27 January 2012

Philanthropy & Exemptions Unit
Personal and Retirement & Income Division
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THE IAN POTTER FOUNDATION

SUBMISSION ON CONSULTATION PAPER
"REVIEW OF NOT-FOR-PROFIT GOVERNANCE ARRANGEMENTS"

This submission is made by The Ian Potter Foundation, The George Alexander Foundation and The Ian Potter Cultural Trust.

We have had the advantage of reading the draft submission made by Philanthropy Australia ("PA"). In general we are in agreement with that submission, although not in all instances.

In particular we agree with PA's response to Consultation Question 24, that the best way to ensure that there will in fact be a reduction in red tape is not to introduce unnecessary complications and micro-managing into the ACNC's functions, but to let the directors and trustees continue to do their job.

We are also concerned that the passage of regulatory administration of not-for-profit bodies ("NFPs") from State to Federal government will involve a reinvention of the wheel. This is evident from the framing of a number of the Consultation Questions that have been asked.

We share PA's grave concerns that there will be a doubling up of regulation and reporting obligations, particularly initially.

We now turn to some of the Consultation Questions:

1. *Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and whom they owe duties to?*

2. *Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The Public? The entity, or mission and purpose of the entity?*

   It would be legally dangerous to legislate on this matter. So far as charities are concerned, the trustee's duty at law is to deal with the fund for the charitable purposes specified in the terms of the trust, and the meaning of this has been spelt out by the courts over the centuries. A donor has at law no claim on the trustees, and should have none. The Attorney-General is by law the guardian of the public interest and can bring the trustee before the court for breaching the trust.

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3. *What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?*

There is no case for reinventing the wheel in this regard. In charitable trusts such as ours, the trustee is a corporation and the directors' legal duties are those specified in the *Corporations Law* for companies limited by guarantee. The formulation of these duties has been developed over many years and it would be a retrograde step to depart from it. Volunteer directors of a trustee company of a charitable trust should not be placed under a greater liability than the directors of BHP Billiton. The provisions of the *Corporations Act* specifying the duties of directors of a company limited by guarantee should be transposed into the ACNC legislation without substantive change.

As to NFPs other than charities, we can see some reason for having a lesser standard of liability in appropriate cases, though it may be difficult to specify what is appropriate.

4. *What should be the minimum standard of care required to comply with any duties? Should any standard of care be higher for paid employees than volunteers? For professional than lay persons?*

Here again, there is no call for special legislative treatment. The common law already takes care of the higher duty imposed on directors with special qualifications in relation to the matter in issue.

5. *Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on the size of the NFP entity or amount of funding it administers)?*

Here, again, there is no cause to reinvent the wheel. A director of BHP Billiton is not required by the *Corporations Act* to have any special qualifications or experience, yet he administers vastly greater amounts of money provided by the public than a director of an NFP charity or other entity is ever likely to do.

10. *Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?*

The *Corporations Act*, but possibly with an alternate model based on incorporated associations legislation for those organisations for which that would be more appropriate.

15. *Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?*

The issue for NFPs' directors is no greater than for company directors, and the legislation should therefore not exceed the *Corporations Act* provisions.

16. *Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?*

The implication from the way in which this question is framed is that the fact that the funds come from the public requires that the directors of an NFP must take greater care of them than the directors of a commercial enterprise would do. This is of course nonsense. Every public listed company receives share capital from the public, and maybe loan moneys as well, usually in considerably larger amounts than NFPs receive. The member of the public who invests in the listed company has very much greater reason to be concerned about how the investment is safeguarded than where he or she has simply given the money away. In the case of both for-profit and

not-for-profit entities, therefore, the obligations of the custodians of the funds should be no greater than those prescribed by the *Corporations Act*.

17. *Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure that they have adequate procedures in place?*

We agree with PA's recommendation that there be no mandated requirement for an investment policy.

18. *Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?*

No, it would be quite inappropriate. The need for insurance, the choice of risks to be insured, the amount of cover, and the extent to which the NFP will be "self insured" are commercial matters for the discretion of the directors in the light of their assessment of the risks of the particular entity, not for the regulator to impose. Such a mandate would be bureaucratic micro-management at its worst.

19. *Should responsible individuals generally be required to have indemnity insurance?*

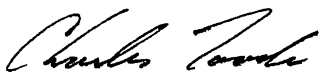
No, for the same reasons as for question 18.

Risk Management generally– It has been suggested that AS/NZ ISO 31000-2009 be adopted as a principle. We would make the point that the key word is "principle". While the standard might be recommended in appropriate cases, it would of course be inappropriate micro-management to impose compliance with the standard on NFPs as a mandatory obligation.

20-23 These Consultation Questions all relate to matters involving the constitutions or rules of NFPs. They are matters between the NFP and its members and should no more be mandated by the legislation or the ACNC than they are for corporations or incorporated associations. Of course, optional model rules would be advisable for NFPs that are the equivalent of incorporated associations under State laws.

20-24 *How can we ensure that these standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red tape for NFPs?*

- Keep it simple.
- Don't over-regulate.
- Don't reinvent the wheel.
- Don't micro-manage.
- Educate and lead rather than drive.



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