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Level 12  
Angel Place  
123 Pitt Street Sydney  
GPO Box 4172  
SYDNEY NSW 2001  
Australia  
DX 365 Sydney  
Telephone 02 9229 9000  
Facsimile 02 8256 1459

Mr John Hawkins  
Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Sir

### **Disclosure regimes for charities and not-for-profit organisations**

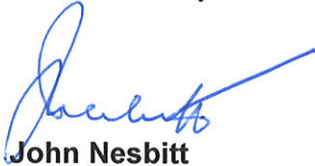
I refer to the background paper issued by the Senate Standing Committee on Economics. Perpetual Limited (Perpetual) welcomes the inquiry outlined in that paper.

I enclose a submission on behalf of Perpetual.

Should there be a need to discuss any aspect of the submission please contact Catherine Baldwin at [catherine.baldwin@perpetual.com.au](mailto:catherine.baldwin@perpetual.com.au) or on 02 92293772.

Perpetual looks forward to the next phase in the inquiry process.

Yours sincerely



**John Nesbitt**  
Group Executive - Private Wealth  
Direct Phone 02 9229 9067  
E-mail [john.nesbitt@perpetual.com.au](mailto:john.nesbitt@perpetual.com.au)

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# Perpetual Limited

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## **Inquiry into the disclosure regimes for charities and not-for- profit organisations.**

**Submission to the Senate Committee on  
Economics**

**September 2008**

## Introduction

For over 120 years, Perpetual has helped individuals, families and companies realise their philanthropic aspirations. We have helped many charitable and non-profit organisations to maximise their financial resources and become more effective in the community by investing and managing their funds. We have also contributed to the growth and development of community services through the allocation of philanthropic donations to a wide range of charitable and community organisations.

Perpetual is one of the largest managers of private charitable foundations in Australia, with over \$1.2 billion in funds under management as at 31 December 2007. As trustee of over 400 charitable trusts, we have assisted in the establishment and distribution of funds for medical, social, environmental, religious, cultural and educational purposes. Each year Perpetual make grants to charities of approximately \$40 million and in the process engages with 1,000s of non-profit organisations.

Our proven success in managing charitable funds in Australia and growing the assets of charitable trusts means we understand the present and future needs of philanthropists, charitable and non-profit organisations as well as professionals servicing these groups.

Perpetual established the Perpetual Foundation as a public charitable trust in 1998. It brings together the generosity of individuals and organisations with the expertise and resources of Perpetual, providing the community with valuable support. The Foundation's key objective is to promote thought leadership and best practice in philanthropy. Through the Foundation we offer opportunities for open discussion in the areas of philanthropy and the social economy by providing forums and commissioning research. Philanthropists, non-profit organisations, industry bodies, government and business are encouraged to engage in our open discussions. The Foundation places a particular emphasis on improved leadership, management and governance of non-profit organisations and their capacity to achieve sustainability for the long term benefit of Australian society.

Research commissioned last year by the Perpetual Foundation, on leadership and management in the Australian social economy, identified the need for improved governance of charities.<sup>1</sup>

Therefore Perpetual is well placed to comment on

- the relevance and appropriateness of current disclosure regimes for charities and all other not-for-profit organisations;
- models of regulation and legal forms that would improve governance and management of charities and not-for-profit organisations and cater for emerging social enterprises; and
- other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability and transparency its use of public and funds.

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<sup>1</sup> [http://www.perpetual.com.au/pdf/research\\_report.pdf](http://www.perpetual.com.au/pdf/research_report.pdf)

## **Concerns for the not-for-profit sector**

The first concern is a definitional one. There is confusion in the use of terminology describing the participants in this sector. The following descriptions need to be defined and the relationship between them clarified - not-for-profits, charities, social enterprises, charitable, trust, foundations and the like.

Also there are “doing” participants and “giving or “funding” participants.

Where does a trustee corporation such as Perpetual fit in? Perpetual is neither a charity nor not-for-profit organisation but, as indicated, still plays a significant role in the philanthropic environment.

Also, any discussion involving trustee corporations needs to take into account the current Federal Treasury Green Paper on, amongst other matters, uniform trustee corporation regulation. As a consequence of this Green Paper, a single, national regulatory scheme will be introduced by the Federal government through Commonwealth legislation. The preferred model seems to be one based on the inclusion of additional provisions to the Corporations Act 2001 with the regulator being the Australian Securities & Investments Commission (ASIC). The requirement for disclosure and reporting by trustee corporations should be addressed in this new legislation.

The Senate enquiry needs to settle on a consistent terminology and definition for the participants in the sector for the purpose of the enquiry before it can consider the issue of disclosure. What the appropriate structure is for those participants is also related to this consideration and is important to resolve before a determination is made as to what is appropriate disclosure.

In the context of the Senate enquiry, what do the following obligations mean and how do they interact – governance, disclosure, transparency and accountability? They are often used as if they are interchangeable but this is not necessarily the case. Again this enquiry needs to determine what each obligation entails.

The second concern is the lack of a consistent, national focus and oversight of the sector. This is due to the number of structures under which the participants operate, the fact that those structures are subject to different federal and state legislation, and the involvement of a number of quasi regulatory bodies ranging from the Australian Taxation Office (ATO), ASIC through to individual state and territories departments issuing fund raising licences.

Therefore a regulatory review of the not-for-profit sector should have the following objectives:

- uniformity in reporting;
- public accountability;
- simplicity;
- one national regime;
- transparency between the various stakeholders; and
- cost effectiveness.

## **Questions for consideration**

Looking at the specific questions for consideration raised by the background paper, Perpetual's view is as follows.

### ***1. Are current disclosure regimes for not-for-profit organisations adequate?***

No, the current disclosure regimes for not-for-profit organisations are not adequate.

*If not, why not?*

There is inconsistent or non-existent disclosure because of the lack of a uniform national approach to such disclosure. There is no consistency in the level of disclosure required or in the supervision of such disclosure.

Lack of disclosure by not-for-profit organisations does not engender public confidence as there is a consequent lack of public accountability. Inability to access financial and non-financial information inhibits the ability of donors and funders to properly understand the economic basis on which not-for-profit organisations operate.

The sector is disadvantaged by the paucity of research and analysis on trends and drivers impacting not-for-profit organisations. Comprehensive research is dependent on availability of and access to data, and the ability to make comparisons and to benchmark not-for-profit organisations.

## ***2. What would be the potential advantages and disadvantages for not-for-profit organisations of moving towards a single national disclosure regime?***

The advantages of moving towards a single national disclosure regime would be consistency and certainty. All the stakeholders in the sector would be in the same position and not disadvantaged by lack of information or subjective reporting by individual organisations.

The major disadvantage would be providing a single regime for the broad range of participants in the sector – between the “doers” and the “givers”; the simple community based organisations and the social investment organisations; the public funds and the private funds; and the large and the small.

A related disadvantage would be the cost of compliance with the disclosure regime. In real and relative terms, this cost would, most likely, have a greater impact on the smaller, less sophisticated organisations.

However, harmonisation in disclosure requirements would produce efficiencies and reduce the current onerous and multiple reporting regimes. Application of the Standard Chart of Accounts (developed by QUT) would improve consistency in reporting and improve the overall standard of financial reporting.

*How might any disadvantages be minimised?*

All participants in the sector should be required to be of the same structure, regulated under the same legislation. This preferably should be a corporate structure under the Corporations Act 2001 and regulated by ASIC. This could also apply to the trustees of charitable funds where at least one of the trustees would be a corporate trustee.

The same reporting standards should be applied to all organisations but with increasing levels of detail and information as the complexity of the organisation increases. The cost of the reporting would reflect the level of complexity required. Exemptions could be given if the reporting has already been provided under another legislative requirement to the same regulator. For example, the reporting standard for strata corporations is tailored according to the relative size and complexity of the property.

**3. Would a standardised disclosure regime assist not-for-profit organisations who undertake fundraising activities, and who operate nationally, to reduce their compliance costs if it meant that they would only have to report on fundraising to a single entity (rather than reporting to each state and territory)?**

Yes, this is one of the major areas of duplication currently in place because the need for a fund raising licence is state and territory based. There are inconsistent approaches between each state and territory requiring different levels of information and details. There are differing levels of interest and understanding between the various departments that are tasked with the issue of the fund raising licence and different interpretations of the applicable legislation.

By way of example, the Perpetual Foundation, as a public ancillary fund, is required to hold fundraising licenses in each state and territory simply to enable receipt of public donations. The emphasis in fundraising regulation should be directed towards transparency and accountability for costs incurred and net revenue raised. Building confidence in fundraising is both in the public interest and of direct benefit to the development of the not-for-profit sector

**4. If there was to be a nationally consistent disclosure regime, should it apply across all not-for-profit organisations or should different regimes apply to different parts of the sector? For example, should charities be treated differently than other not-for-profit entities?**

The nationally consistent disclosure regime should apply to all organisations across the sector. Although there is a wide diversity of organisations in the sector, and this is a healthy sign of a vibrant sector, this is also one of the prime reasons for the uncertainty and difficulty experienced in the sector. As indicated in 3 above, there would need to be benchmark reporting based on the level of complexity of operation of organisations.

**5. If different regimes were to apply to different parts of the sector, how would this be determined and why? For example, would it be based on classifications, i.e. as a charity or deductible gift recipient, or would different regimes apply to different organisations based on their annual financial turnover or staffing levels (or some other proxy for size and/or capacity)?**

Without propagating the current uncertainty and complexity, if different regimes were to apply, these would need to be determined at 2 levels. Firstly there would need to be a distinction between those organisations that are fundamentally community based and reliant on minimal public funding and those that are engaged in regular public fund raising.

And then there would need to be a classification in each group based on annual financial turnover with differing thresholds and benchmarks as the complexity of the organisation increases.

Interestingly, these different classifications could still apply in the single national disclosure regime.

### **Calls for regulatory reform**

There is a definite need for the reform of the not-for-profit sector in Australia with the establishment of a single regulatory entity. The regulatory entity does not need to be new entity but the responsibility can be incorporated into an existing entity such as ASIC.

ASIC is the ideal choice as it already has responsibilities for corporations and, hopefully, will have responsibility for trustee corporations.

## Questions for consideration

### **1, Does there need to be regulatory reform of the not-for-profit sector?**

Yes.

*If not:*

- *Why not?*

Not applicable.

- *Are there alternative (non regulatory) measures that might be taken by government and the not-for-profit sector to address some of the concerns raised by groups such as Choice about the governance, standards, accountability and transparency of not-for-profit organisations who use public and/or government funds?*

Without the authority of regulation which has a national focus with a consistent set of reporting standards, it would be impossible to implement any alternative regime that would be effective because of the current diverse nature of organisations in the not-for-profit sector. There would not be the collective will necessary to implement and adhere to such an alternative regime.

- *Who should be responsible for progressing and/or funding these measures?*

No comment is necessary.

- *How might the uptake of any such measures be monitored?*

No comment is necessary.

*If so:*

- *What should be the objectives of reform?*

The objectives of the reform should be:

- uniformity in reporting;
- public accountability;
- simplicity;
- one national regime;
- transparency between the various stakeholders; and
- cost effectiveness.

- *Are there minimum requirements that must be met in order for a national regulatory system to be worthwhile?*

The minimum standards would be those of any organisation involved in the management of public and private funds with the appropriate acquittal standards for the use of those funds.

- *Should regulatory reform apply to the whole not-for-profit sector, or only to segments of the sector? For example, to charities; to bodies receiving public funds, whether through*

*grants or tax concessions; to bodies with a financial turnover above a specified threshold etc?*

The regulatory reform should apply to the whole not-for-profit sector. The concept of competitive neutrality should apply to the sector – all organisations should be on a level playing field when competing for private and public funding. This is not to say that there cannot be different relative thresholds and benchmarking to reflect the level of reliance on such funding and the level of annual financial turnover, or other differentiating criteria.

*• Where should the impetus for reform come from? Who should drive reform?*

The impetus for reform should be driven by all participants of the not-for-profit sector itself. Organisations such as Perpetual should take the lead in such drive. However, any drive for reform will need the full support of the federal government and the cooperation of state and territories governments. The latter governments may have to devolve some constitutional powers to the Commonwealth or agree that the Commonwealth has the appropriate constitutional powers in the first place.

*• What sort of consultation should be conducted on the nature of any regulatory reform? How could input be facilitated from across the broad range of organisations that comprise the not-for-profit sector?*

The opportunity for extensive consultation should be offered across the broad range of organisations. This is partially being achieved by this Senate inquiry but will need to be extended to focus groups across the country in city, provincial and rural public forums. However before this can be done the issues raised at the beginning of this submission need to be resolved – who constitutes the not-for-profit sector and what does disclosure mean. This Senate inquiry should take the lead in resolving these issues and setting the terms of reference for the broader consultative process.

*• Are there particular models of regulation and/or legislative forms that would be useful, in the Australian context, in improving governance and management of charities and not-for-profit organisations and in catering for emerging social enterprises? What are the perceived advantages and/or disadvantages of these models?*

Perpetual supports a model of regulation along the lines of the Charities Commissions established in other countries but not on the basis of a new regulator. The role and responsibilities of such a Commission could be incorporated as part of an existing regulator such as ASIC. Any legislative requirement could be inserted as an additional part of the Corporations Act 2001. This would provide sufficient authority to the regulation and would leverage the existing national structure of such an organisation as ASIC. As well, if the recommendation that all participants in this sector be incorporated under the Corporations Act 2001, there would be existing synergies in having ASIC as the regulator.

A potential negative aspect would be the increase responsibilities for ASIC.

To ensure sector input into the regulatory process, a not-for-profit governance council could be established along the lines of the ASX Corporate Governance Council. Participation of representatives from the sector on such a council would be voluntary and would have secretariat support from ASIC. Guidelines, standards, protocols and broader governance and sector issues could be debated and resolved through a council of this kind. In the first instance the work of such a council could build on the initiatives of the



ASX Corporate Governance Council in establishing principles for publicly listed companies.

## **2. Should there be a single national regulator for the not-for-profit sector?**

Yes. The services provided by the not-for-profit sector are not limited by state and territory boundaries. Multiple regulation puts unnecessary restrictions on the sector and leads to duplication, complexity and confusion.

*If not,*

- *Why not? What would be the disadvantages in having a single national regulator?*

There are no disadvantages.

*If so:*

- *Should a national regulator be responsible for the entire not-for-profit sector or only the charitable sector?*

The regulator should be responsible for the entire not-for-profit sector.

- *Should the regulator be independent of government?*

The regulator needs to be supported by appropriate legislation and dependant on the infrastructure provided by the federal government, but it needs to be independent of the political will of the government of the day.

- *Where would the regulator be best located? For example, as a stand alone agency or located within an existing institution, such as the Australian Securities and Investment Commission.*

For the reasons previously stated, the regulator should form part of ASIC.

- *What would be the role of a national regulator? For example, should it have an:*
  - *educative/advisory role*
  - *enforcement role*
  - *mediation/dispute resolution role?*

A national regulator would carry out all of these roles either directly itself or indirectly by approving suitable outsourced agencies such as external dispute resolution providers. It should also have a role in the registration and licensing of participants in the sector and the issue of fund raising licences.

- *Should a national regulator be responsible for making decisions about charitable status?*

Yes, this would be fundamental to its role and would support the role of registration and licensing. This would include some of the responsibilities currently done by the ATO, such as determining income tax status, deductible gift recipient status and prescribed private fund approvals.

- *How should any national regulator be funded - for example, by the federal government, by federal, state and territory governments, or on a cost recovery basis?*

Funding should be by way of a combination of all of these options. All levels of government should participate in some level of funding through normal federal/state financial arrangements. Within reason and based on relativity, there should also be some funding by way of cost recovery/user pays.

### **3. Should there be a single, specialist, legal structure for the not-for-profit sector?**

Yes, as previously stated, there should be some form of incorporation under the federal legislation - the Corporations Act 2001.

*If not,*

• *Why not? What would be the disadvantages in having a single, specialist, legal structure for the not-for-profit sector?*

The major disadvantage would relate to the conversion of existing state regulated, or informal, structures to a more formal national structure. There would have to be transitional and grandfathering provisions to accommodate these organisations.

*If so, would this be best achieved through:*

- *A national legislation scheme, whereby current national and state and territory laws relating to the not-for-profit sector are harmonised into uniform law; or*
- *The referral of powers from the states and territories to the Commonwealth, allowing for incorporation of current laws relating to the regulation of the not-for-profit sector, for example, incorporations Acts and fundraising Acts, into Commonwealth legislation?*

This would be achieved by a combination of both of these options – the referral of powers to the Commonwealth (so there is one national legislative authority with the appropriate constitutional powers) and the implementation of a national legislation scheme (to provide for one piece of national uniform legislation).

• *What should be the minimum features of any legal structure?*

The minimum features would be those of a company limited by guarantee. Consideration should be given to the legal structure established in the UK to support social enterprises that by nature have a commercial component to their otherwise not-for-profit business model. Any commercial gain through direct business or partnership is returned to the entity rather than to shareholders (as is the case with for-profit entities). Enabling not-for-profit organisations to be more entrepreneurial and to have self-generated revenue would assist the long term viability for the not-for-profit sector.

The Perpetual Foundation is developing philanthropic filters to assist in the selection and assurance of charities and not-for-profit organisations as part of Perpetual's grant-making strategy. Our aim is to build confidence in philanthropy and to improve the transactional process between donors and not-for-profit organisations. The filters will facilitate a more transparent and comprehensive disclosure of organisational processes, including financial reporting and governance. During October and November we will be consulting with not-for-profit organisations, philanthropists and funders on the implementation of this new approach to grant-making.