IS IT A NOT-FOR-PROFIT ORGANISATION OR A FOR-PROFIT ORGANISATION? THE CASE FOR A CIC STRUCTURE IN AUSTRALIA

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ABSTRACT

Australia’s not-for-profit sector has fundamentally changed. The sector was once informally organised and unconstrained by the exigencies of commercial and government pressures; at its core there was a strong sense of affection. However, in recent times the sector has exploded to become first a highly organised, competitive space and subsequently a significant economic contributor. Participants in this sector are now de facto organisational structures which function and behave as an extension of the government or as a for-profit company. These changes in behaviour raise questions: are Australia’s traditional not-for-profit structures out-dated, and is there a need to introduce a hybrid form of organisation? The starting point of this article is the significant change observed in Australia’s not-for-profit sector. From here this article discusses the way these changes have made it an increasingly challenging task to clearly differentiate between traditional not-for-profit organisations, for-profit organisations and social enterprises. This challenge illuminates the complexity and scope of organisational behaviour that has blurred the sector’s boundaries. Addressing this issue of blurred boundaries, the United Kingdom has introduced the structure of a Community Interest Company (CIC). Drawing on the UK experience and the identified changes in Australia’s not-for-profit sector, this article argues that a new organisational structure such as a CIC is needed. Lastly, this article will identify the shortfalls inherent in a UK-style CIC structure within the Australian corporate framework, and suggests ways in which they could be overcome.

Key words: Not-for-profit organisations, social enterprise, hybrid structures, Community Interest Companies, CICs.

1 INTRODUCTION

Not-for-profit organisations have developed internal structures and activities that have welfare and free market dimensions. These developments are in reaction to the state resiling from its welfare responsibilities and the increasing trend of not-for-profit organisations deriving income from commercial activities. The need to undertake commercial activities arises from pressure to cross-subsidise the organisation’s mission related services.¹ Not-for-profit organisations

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that carry on commercial activities invite potential legal and taxation consequences. Despite these risks, not-for-profits compete for profit margins and a place in the market, and altruism consequently takes a back seat. This change in behaviour affirms the need to find new ways to recognise that not-for-profits also have the ability to trade competitively in the marketplace.

However, acknowledging that not-for-profit organisations have mixed purposes can present problems from a trust perspective, as well as from within the regulatory and governance framework. This article will highlight the way Australia’s not-for-profit sector and its organisations — along with other common law jurisdictions — have changed, and how these changes now make it a challenging task to differentiate between a for-profit and a social enterprise. From here the article will aim to show that a new organisational structure is needed in Australia by examining the United Kingdom’s CIC. Lastly, this article will argue that Australia does need a new structure, such as a CIC, that will benefit not-for-profit organisations and social entrepreneurs and whether any identifiable shortcomings of this new structure can be overcome.

II Australia’s Changing Not-For-Profit Sector

The not-for-profit sector has made strong contributions both economically and to Australia’s social wellbeing. In Australia, the economic value of not-for-profit organisations is significant. According to recent data, not-for-profit organisations contribute $57,710m to Australia’s Gross Domestic Product¹ and there are approximately 59,000 economically significant organisations.² The net worth of assets held by not-for-profit organisations is $176B and the total income generated by not-for-profit organisations in Australia was estimated to be $107.5B for 2012–13. The main source of income was government (federal, state and local) followed by service provision ($57.87B).³ Government funding is generally directed towards community-based organisations that are involved in the provision of health services, residential aged care, disability services, etc.⁴ Outside these community-based organisations many other not-for-profits need to generate their own income through a diverse range of sources such as sales of goods and income from services, rent and investment income.⁵ This data shows that Australian not-for-profit organisations are building close working partnerships with government and need to undertake commercial activities to generate income and deliver much-needed services.

Through trading and ‘commercial adventurism’⁶ these divergent activities have made it an increasingly challenging task to clearly differentiate between not-for-profits, public agencies and for-profit organisations. This problem illuminates the complexity of the not-for-profit

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¹ ‘Mission drift’ may occur when not-for-profit organisations respond to government contractual demands and undertake activities outside their original mission statement or trust instrument. The legal implications of mission drift are that the organisation acts ultra vires, rendering contracts void and unenforceable. In these circumstances, officers or trustees will be personally liable to the other contracting party. Where an organisation engages in unauthorised activities it will lose its not-for-profit status and be taxed at a higher rate: Debra Morris, ‘Paying the Piper: The “Contract Culture” as Dependency Culture for Charities?’ in Alison Dunn (ed), The Voluntary Sector, the State and the Law (Jordan, 2000) 128; Stephen Lloyd and Alice F Walker, Charities, Trading and the Law (Jordn, 2nd ed, 2009) 9.


⁴ An economically significant organisation will self-generate 50 per cent of its income through services for a fee, as well as rely on government grants (approximately 37 per cent) and from philanthropic sources (approximately 9 per cent). Australian Government Productivity Commission, Contribution of the Not-for-Profit Sector, Productivity Commission Research Report (January 2010) 72.

⁵ Above n 4, 2.

⁶ Above n 4, 466.
organisation’s situation, which has blurred the sector’s boundaries. However, traditional theoretical frameworks point to various unique features and characteristics that define a not-for-profit organisation. For instance the structural operation definition, Hansmann’s ‘non-distributive constraint’ principle, and trustworthy theories all describe ways in which not-for-profits are different from other units. These early theories overlook the widespread challenges which not-for-profit organisations face today. The main challenge with which not-for-profits must deal with is how to meet the ever-increasing demand for their goods and services. In meeting these demands, not-for-profit organisations are finding opportunities to maximise trading opportunities combined with service delivery. Ben-Ner and Van Hoomissen acknowledge that this maximisation of utility and monetary returns is entrepreneurial. The phenomenon of social entrepreneurship over the past decade has also contributed to structural isomorphism. Di Maggio and Anheier questioned the coherence of not-for-profit organisations when they found that the differences between the for-profit and not-for-profit sectors is due to distinct legal forms, but is rather a result of changes in key factors such as funding and clients, which override any distinguishable differences between the two sectors. Contributing to this problem of blurring of sectoral boundaries is the advent of ambiguous legal forms such as social enterprise. This mixture of features and functions has created difficulty in defining and understanding the essential nature of social enterprise.

The consensus among academics is that social enterprises are organisations or ventures which pursue financial success in the private marketplace in combination with a social purpose. This singular construct of social enterprise may also describe not-for-profit organisations, which balance commercial activities with their missions; this construct, can also describe a for-profit which pursues social goals. Further, it is claimed that social enterprises are organisations, which balance commercial activities with their missions; this construct, can also describe a for-profit which pursues social goals. Further, it is claimed that social enterprises are more diverse than not-for-profits and that they are not willing to be confined to one particular sector. This presents some difficulties in determining what prescribed legal form or legal characteristics constitute a social enterprise. Within Australia a social enterprise must chosen an organisational structure that will be confined to one of the sectors. However, social enterprises consider themselves different from not-for-profits as they have profit-distribution attributes.

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10 The blurring of sectoral boundaries has compromised the independence of the not-for-profit sector and it has been found that not-for-profit organisations are more concerned about their strategic positioning and financial security in the market. This change towards for-profit values is noted to be in direct conflict with an organisation’s core charitable activities and, further, diverts public resources to private gain. Estelle James, ‘Commercialism and the greater the possibility that it will resemble the other group.’ Paul Di Maggo and Walter Powell, ‘The Iron Cage Revisited — Institutional Isomorphism and Collective Rationality in Organizational Fields’ (1983) 48 American Sociological Review 147–160. See also Jeffrey Leiter, ‘Structural Isomorphism in Australian Nonprofit Organizations’ (2005) 16(1) Voluntas: International Journal of Voluntary and Nonprofit Organizations 1–31.

11 The five characteristics of the structural–operation definition are: (1) organised; (2) private; (3) self-governing; (4) non-disruptive of profit; and (5) non-compulsory or voluntary. See United Nations Handbook of National Accounting, Handbook on Non-Profit Institutions in the System of National Accounts (2003) 18.


13 Ibid, 835.

14 See also Salamon’s independency theory, which argues that regardless of government and market failures, non-profits exist as a result of the voluntary action of people’s social obligation. See Lester Salamon and Helmut Anheier, ‘Social Origins of Civil Society: Explaining the Non-Profit Sector Cross-Nationally (Working Paper, Johns Hopkins University, 1996); Helmut Anheier, Nonprofit Organisations — Theory, Management, Policy (Routledge, 2005) 130.


19 Dennis Young and Jesse Lecy, above n 18, 2.
and different from for-profits as they ‘have the priority to benefit the community over profit making.’

While these attributes seem contradictory, it appears that social enterprises are closer to not-for-profits, albeit that social entrepreneurs do not see themselves as being affixed to one particular sector. Nevertheless, efforts to find a standard definition of a social enterprise have shown that the organisational forms are arbitrary and no longer not fit for purpose — either for social enterprises or for economically significant not-for-profit organisations.

III HYBRID STRUCTURES

Australia’s traditional organisational forms have shown over time that they inhibit not-for-profit organisations’ ability to access and raise capital. There is little doubt that it is time to consider a new organisational structure that can better support the commercial activities of not-for-profits and is suitable for social enterprise activities in Australia. Such consideration of a new organisation form at this point in time is somewhat unlikely, as the federal government has announced the abolition of the Australian Charities and Not-for-Profit Commission and the expressed the desirability of not-for-profits being self-managed. This policy agenda is a clog on any idea of a new structure, but a discussion should nevertheless take place.

The evolution of not-for-profits in the marketplace makes the legal concept of the public benefit and the concepts of altruism complicated. Creation of hybrid structures can address these complications. Known hybrid structures are the low-profit, limited liability company (L3C) found in the United States and the Charitable Incorporated Organisation (CIO) and the Community Interest Company (CIC) in the United Kingdom. The focus of this article is on the CIC, as it is a relatively new structure which appears to be more suitable for social enterprise as well as not-for-profit organisations.

IV THE CIC STRUCTURE

The CIC was created in 2005 for organisations that did not want to be a charity, but wished to pursue altruistic activities. At the time of creation, the CIC structure was earmarked as an effective legal form for social enterprises. Specifically, the design of the CIC structure allows for people who would like to establish or conduct a business that trades with a social purpose, or for a community benefit. Common activities carried out by CICs are community medical practices, environment projects, childcare, arts and education projects. Like any other not-for-profit organisation, a CIC cannot be formed or used for the personal gain of an individual.

20 Ibid, 5.
21 Above n 8, Chap 7.
22 Explanatory Memorandum, Australian Charities and Not-for-Profit Commission (Repeal) (No 1) Bill 2014 (Cth) 1.
23 Traditionally, altruism was seen as any act by an individual that was free from any self-interest and motivated by ethics and goodwill, thereby contributing to social capital and civil society. In more recent times, the characteristics of altruism have been entangled in charitable purposes and the public benefit test. See Re Scarisbrick (1951) Ch 622. Acts of altruism, in an ever-changing social context, do not always square fit within the traditional meaning or the traditional heads of charitable purposes. For instance, venture philanthropists would label their actions as altruistic; however, such actions do not require that a benefit to the public be achieved. Further, it is not within the scope of this paper to discuss the regulatory process, such as the activities test (Navy Health Ltd v DFC of T [1996] Ch Com Rep 79); the destination of income test (Commissioner of Taxation of the Commonwealth of Australia v World Investments Ltd (2008) 236 CLR 204; the commerciality test (Re Education New Zealand Trust, HC, Wellington, CV-2009-485-2301 (29 June 2010)) or the commensurate test (T Von Hippel and W R Walz, ‘Tax Law as an Instrument to Strengthen Governance of Non-Profit Organizations’ (2011) 242–243.
24 This paper will not discuss the Charitable Incorporated Organisation (CIO), as that structure has some similarities to our incorporated association; both have a constitution and limited liability. The rationale for the creation of a CIO was to provide the benefit of incorporation by creating a legal personality for a charity and to provide the trustee/s with limited liability. Charity Commission, ‘Charities Act 2006 — What Trustees need to know’ 15–16.
25 Sara Burgess, The Regulator of Community Interest Companies, 2 <http://www.cicregulator.gov.uk/guidance/Chapter%201%20-%20October%202009%20%20version%204%20final.pdf>.
individual or a group of people, such as investors — nor can it be formed to support political purposes. However, if the organisation has a charitable status, it may apply to registered as a CIC subsidiary company with Companies House.

CICs’ members enjoy limited liability, and this structure can be put in place by incorporating a new company or converting an existing one. The forms a CIC may take are: a company limited by guarantee; a private company limited by shares; or a public company limited by shares. Before granting company status, the CIC Regulator must be satisfied that the company has met the asset lock test and the community interest test, which is similar to the public benefit test for charities. There is an inter-relationship between the asset lock test and the community interest test. For a company to satisfy the community interest test, ‘a reasonable person might consider its activities are being carried on for the benefit of the community.’ The asset lock test ensures that the company’s assets generated from its activities (including any profits or surplus) are used for the benefit of the community. The company’s articles of association must state ‘the company shall not transfer any of its assets for full consideration (market value).’

A CIC is permitted to pay dividends to shareholders, but this depends on the company’s article, which the company adopts from the Community Interest Company (Amendment) Regulations 2009 (UK). A CIC with share capital that adopts Schedule 2’s articles of association may pay dividends to an asset-locked body, and a dividend payment is only made with the consent of the Regulator. Alternatively, if a CIC with share capital has Schedule 3 as its articles of association, dividends maybe paid to shareholders who are not asset-locked bodies. Any dividend payment to a private financial investor is subject to a dividend cap. However, a dividend cap does not apply to those paid to certain asset-locked bodies. The dividend cap is designed to achieve a balance that encourages people to invest and to ensure assets and profits are used for the benefit of the community.

Payment of a dividend to a private financial investor is subject to the dividend cap. The dividend cap has three elements:

1. The maximum dividend per share limits the amount of dividend that can be paid on any given share. The limit for shares issued between 1 July 2005 and 5 April 2010 is 5 per cent above the Bank of England base lending rate of the paid-up value of a share. The limit for shares issued on or after 6 April 2010 is 20 per cent of the paid-up value of a share.

2. The maximum aggregate dividend limits the amount of dividend declared in terms of the profits available for distribution, currently limited to 35 per cent.

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27 Ibid, 4.
29 A limited company registered with the Registrar of Companies for England and Wales, Northern Ireland or Scotland.
32 Ibid.
33 Companies (Audit and Investigations and Community Enterprise) Act 2004 (UK) c 17, s 35; Community Interest Company Regulator, above n 31. ‘Community’ means either the community or population as a whole, or a definable sector or group of people in the United Kingdom or elsewhere. Any group of individuals constitutes a community if they share a common characteristic that a reasonable person could distinguish from other members of the community, or a section of the community. Community Interest Company (Amendment) Regulations 2009 (UK) SI 2008/629, reg 5.
34 Community Interest Company Regulator, above n 31.
37 Community Interest Regulator, above n 31.
38 Ibid, 5–6. There are three elements to a dividend cap: (i) maximum share; (ii) aggregate; and (iii) a carried forward unused dividend. Community Interest Regulator, ‘Chapter 6, above n 31.
39 Ibid, [6.3].
3. The ability to carry forward unused dividend capacity from year to year is limited (currently to five years).

The dividend cap ensures that a paid dividend is proportionate to the amount invested and the CIC’s profits. The above elements were simplified in response to the main criticisms of the dividend cap being too complex and restrictive, which affected investors’ ability to make social investments. These and other criticisms are explored further below.

V THE UNITED KINGDOM EXPERIENCE

Albeit that the CIC structure has only been in existence for a relatively short time, since 2005, there has been increased understanding of this structure. Since the inception of the CIC, their growth has continued, despite the United Kingdom facing very tough economic times. The CIC Regulator’s statistics note that as at June 2014 there are over 9,500 registered CICs. However, although the numbers are growing, many CICs are also dissolving. Between August 2005 and March 2012 the Regulator reports 1,626 dissolutions of CICs, or just over 20 per cent of those CICs registered in that period. The main reasons for dissolution identified by the Regulator were: lack of funding (25 per cent); have not traded since incorporation (20 per cent); no longer viable (15 per cent); and the organisation was not awarded the contract (.05 per cent). Most of these dissolutions come from the education and health industries. Even so, the CIC structure has been more successful in attracting a level of investment than traditional not-for-profit structures.

The most notable success of the CIC structure is found where a wholly owned trading subsidiary seeks capital injections from other sources outside the equity banking sectors. This arrangement is taken up by charities in the United Kingdom. CICs have been found to be restrictive in the rate of return on performance — but, conversely, the cap has proved to be an attraction for investors. Also attractive is the social investment tax relief which CICs provide. Where a CIC is established under Schedule 3, a divided can be paid to equity investors; however, this feature, while it has been successful in attraction commercial investors, has not attracted philanthropic funders.

The special allocation of dividends from CICs creates an interplay between a particular private benefit (profit) and the public or community benefit, and this interplay generates the need for regulation. Where public and private benefits are mixed, this will impact on the trustworthiness of not-for-profit organisations, and raises the need for policing. The CIC Regulator has a ‘light touch’ approach to the regulation of CICs. The fundamental role of the CIC Regulator is concerned with registering CICs and providing support to a CIC. The members control the affairs of CICs, and it is suggested that members are to be active within the organisation to ensure that the company meets the community interest test. This relaxed style of regulation places a heavy burden on members and relies on the good faith of all involved. Notwithstanding this, the community interest test and the asset lock test have been designed as the mechanism to guard against unscrupulous behaviour by individuals.

40 Community Interest Regulator, ‘Chapter 6, above n 31.
44 Ibid.
45 Ibid.
46 Ibid.
48 Ibid.
However, it is the mechanism of the asset lock test which has been identified as a hindrance on the CIC’s ability to expand. This criticism stems largely from social entrepreneurs who want ‘sweat equity’ and the ability to secure equity or quasi-equity. Progressively, the CIC structure is showing that it has a heavy reliance on market revenue — or at least a desire to have avenues of funding from all markets — and, moreover, to have managerial freedom to access the equity market. This demand is a reminder that social enterprise has developed in a market context as well as a political context.

Policy frameworks have emerged, especially in the United States and Europe, which influence the effectiveness and viability of these hybrid structures. The US policy emphasises tax and expenditure, which shows a preference towards the private market place. In comparison with Europe, these forms of organisations are part of the effective direct government program, with the emphasis on a social purpose that will address social needs. These policy frameworks arise from different cultural and geographic contexts. How Australia will develop policy, and what that policy might emphasise, is yet to be seen.

VI Does Australia Need A CIC Structure?

Little doubt remains of the need for a new structure, both for social enterprises and for enterprising not-for-profit organisations. When considering what this new structure might look like, our policy makers need to address a fundamental problem regarding the treatment of intersectoral boundaries. Not-for-profit organisations that have become driven by the profit motive should adopt or convert to this new hybrid structure — but then governments will need to subsidise not-for-profits so that they can effectively compete with for-profits. Alternatively, a stricter activities test would need to be introduced to strictly regulate any related benefit for the public. Further, creation of a hybrid organisation requires a decision as to the sector in which this new organisation should sit. Having a hybrid structure in the not-for-profit sector would compromise key characteristics which the sector strongly believes in, such as independence and non-profit distribution; it would also lead to more confusion.

Incorporating hybrid structures within the for-profit corporate sector would require legislative recognition of profit-making behaviour and permission for it to occur parallel with advancing social life. Such an explicit connection between market or capital behaviour and social needs gives clarity and would neutralise any identity crisis. Furthermore, a statutory test of ‘advancing social life’ would need to be introduced. Satisfying such a test would involve an organisation demonstrating, explicitly, how its social purpose and activities advance society. Looking at the way an organisation can ‘advance society’ requires an objective analysis of the activities performed by the organisation, and/or its use of assets, in a manner that would directly or indirectly advance or better society as a whole, or a section of society. The test would need to provide a clear means of determining what is an acceptable private benefit alongside a social purpose. This approach would avoid imposing the legal requirement of a charitable purpose on these new structures and at the same time protect the non-distribution constraint

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49 ‘Sweat equity’ is the founder’s efforts in establishing the enterprise or venture, which is said to be unrewarded owing to the way the asset lock works. This means founders will only receive the value of their shares when they sell their shares upon exit from the organisation. Founders argue that their ‘sweat equity’ should be rewarded. Vibeka Mair, ‘CIC Association Recommends Changes to Dividend Cap’ on Civil Society, Civil Society Finance (14 February 2013) <http://www.civilsociety.co.uk/finance/news/content/14463/cic_association_recommends_removing_20_per_cent_cap_on_initial_investment>.

50 Ibid.
51 Above n 18, 12.
52 Ibid.
53 Ibid.
54 Above n 3, 534.
55 The tension between profit and advancing social life is not unique to enterprising non-profits. For-profits, today, are also expected to be a responsible corporate citizen as well as discharging their responsibilities to shareholders, advancing the company for a sustainable future and, further, not transgressing upon societal interests. See Simon Mortimore (ed), Company Directors — Duties, Liabilities and Remedies (Oxford University Press, 2nd ed, 2013); Doreen McHamet, Aurora Vosuceasa and Tom Campbell (eds), The New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge University Press, 2009).
principle, which is very important to the not-for-profit sector, and in turn protect the sectors’ boundaries.56

The ‘advancement of social life’ test should be a strict test whereby an organisation demonstrates that its activities will address real social issues. This will not only address one of the main downfalls of social enterprise, but ensure that the founders have clear, definable goals that will deliver real and tangible benefits to society, not only for personal gain or other self-serving purposes.

Similar to the United Kingdom model, Australia’s hybrid organisation should cap or restrict the payment of a dividend. The threshold of this cap would need extensive consultation with social entrepreneurs, investors and not-for-profit organisations to establish a realistic level that these new organisations could sustain. Incorporated into the consultation process is whether the payment of dividends is connected to the organisation’s constitution. In the UK, Schedule 2 and 3 CICs restrict an organisation’s freedom as to when and to whom a dividend should or should not be paid. The Australian model may want to do away with these restrictions, which may cause some transparency concerns for not-for-profit organisations.

Another matter for consideration is whether Australia would impose an asset lock test, given the troubles associated with the asset lock test in the United Kingdom. The cautionary approach suggests an asset-lock style of test to ensure that no unscrupulous person is using assets for personal gain over the community. However, the question still remains whether the asset lock test really does provide a solid guarantee of preventing unscrupulous behaviour with the organisation’s assets. There is doubt. A strongly worded ‘advancement of social life’ test might ensure that all of the organisation’s assets are tangibly utilised in the interest and advancement of society, and thus eliminate the need for an asset lock test. Where an organisation uses assets in a contradictory way, the organisation and its directors should be penalised by way of a civil penalty.

A civil penalty would adequately deal with any instances where organisations, without intent, fail to confer benefits on society. The civil penalty to be imposed against the organisation and its directors should be designed to encourage good behaviour and practices within organisations. Where there are instances beyond mistakes, or an organisation is found to be in gross or continual breach of the social test, it would be open to the Regulator to strip the organisation of its status.57

As conceived, this new organisational form has a degree of interaction with civil society, and it is therefore necessary for a model regulation to ensure that real social endeavours are both pursued and actually achieved. The ‘light approach’ in the United Kingdom is not ideal; strong controls will be needed,58 such as strong governance, reporting and disclosure mechanisms to Australian Securities Investment Commission, coupled with independent directors to curb powerful influences and problems of agency that may arise. The level of reporting always attracts criticism about the complexity of the process, its time-consuming nature, and unnecessary ‘red

56 Charitable purposes under Charities Act 2013 (Cth) are largely a direct reflection of the traditional charitable purposes. Compared with the charitable purposes listed in the respective statute in the United Kingdom, Australia’s charitable purposes are rather limiting and do little to modernise charities to be more relevant to the needs of the twenty-first century. It is hoped that the proposed new structure will be relevant and meet contemporary society’s needs, which are wider than the traditional charitable purposes. See Charities Act 2006 (UK) c 30, s 3; Charities Act 2011 (UK) c 25, s 3.

57 Although it would be ideal for the new structure to have its own stand-alone regulator (similar to the United Kingdom’s CIC Regulator), this is currently unlikely owing to the federal Liberal government’s aversion to regulators. Therefore, it is suggested that the appropriate regulator for the proposed new structure is the Australian Securities Investment Commission.

58 The role of the CIC Regulator is best described as that of an administrative decision making body to ‘facilitate the formation of CICs’ and not to be ‘pro-active’ in the supervision of individual CICs. Community Interest Regulator, ‘Chapter 11: The Regulator’ (March 2013) 4, 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211751/13-14-community-interest-companies-guidance-chapter-11-the-regulator.pdf>.
tape’. The solution is tiered financial reporting.59 These governance mechanisms will drive the organisation’s activities towards providing innovative solutions to social problems in a sustainable and transparent way.

This framework is designed to provide managerial freedom to address the diverse range of social issues rather than simply providing business solutions to fix social problems. The ability to reinforce the central societal activity is important, not only from a branding perspective for the organisation but also because it reduces any perceived risks regarding the organisation’s conduct. Additionally, public trust and good will can be achieved if the organisation can clearly demonstrate that the activities it pursues are not for the sole benefit of its donor’s, founder’s or director’s values and interests. Accompanying good regulatory processes will also be the need for tax exemptions.

Again owing to the ‘societal’ nature of the organisation’s activities the new form of organisation should be afforded taxation and legislative support similar to that given to not-for-profit and public benevolent organisations.60 The extent of this support should be proportional to the degree of profit-making activity by the organisation.61 This proportional approach will also go some way to removing entry barriers, and will allow organisations to compete with for-profits — and to some extent with well-established, commercially active not-for-profits.

VII Conclusion

Australia’s not-for-profit sector and its organisations have needed to change in response to the shrinking of welfare by governments, and they are considered to be significant economic contributors. Contributing to this changed landscape are social entrepreneurs. These changes have blurred the sectoral boundaries that comprise the integrity of the not-for-profit sector, and organisational structures are now inhibiting not-for-profits’ access to capital to the extent that they are no longer fit for purpose. The proposal to address and overcome these issues is the creation of new hybrid structures. The United States and United Kingdom have taken the lead by creating new legal forms which give organisations the capacity to utilise the market — which, in turn, supports a social activity and allows a private benefit to be enjoyed. This public/private benefit requires good regulatory and governance practices to overcome agency problems. The proposed new direction requires statutory intervention that will fix the boundaries and strive to protect the underlying values that are important to the not-for-profit sector.62 Australia’s not-for-profit sector will lag further behind other common law jurisdictions should the discussion of how a hybrid organisation can best serve not-for-profit organisations and social entrepreneurs not be started.

59 See reporting obligations for incorporated associations: Associations Incorporated Act 1981 (Qld) ss 58, 58A–59; Associations Incorporated Act 2009 (NSW) s 56; Associations Incorporation Regulation 2010 (NSW) regs 7–9; Associations Incorporation Reform Act 2012 (Vic) ss 92, 95, 98–99; Associations Incorporation Reform Regulations 2012 (Vic) reg 15, Sch 1; Associations Act 2003 (NT) ss 47–48; Associations Regulations 2004 (NT) reg 11–13; Associations Incorporation Act 1983 (SA) 35; Incorporated Associations Regulations 2008 (SA) reg 4.

60 This article does not seek to comprehensively outline a taxation policy for the proposed new structure. However, it is suggested that the new structure be provided with the necessary taxation concessions (different from those afforded to not-for-profits and for-profits) to encourage this new structure to be taken up.

61 Above n 3, 535.

62 Above n 3, 532–535.