governance Standards*, Consultation Paper (December 2012) Appendix 2, 'Government Requirements Across the Commonwealth' tabling those sections from various pieces of Commonwealth legislation and relevant principles and cases in general law which were influential on the drafting of the six proposed draft governance standards.

⁷⁴ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.5.

⁷⁵ Ibid reg 45.10.

⁷⁶ Ibid reg 45.15.

Standard 4: Suitability of responsible entities⁷⁷

- Maintaining, protecting and enhancing public trust and confidence in the governance and operation of a registered entity.⁷⁸

Standard 5: Duties of responsible entities

- Ensuring that a registered entity takes reasonable steps to ensure that its responsible entities are subject to, and comply with, duties of reasonable care and diligence, good faith, proper use of position and information, disclosure of material conflicts of interest, and prevention against insolvent trading.⁷⁹

Of particular interest for the purposes of this paper is the governance standard relating to the obligations of those in charge of managing NFPs, the so-called ‘responsible entities’ – governance standard 5. Governance standard 5 comprises obligations that could typically be categorised as ‘directors’ and officers’ obligations’ in the context of companies registered under the *Corporations Act 2001* (Cth), as recognised in the Explanatory Statement to the *Australian Charities and Not-for-profits Commission Amendment Regulation 2013* (No

⁷⁷ Pursuant to the ACNC Act, ‘[e]ach of the following is a *responsible entity* of a registered entity:

- (a) in the case of a registered entity that is a company - a director of the registered entity;
- (b) in the case of a registered entity that is a trust – each of the following:
 - (i) a trustee of the registered entity;
 - (ii) if a trustee of the registered entity is a body corporate – a director of the trustee;
- (c) a person who is any of the following:
 - (i) a trustee in bankruptcy of the registered entity;
 - (ii) a receiver, or receiver and manager, of the property of the registered entity;
 - (iii) an administrator of the registered entity;
 - (iv) an administrator of a deed of company arrangement executed by the registered entity;
 - (v) a liquidator of the registered entity;
 - (vi) a trustee or other entity administering a compromise or arrangement made between the registered entity and someone else.’: *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-30.

⁷⁸ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.20.

⁷⁹ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.25. See also, Explanatory Statement to *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) sub-div 45-B.

I)⁸⁰ and it is envisaged ‘that the meaning of these duties be interpreted with reference to the existing common law and relevant legislation’.⁸¹

The language used in governance standard 5 closely resembles the way in which traditional directors’ duties are formulated in terms of corporate law principles (e.g. ‘reasonable care and diligence’; ‘good faith’; ‘proper use of position and information’; not to allow the registered entity to trade while insolvent; and so on). This could create the impression that the persons or entities managing the NFP are subject to similar duties as directors of for-profit companies. The consequences of not complying with these types of duties are not the same, however. In the case of a company director breaching his/her duties, the director in question will be liable. In a situation where a person or entity managing an NFP is in breach of these ‘director type’ duties, it appears that the consequences will be visited upon the registered entity (i.e. NFP) itself, and not on the person or entity who is in breach of the duties.

The Explanatory Statement to the *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No 1)* on governance standards furthermore indicates that a registered charity ‘can choose which steps it takes to apply the duties (as are reasonable) in this draft standard to its responsible entities’.⁸² It is suggested that this could be achieved in a number of ways, for example by adopting a board charter or code of conduct; by amending the constitution or rules; and so on.⁸³ Where there are pre-existing statutory duties that apply, the NFP could rely on these.⁸⁴ NFPs will thus not carry an identical burden in this respect, depending on whether the registered entity is already subject to State or Territory legislation that would cause these duties to apply.⁸⁵ It is

⁸⁰ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.25.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

also recognised that some duties imposed by other Australian laws ‘may require a responsible entity to exercise its powers and discharge its duties to a higher standard’.⁸⁶ Ultimately, ‘[t]he question of what will satisfy reasonable steps may depend on characteristics of the association, such as duties prescribed in their incorporating jurisdiction’.⁸⁷ To a significant extent therefore the pre-existing diversity of corporate governance standards in the NFP sector can be expected to continue to be evident.

The *Australian Charities and Not-for-profits Commission Regulation 2013* on governance standards furthermore suggests ‘protections’ that would enable a registered entity to demonstrate compliance with some of its responsibility in this context.⁸⁸ In terms of the protections, a registered entity is regarded as having taken all reasonable steps to ensure that its responsible entities have complied with the duties referred to above, insofar as the responsible entity meets a ‘protection’. The ‘protections’ once again mirror language used in the *Corporations Act 2001* (Cth) and bear close resemblance to, for example, the statutory business judgment rule in terms of section 180(2) of the *Corporations Act 2001* (Cth),⁸⁹ the statutory defences against insolvent trading liability as per s 588H of the *Corporations Act 2001* (Cth),⁹⁰ and so on.

3 Ensuring Compliance with Governance Standards

The ACNC Act attempts to ensure compliance with the statutory governance standards in various ways. Compliance with the

⁸⁶ See Note 2 to *Australian Charities and Not-for-profits Commission Regulation 2013* reg 45.25(2).

⁸⁷ Council of Australian Governments, *Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities* (January 2013) 76.

⁸⁸ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) regs 45.100-45.120.

⁸⁹ With specific reference to Protection 2. See Australian Government, Treasury, *Development of Governance Standards*, Consultation Paper (December 2012) 24 [3.6].

⁹⁰ With specific reference to Protections 3 and 4: see Australian Government, Treasury, *Development of Governance Standards*, Consultation Paper (December 2012) 24 [3.6].

governance standards is a requirement for registration, for example, and any organisation that wishes to register as a charity under the ACNC Act must be able to demonstrate that it meets the governance standards.⁹¹ The obligation to comply with governance standards is a continuing obligation and a charity is required to continue to comply with these standards in order to maintain its status as a registered charity.⁹² Registered charities are furthermore required to notify the ACNC if there is significant non-compliance with the governance standards.⁹³ Non-compliance with governance standards is one of the 'thresholds' that would enable the ACNC to activate a number of its enforcement powers, for example the power to issue warnings or directions,⁹⁴ the power to suspend or remove the member of a governing body of a registered entity,⁹⁵ and ultimately to revoke the registration of the NFP in the most egregious of cases.⁹⁶ It is important to note, however, that some of these powers, for example powers related to suspension, removal and replacement of responsible entities, only apply to responsible entities of federally regulated entities.⁹⁷ Insofar as the responsible entity is not a federally regulated entity, these powers of the ACNC Commissioner would not apply.⁹⁸

4 *Regulatory Theory and NFP Governance Standards*

Regulatory theory offers a perspective to help understand public enforcement measures in relation to the activities of various sectors of society, including NFPs. In recent years it has become virtually impossible to comment on public regulation in the corporate space

⁹¹ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25-5(3)(b).

⁹² *Ibid* s 35-10(1)(a).

⁹³ *Ibid* s 65-5(2)(a)(ii).

⁹⁴ *Ibid* ss 80-5(1)(b), 85-5(1)(b).

⁹⁵ *Ibid* s 100-10(1), read with s 100-5(1)(b).

⁹⁶ *Ibid* s 35-10(1)(c)(ii).

⁹⁷ *Ibid* ss 100-5(1)(a)-(b).

⁹⁸ This aspect has been raised by, amongst others, the Financial Services Council in its submission in relation to the ACNC Draft Governance Standards, <http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/Governance%20Standards%20for%20the%20Not-for-profit%20Sector/Submissions/PDF/031_Financial_Services_Council.ashx>, accessed on 14 March 2013.

without referring to the ‘compliance pyramid’ model developed by Ayres and Braithwaite, and the device has been widely used in other sectors also.⁹⁹ In the case of the current changes to NFP regulation in Australia, it offers a model for analysing developments that is useful in light of industry unease with the reform agenda. The Ayres and Braithwaite framework is expressed in the form of a ‘pyramid’ within which compliance with regulations is enforced by remedies that become increasingly severe higher up the pyramid, as the corresponding breaches become more serious. The key assumption of the model is that regulation achieves maximum effectiveness where the more intrusive remedies are used least frequently (and vice versa).¹⁰⁰ This approach ensures that an incentive to trend towards compliant behaviour is inherent in the model; its authors suggests the model’s success lies in its ability to allow regulators to ‘speak softly, while carrying big sticks’.¹⁰¹

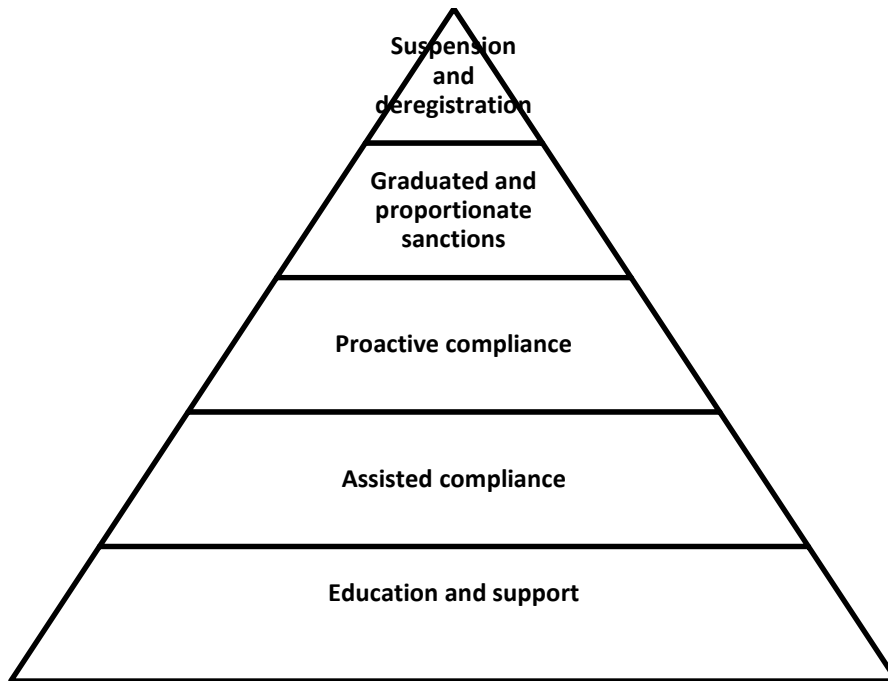
It is proposed that the regulatory powers of the ACNC are to be implemented on the basis of this regulatory pyramid, as illustrated below.¹⁰²

⁹⁹ The regulatory pyramid elaborated by Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) enjoys wide recognition in the Australian public regulatory context and has been adopted by various regulatory agencies. It was also adopted by the Cooney Committee in its recommendations regarding sanctions to regulate corporate directors and officer conduct. See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors’ Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) 190-191.

¹⁰⁰ Ibid 35-36. They assert that ‘[c]ompliance is optimised by regulation that is contingently co-operative, tough and forgiving’: at 51.

¹⁰¹ Ibid 40.

¹⁰² Australian Charities and Not-for-profits Commission, *Implementation Report*, Report, Implementation Task Force (June 2012) 5-6; see also Australian Government, Treasury, *The ACNC Exposure Draft Education, Compliance & Enforcement* (9 December 2011), Not- For-Profit Fact Sheets, <<http://www.treasury.gov.au/PolicyTopics/PeopleAndSociety/NFP-reform/Factsheets>>.



Education and support from the ACNC form the broad base of the pyramid.¹⁰³ This will include aspects such as good guidance materials, advice services, education, and capacity building. It is envisaged that this layer of regulation will be accessed in instances where a charity, for example, forgets to lodge a statement or report; or in cases of minor or common mistakes.¹⁰⁴ Assisted compliance, for example monitoring activities, phone calls and site visits will comprise the next level up.¹⁰⁵ These measures will become operative where a charity, for example, repeatedly fails to lodge documents on time.¹⁰⁶

¹⁰³ Australian Charities and Not-for-profits Commission, *Implementation Report*, Report, Implementation Task Force (June 2012) 6.

¹⁰⁴ Australian Charities and Not-for-Profits Commission, *Regulatory Approach: Statement for Consultation* (December 2012) 11, <http://www.acnc.gov.au/ACNC/Contact_us/Pub_consult_comment/RegApCon/ACNC/Edu/Consult_RegApp.aspx?hkey=c668823a-fc80-4754-affa-5c14529508b2>.

¹⁰⁵ Ibid.

¹⁰⁶ Australian Charities and Not-for-Profits Commission, above n 104, 13.

The third layer of the pyramid will focus on proactive compliance, including investigations, responding to serious complaints and use of compulsory powers to gather information.¹⁰⁷ More serious transgressions will be addressed by way of regulatory sanctions found in this layer of the pyramid, for example where there is evidence of excess financial benefit to owners, or evidence of tax evasion.¹⁰⁸

The second layer from the top consists of graduated and proportionate sanctions, such as warnings, directions, enforceable undertakings and injunctions,¹⁰⁹ aimed at regulating conduct such as entry into financial transactions that risk insolvency; involvement in illegal activity; and private benefits obtained by board members.¹¹⁰

Suspension and deregistration are at the apex of the pyramid for the most blatant breaches of the law.¹¹¹ In line with the philosophy underpinning the Ayres and Braithwaite pyramid, namely that regulation is most effective when increasing intrusiveness is matched by decreasing frequency of use,¹¹² it is envisaged that the most active enforcement powers will only become relevant in a small number of cases where the seriousness of the case warrants the use of these powers.¹¹³ Matters that are regarded as serious enough to warrant use of the last layer of sanctions include misuse of the charity for serious criminal purposes (including financing terrorist activities) or significant private benefit.¹¹⁴ Only time will tell whether these measures are able to regulate conduct within not-for-profit organisations effectively, with the ACNC acknowledging that limits to its legal powers mean that it may not always be able to

¹⁰⁷ Ibid.

¹⁰⁸ Australian Charities and Not-for-Profits Commission, above n 104, 13.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) 35-6.

¹¹³ Australian Government, Treasury, *Development of governance standards*, Consultation Paper (December 2012) 7 [2.3.1].

¹¹⁴ Australian Charities and Not-for-Profits Commission, above n 104, 13.

suspend or remove individuals or impose graduated and proportionate sanctions.¹¹⁵

It is likely that the NFP industry in Australia, as a matter of general principle, would be sympathetic to Ayres and Braithwaite's logic. Much of the initial negative response to the proposed NFP reforms appeared connected to the industry's perception that 'big sticks' might be used to punish small NFPs for minor transgressions:

[t]here will always be [NFPs] that exploit the system, but [the Government] will end up over-regulating it and it's the smaller, hard working community organisations that will pay.¹¹⁶

Some of these concerns may also be allayed by statements by the ACNC more recently to the effect that 'minimum action required to address the issue' will be taken and that charities will usually be given a chance to explain before any formal powers will be put to use.¹¹⁷

5 *Analysis and Critique*

The application of NFP governance standards is unusual in the sense that although the governance standards, in particular governance standard 5, mirror typical corporate directors' duties, the burden of ensuring compliance with these appear to rest on the NFP, rather than on the person in the managerial position,¹¹⁸ which may derogate from their efficacy. Further, should the responsible entity (or 'director' equivalent) be able to demonstrate one of the defences that could typically apply where a breach of directors' duties is alleged,

¹¹⁵ Ibid.

¹¹⁶ David Gilchrist, Curtin University, *Directors Social Impact Study 2012-Examining the contribution of directors to Australia's not for profit sector* (2012) 28.

¹¹⁷ Australian Charities and Not-for-Profits Commission, above n 104, 14.

¹¹⁸ As discussed above, with reference to the fact that non-compliance with governance standards is one of the 'thresholds' that would enable the ACNC to activate a number of its enforcement powers, for example the power to issue warnings or directions: see *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 80-5(1)(b), 85-5(1)(b).

the NFP would be deemed to have complied with its obligation in ensuring adherence to appropriate governance standards.¹¹⁹ It is also uncertain what the consequences will be where a responsible entity fails to comply with the governance standards, while the registered entity is in a position to demonstrate that it took reasonable steps to apply the duties embodied in the governance standards. This would seem to indicate a general confusion of principles in relation to responsibility for discharging the obligations, and ability to raise the defences.

Further, as previously mentioned, a registered entity that is already subject to State or Territory legislation that applies these duties, need not implement 'steps' to apply duties contained in the governance standards, as the responsible entity will already be subject to those duties.¹²⁰ It is unclear, however, whether non-compliance with these duties will result in consequences as per the ACNC Act, or consequences in terms of the other legislation, or both.

It is also submitted that mechanisms to ensure compliance with the governance standards are lacking. The responsibility to ensure compliance with the governance standards rests on the NFP. Non-adherence to the governance standards could result in a range of consequences, as discussed above. In the most egregious of cases it could involve the deregistration of the NFP, resulting in its inability to access tax concessions. However, the repercussions for the responsible entity, the person or entity that is actually acting contrary to these standards, are minimal or non-existent. Only in cases where the responsible entity is a federally regulated entity, will the ACNC Commissioner be able to access powers to suspend or remove the entity. Express provision is not made for personal liability on the part of the responsible entity, however, as is the case when directors of for-profit companies are in breach of their duties to the

¹¹⁹ See *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.100.

¹²⁰ Explanatory Statement to *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No 1)* (Cth) sub-div 45-B.

corporation. This particular point also raises a further concern, namely the discrepancy in result of non-compliance with governance standards, depending on whether the responsible entity is a federally regulated entity, or not. None of these factors suggests an ideal application of the graduated sanctions of Ayres and Braithwaite's regulatory pyramid.

Lastly, even though some consequences could flow where it can be shown that a registered entity failed to take steps to apply the duties in the governance standards to responsible entities, it is unclear how the ACNC Commissioner will become aware of this failure. It seems fairly obvious that a registered entity will not report its own failure in this regard, as the consequences of the failure will be primarily visited upon the registered entity and not the responsible entities. The absence of financial stakeholders in the registered entity, as discussed above, exacerbates this problem. In this context whistle-blowers could play an important role in ensuring regulatory compliance. No express statutory provision is made for the protection of whistle-blowers in this context, however.¹²¹

¹²¹ The ACNC Act does not make any specific reference to whistle-blowers. However, the ACNC does take concerns about registered charities seriously. Generally, while the ACNC cannot act on concerns about internal disputes, it will act where there is a 'serious risk to public trust and confidence' which relates to a charity's compliance with the requirements of the ACNC Act: ACNC, 'Raise a concern about a charity', <http://www.acnc.gov.au/ACNC/Contact_us/Raise_Concern/ACNC/Adv/Raise_Concern.aspx?hkey=5fe0e51d-b2e3-4417-8de9-799d0f90b483>. Pursuant to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) div 150 ('Secrecy'), a complainant, their personal information, and any details relating to the charity are 'protected ACNC information', meaning 'information that: (a) was disclosed or obtained under or for the purposes of... [the ACNC]... Act; and (b) relates to the affairs of the... [registered charity]..; and (c) identifies, or is reasonably capable of being used to identify, the ... [registered charity]...': at s 150-15. The ACNC will accept anonymous complaints (presumably including any from whistle-blowers) where appropriate: Australian Government, ACNC Commissioner's Policy Statement: *Complaints about Charities* (CPS 2012/06 effective from 3 December 2012), <http://www.acnc.gov.au/ACNC/Publications/Policy_PDFs/CommSt_CharComplain.aspx>.

IV CONCLUSION

Given the size and significance of the not-for-profit industry in Australia, the importance of appropriate governance standards in the NFP sector cannot be denied. From this perspective, the reform agenda in the NFP sector is to be welcomed. In particular, moves to establish a public regulator, the ACNC, tasked as it is with enforcing these governance standards is to be welcomed, due to the resource, information and structural asymmetries within the NFP sector that militate against effective individual enforcement.

Unfortunately, the reforms appear to leave a number of important questions unanswered. It is submitted that the new framework contributes to increased confusion and lack of clarity for a number of reasons. The interaction between NFP standards and standards in terms of other (potentially applicable) legislation is not clear. Furthermore, even though the formulation of the standards resembles well-known formulations of directors' duties, the consequences of non-compliance do not appear to fall on the responsible entity (or 'director' equivalent). The consequences of non-compliance also appear to vary, depending on whether the responsible entity is a federally regulated entity, or some other entity. Moreover, the reforms do not make adequate provision for adequate regulatory enforcement of the governance standards. For example, it is unclear how the ACNC Commissioner will be alerted to non-compliance with governance standards. The clearly gradated hierarchy of regulatory responses indicated by Ayres and Braithwaite's well-known pyramid is not easily recognisable in this somewhat confusing governance model.

It is conceded that the diversity of bodies comprising the NFP sector contributes to the difficulty in legislating appropriately in this arena and it has been noted that 'legislation could either burgeon into volumes if it catered for even the modest diversity of legal structure and governance or at the other extreme be too compromised, if the

bare bones of legal facilitation were merely adopted'.¹²² In this instance, it seems as if the 'bare bones of legal facilitation' have been adopted. The missed opportunity is a great pity.

Whether industry feels that it has now been listened to, and whether the reforms will cause as much disruption and additional cost burden as industry seem to anticipate, is yet to be determined. Given the size and significance of the NFP sector, and its likely continued strong growth (given on-going outsourcing of service provision by government), together with the seeming shortcomings of the current reforms, it will not be surprising if the issue of NFP governance will remain under the regulatory radar for some years to come.

¹²² Myles McGregor-Lowndes and Frances Hannah, 'Unincorporated Associations as Entities: A Matter of Balance between Regulation and Facilitation' (2010) 28 *Company and Securities Law Journal* 197, 218.