Regulating the Not-for-Profit Sector

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overview

This paper investigates the regulation of the Not-for-Profit (NFP) sector from theoretical and empirical perspectives. This is undertaken in an Australian context where the nature and scope of the Third Sector is contested, thinly researched and weakly documented. It begins with a select review of the literature on regulatory practice and then moves to interrogate recent reviews of the regulation of NFPs by governments in Victoria, Australia, the United Kingdom and New Zealand. Particular attention is given to the 2007 review of the regulation of NFPs conducted by the State Services Authority (SSA) in Victoria and the complementary Strengthening Community Organisations Project. Findings from these reviews are used to discuss approaches to good practice regulation for the NFP sector. The paper argues for government to retain a repertoire of approaches to the regulation of the NFP sector, with a movement toward co-regulatory approaches which recognise the capacity for self-regulatory oversight in member-based organisations, the synergy between the mission of many NFPs and the service delivery of role of Government, and the growing capability of many NFPs to self-govern within existing legislative environments.

1 regulatory theory

1.1 introduction

Our starting point is that we need appropriate, good quality regulation, properly and fairly enforced, to improve our economic performance and quality of life. We cannot protect the environment, reduce accidents, tackle discrimination or promote a competitive, efficient economy without an appropriate framework of regulation and the necessary commitment and resources to enforce it. (Better Regulation Task Force 2005a, p. 11)

Our lives are replete with regulation from the quality of the air we breathe, to the flow of water in our taps and the safety of the food we eat. As individuals we self-regulate our intake of food and alcohol, and live in households with their own rules and sanctions. While most public regulation is made by local, state and federal governments, Australia is also bound by a range of international conventions and agreements in areas as diverse as trade, refugee rights and bioethics.

Much of the public discourse sees this proliferation of regulation as undesirable: however, the default position in many homes, professional bodies and government departments is to respond to a critical incident or anticipate a risk by advocating new regulation. Given our reliance on codified expectations of human behaviour, our emphasis should be on good regulation. This section provides an overview of contemporary regulatory theory. It moves to investigate the regulatory environment in which NFPs operate.

1.2 regulatory theory

There are few more contested concepts in regulatory theory than the meaning of ‘regulation’ itself. (Freiberg 2007, p. 1)

In any particular situation there is likely to be a mix of self-regulation, government regulation and other forms of market and third party regulation each influencing activity... The policy challenge therefore is how government intervention in this mix of regulation and influence can best achieve democratically defined objectives and an appropriate level of accountability to the wider community. (Parker 2007, p. 3)

Regulatory practitioners, academics and policy makers use the term ‘regulation’ to apply to a wide range of activity from Acts of Parliament to Ministerial orders to professional codes. The term applies to a wide range of legally enforceable obligations imposed by the state including primary legislation, statutory rules, mandatory codes, guidelines and so on. It refers broadly to intentional acts to alter the behaviour of others according to pre-specified standards upheld by government authority. Capital ‘r’ regulation is legislation, and small ‘r’ regulation is includes subordinate regulation and Ministerial orders. Occupational
codes, some departmental ‘guidelines’ and elements of funding and service agreements are also referred to as regulation. The latter group are the administrative regulations pejoratively known as ‘red tape’ when excessively applied. The language used to describe efforts to reduce regulatory requirements shifts from ‘administrative simplification’ to ‘red tape reduction’ to ‘easing the regulatory burden’, and variations on all three. Most agree that it refers broadly to intentional acts to alter the behaviour of others according to pre-specified standards.

In most developed political and economic systems there is an overall commitment to good regulatory practice, and a recognition that the conceptions of best practice are changing. There is consensus that businesses and NFPs are subject to too much ‘red tape’ and, therefore, targets are being set to reduce regulation, regulatory costs and introduce better regulation.

Broadly, regulatory practitioners, academics and policy makers have recognised that the regulatory burden is growing as a result of a range of pressures, including hyper-sensitivity to risk and high levels of risk mitigation. The danger in a ‘regulate first, ask questions later’ approach is a movement toward the Nanny State where government increasingly assumes responsibility for the risks in peoples’ lives. A three pronged approach is proposed to overcoming inappropriate regulatory expansion:

1. make regulation more effective and responsive;
2. reduce the cost of regulation; and
3. improve regulatory processes so new regulation is only introduced when its benefits outweigh its cost.

This section discusses the growth in regulation and how this has resulted in a call to make regulation more effective and responsive. The issues of reducing the costs of regulation and improving regulatory processes are discussed later in the paper.

While it is well accepted that the level of regulation is growing, the reasons for that growth are complex. Growth in the incentives for governments to regulate arises because of changes in the role of government, changes in the structure of industry and the business environment, and changes in community expectations. The move from ‘big government’ Keynesian welfare states to ‘small government’ regulatory states in many Western democracies in the latter part of the twentieth century is well documented. With greater exposure to market forces, paradoxically, has come a greater need for regulators to provide protection against the worst excesses of that market. The growing reliance by government on private, commercial and NFP providers to deliver a range of human services had been accompanied by a growth in the regulatory bodies overseeing the quality, efficiency, effectiveness and safety of those services. Viewed through the prism of the decade prior to 2005, the OECD argues that ‘when governments turn elsewhere for provision of services, regulation is necessary to shape market conditions and meet public interest.’ (OECD 2005, p. 1)

The market is not just an economic abstraction, but is also socially created. The development of regulatory practice is itself as much a product of social as economic and political circumstances. (For example, the growth in regulation relating to environmental and human rights matters is a reflection of community concern.) Taking a longer historical view of the creation of the regulatory state, Braithwaite argues that the legal invention of financial instruments such as securities in the seventeenth century had a lasting impact on government relations to markets creating a story of ‘reciprocal causation’ where ultimately family firms were replaced by large corporations. ‘The regulatory state creates mega-corporations, but large corporations enable regulatory states.’ (Braithwaite 2005, p. 25). These changes followed increases in the size of businesses and a resultant greater capacity to meet regulatory obligations which are now seen as appropriate. Often large businesses advocate greater regulation, which can make it harder from smaller businesses in their industry to compete. As the number of businesses in an industry decreases it becomes more practical for the government to impose regulation as it is easier to monitor and enforce standards that apply to fewer players (Braithwaite 2005, p. 27).

More broadly, an overview by Bartle and Vass (2005) of the long history of self-regulation in Britain argues that the growth of the regulatory state also vests reflects the declining influence of ruling elites, the effects
of globalisation, the impact of information and communications technologies, and a series of financial and governance scandals.

It is ironic that in a period of eroding trust in government, citizens are nonetheless looking to it to regulate to limit perceived personal or community risk. This partly explains the spiralling growth in regulation. According to Britain’s Better Regulation Commission we need to return to liberal notions of individual responsibility and not unwittingly create a ‘nanny state’. They posit that all policy making should start with a simple principle evocative of John Stuart Mills famous 1859 essay *On Liberty*:

> When informed adults choose voluntarily to expose themselves to a risk and/or take responsibility for managing that risk and their behaviour does not harm others, the government should not intervene. (Better Regulation Commission 2006, p. 31)

This principle is often difficult to adopt as policy makers resort to new regulations to respond to crisis situations or manage complex endemic social problems. From a public sector agency perspective, advocating new legislation potentially avoids the criticism that the problem resulted from the agency’s failure to act. From a government perspective, new specific regulation may be viewed as more proactive and, therefore, more likely to demonstrate to the community that the government is addressing the problem and reducing the risk that it will recur. And industry groups may argue for regulation that would protect the position of established businesses. Regulation may not only keep rogue operators out of the industry but also reduce competition overall. (Consumer Affairs Victoria 2006)

In response to the push for additional regulation, there has been sustained analysis on what is needed to make regulation more efficient and effective. Some of the key conclusions note:

- attempting to regulate to avoid all potential community risks is impossible and extremely costly, therefore regulation should only be imposed if it is necessary;
- regulation should be principles-based, flexible and responsive to industry need, so it can achieve its objectives at the lowest possible cost; and
- self-regulation should be used where possible, as successful self-regulation combines flexibility with a reduction in the regulatory burden and encourages industry to take ownership of the regulatory objectives.

Britain’s Better Regulation Commission argues that personal responsibility should be encouraged:

> Building on the principles of subsidiarity and devolution, the state should not intervene and assume responsibility for risks that are better managed by individuals, families, businesses, organisations or local communities. In the absence of contrary evidence, government and regulators should assume that those they regulate are capable and trustworthy. (Better Regulation Commission 2006, p. 31)

The Better Regulation Commission’s emphasis on personal responsibility is a reminder of the centrality of ethics in the regulatory field. While ethical dispositions are implied in much of the literature, ethical considerations are rarely specified. One interesting exception is the move to the introduction of integrity systems in the Australian Information Technology profession. Mechanisms such as behavioural codes, unofficial sanctions and education on ethical thinking are proposed to introduce an ethical climate.

> The mechanisms employed in integrity systems have the goal of institutionalising ethical values into norms of behaviour that guide action. They are intended to promote and sustain ethical values in such a way that they inform the actions of industry members on a day to day basis, rather than simply being ideals that exist only in codes or policies that have little concrete relevance. (Lucas, Moss & Weckart, forthcoming)

Similarly, moves towards principles-based regulation are reliant on the capacity of individuals to make ethical and professional judgements consistent with broad public values and professional standards. Principles-based regulation means that the standards are outcome based rather than prescribing processes, leaving the individual to interpret expectations and to make judgements regarding attainment
of standards. Principles-based regulation offers opportunities for regulation reduction and improved professional practice.

In addition, principles-based regulation is seen as a useful tool within the repertoire of flexible responses required to deal with current problems. An arresting analysis of contemporary regulatory practice concludes that the ‘regulatory state rests on the brink of a crisis’ (Chapman, Miller & Skidmore 2003, p. 9). It argues that economic, demographic, environmental and technological changes have adjusted the context of the regulatory state and that current regulatory approaches are inadequate to deal with complex contemporary problems. The inadequacies cited include:

- reductionist approaches which disaggregate complex interconnected problems;
- economic analyses such as ‘market failure’ which do not sufficiently describe complex problems;
- command and control regulation which is overly reliant on institutional authority; and
- on the positive side of the ledger, evidence of moves to an emphasis on public value.

Much of the literature refers to the fluidity of global political and economic systems and their impact on state regulatory regimes, to the complexity of contemporary human problems and the attendant strains on current regulatory approaches, and to the benefits of adaptive flexible approaches. Ayres and Braithwaite’s 1992 Pyramid of Enforcement Strategies (below) figuratively describes a responsive regulatory approach where entities are encouraged to operate at the base of the pyramid but forced up to increasingly higher levels of intervention and enforcement if capacity or good will do not enable them to operate at lower levels. Adaptations of this pyramid have been applied to a range of sectors including health (Braithwaite, Healy & Dwan 2005) and taxation (Braithwaite 2007).

Figure 1: Pyramid of enforcement strategies (Ayres and Braithwaite, 1992)

Another approach to supporting economic activity and protecting high standards of probity while simultaneously reducing regulatory burden is encapsulated in the ‘Hampton Principles’ (Hampton 2005). This approach puts the onus back on the regulators to justify regulation, adopt a risk-based approach to monitoring, and argues reporting requirements should be graduated accordingly. Like the responsive regulatory pyramid, the Hampton approach requires regulators to take account of an entity’s compliance performance and tailor its requirements with ‘light touch’ expectations for compliant and low risk bodies, moving to higher levels of monitoring and intervention for non-compliant or high risk bodies.

One form of regulation that can be highly flexible and responsive to changing industry environments is self-regulation. Regulatory practice can be viewed along a continuum which ebbs and flows in response to policy, political and contextual factors from no regulation to self-regulation to co-regulation and then statutory regulation. ‘The new wave of self-regulation should not therefore be seen so much as a
'deregulatory' agenda, but as a more efficient and effective mode of operation for the regulatory state – a better regulatory agenda.' (Bartle & Vass 2005, p. 49)

Similarly, Skidmore and his colleagues argue for an approach of regulating via self-regulation where the state embraces co-production with entities, moves toward principles-based regulation, allows organisations to operate within modes of ‘enforced self-regulation’, ‘speaks softly but carries big sticks’, regulates the information commons to improve transparency and knowledge-sharing, and adopts sunset clauses for regulators.

Our current repertoire of regulatory strategies is proving increasingly unable to cope with the complexity of demands made on it. Its continuing legitimacy and effectiveness depends on creating systems of regulation that can manage this complexity, not wish it away. (Chapman, Miller & Skidmore 2003, pp. 104-05)

The SSA was interested in exploring the application of these concepts in its review of the regulation of the NFP Sector. Christine Parker was commissioned to apply her concept of open self-regulation to the NFP sector. She argued for a realistic definition of self-regulation.

The objectives of open self-regulation are to allow the regulated entity to go about their normal activities to the extent possible in a way that also meets publicly defined objectives, standards or values that the broader democracy sees as applicable to that activity. (Parker 2007, pp. 3-4)

Parker (2007) argued that self-regulation has the potential to reduce regulatory burden. However, any plan for this approach would need to address factors such as human motivation, adequate transparency and accountability, the over-zealous self-regulator and an assessment of the effectiveness of self-regulation. Further discussion of her paper is included in the final section on approaches to good practice regulation for NFPs.

This select overview of regulatory theory has illustrated concerns with regulatory approaches which focus on command and control approaches and are overly focussed on risk mitigation and quality control. The resultant growth in administrative requirements is ill-suited to dealing with complex human problems or global markets. Improved approaches are required which are responsive to the capability, integrity and good will of the entity being regulated, and enable a repertoire of regulatory practices to be adopted.

The need for good regulatory practice is equally important for the NFP sector. As noted below, this sector plays an increasing role in government service delivery. Therefore, poor regulatory design can have a significant impact on the delivery of government services to some of the most vulnerable and disadvantaged sectors of the community. In addition, the capacity of NFP organisations to cope with poor or costly regulation is often limited, making them more vulnerable to bad regulatory practices.

2 NFP organisations

The primary objective for any regulatory design is to change behaviour to achieve certain goals such as a healthier environment, a safer workplace, fair competition. In the case of NFPs these objectives might also include sustainable community organisations, that are faithful to their missions, support for community activities, confidence and trust in the sector, high quality service delivery, appropriately informed donors and efficient expenditure of funds. (Parker 2007, p. 6)

The traditional Westminster public accountability system where ministers are accountable for the appropriation to their departments is challenged when the service providers are voluntary organisations. (Cribb 2006, p. 5)

2.1 the nature of NFP organisations

NFP organisations are part of the ‘Third Sector’, that part of civil society not occupied by government or business, which concerns itself with a wide range of social, advocacy, charitable, community and member-based activities. By definition not-for-profit organisations are not primarily engaged in profit-making activities, and any donor, operational or trading surpluses are ploughed back into the NFP entity.
The SSA 2007 Review of the Regulation of the NFP Sector, described NFPs as

Organisations that operate for social or community purposes, do not distribute profits to members, are self-governing and independent of government (State Services Authority 2007, p. 15)

Johns Hopkins University Comparative Nonprofit Sector Project described the NFP sector in 2000 as the ‘lost continent on the social landscape of modern society’. This comparative project is an ongoing collaborative activity by scholars from twenty-four countries to understand the scope, structure and role of the NFP sector using a common framework to analyse each participating country. It attributes the growing interest in NFPs globally to the fact that ‘growing numbers of political leaders and community activists have come to see such civil society organisations as strategically important participants in the search for a middle way between sole reliance on the market and sole reliance on the state’ (Salamon, Sokolowski & Anheier, 2000, p. 1). In a 2006 update of the project the common features of NFP entities were defined as private, self-governing, voluntary and non-profit distributing. (Salamon 2006)

While this paper refers to the NFP sector, it recognises that it is as much a blunt aggregation to describe NFPs as a sector, as it is to define the full range of business and quasi-commercial entities as the business sector. The Third Sector does not lend itself to simple linear classification. In its attempt to delineate and categorise the sector the Australian Taxation Office (ATO) used an organic depiction (Figure 2).

**Figure 2: Non-profit sector (ATO, 2001)**

NFPs are characterised by diversity in size, type of activity and primary purpose. They share heterogeneity with the business sector to the degree that both are better classified by sub-sectors (such as small business or charity). Like the business sector, NFPs have a range of representative and advocacy voices from the National Roundtable for Nonprofit Organisations to the Victorian Council of Social Services, to VicSport.
2.2 NFPs in Victoria

It is difficult to definitively quantify the NFP sector in Victoria as there is no single database. There are an estimated 500,000 – 700,000 NFPs in Australia. Research for the SSA review found those NFPs in Victoria which have sought a legal persona are made up of:

- 32,522 entities registered as incorporated associations with Consumer Affairs Victoria (CAV);
- 1645 entities registered as Companies Limited by Guarantee or Shares with the Australian Securities and Investment Commission (ASIC);
- 748 entities registered as Co-operatives with CAV; and
- an estimated 20 entities with their own Acts of Parliament (such as churches).

Most NFPs in Victoria are small organisations with some 90% having revenue per annum under $200,000 and/or assets under $500,000. Similarly, most NFPs have small membership, with around a quarter with fewer than 20 members, just over a half with fewer than 50 members and about a quarter with more than 100 members. Over three quarters of all associations (76.2%) do not employ any paid staff. Hence the reality for most Victorian NFPs is that their interaction with regulation associated with legislation occurs at the time of their establishment and from that point relates to requirements to comply with legislation such as the Associations Incorporation Act 1981, the Fundraising Act 1998, and the requirements of the State Revenue Office (SRO) and Australian Taxation Office (ATO) for tax exemptions. In essence, most of the ongoing regulation of NFPs relates to their administrative, taxation and fundraising activities.

However, much of the thrust of this paper concerns itself with the impact of ‘small r’ regulation – the administrative and compliance requirements of government regulation on NFPs. Given the increased practice of governments to contract NFPs to deliver health, education, welfare and other services on their behalf, the regulatory requirements need to be balanced between governments’ need for quality assurance and accountability and a reasonable level of administration for NFPs.

3 regulatory practice

3.1 introduction

Regulatory practice is influenced by historical, socio-demographic and political factors. This section on regulatory practice will take a select overview of a number of jurisdictions both local and international beginning with Victoria.

3.2 regulatory practice in Victoria

*The Victorian Government recognises that good regulation will protect the community and the environment, while underpinning efficient and well functioning market economies. Conversely, ineffective regulation can both hinder economic activity and defeat the intended objectives of the regulation. (Department of Treasury and Finance 2006a, p. 2)*

The Victorian Government has made a major commitment to reducing regulation. In its 2006 *Reducing the Regulatory Burden: The Victorian Government’s Plan to Reduce Red Tape*, the Government committed to:

1. cutting the existing administrative burden of regulation by 15 per cent over three years and 25 per cent over five years;
2. ensuring the administrative burden of any new regulation is met by an ‘offsetting simplification’ in the same or related area; and
3. undertaking a program of reviews to identify the necessary actions to reduce compliance burdens.
To support these targets the Department of Treasury and Finance’s (DTF) Better Regulation Unit (BRU) administered a fund of $42m to finance projects across government to reduce red tape for both the business and NFP sectors.

The second edition of the *Victorian Guide to Regulation* (Department of Treasury and Finance 2007) provides insights into movements in regulatory practice with the inclusion of the methodology for measuring changes to the administrative burden (known as the Standard Cost Model), information on the Victorian Charter of Human Rights and Responsibilities, and guidance on the impact of regulation on small business. The revised Guide continues to advocate Government regulating only when necessary and argues, ‘government intervention in markets is justified on economic efficiency grounds or to achieve social and environmental objectives.’ (Department of Treasury and Finance 2007, p. 2-1). It envisages government regulation to address market failure, achieve social welfare objectives and manage public risk, and other forms of regulation or other approaches to achieve the diverse range of policy objectives.

The *Victorian Guide to Regulation* advocates government regulation only when it can be demonstrated that a problem exists, that government action is justified and that regulation is the best option. Regulation should be effective, proportionate, flexible, transparent, consistent and predictable, developed co-operatively, accountable and subject to appeal (Department of Treasury and Finance 2007, pp. 3-2). There are formal processes for vetting new and amended legislation and regulation. Legislation is subject to both a Business Impact Assessment (BIA) and a Regulatory Impact Statement. Both BIAs and RISs require an analysis that demonstrates that the benefits of regulation outweigh its costs and are subject to independent review by the Victorian Competition and Efficiency Commission (VCEC). However, similar processes do not apply to ‘small r’ regulation.

### 3.3 regulating NFPs in Victoria

The Victorian Government has made explicit commitments to supporting communities in policy statements such as *Growing Victoria Together* and *A Fairer Victoria*. It has initiated reviews of the *Associations Incorporation Act 1981* (Consumer Affairs Victoria 2005a) and the *Fundraising Appeals Act 1998* (Consumer Affairs Victoria 2005b), and ensured that equal focus is placed on the NFP sector in its 2006 strategy to reduce regulatory burden.

The Government took a lead nationally in addressing issues within the NFP sector by establishing two complementary inquiries in 2006 to address both the systems, structures and processes used by Government in its regulation of the NFP sector, as well as the need to maintain sector sustainability into the future. The SSA review of the regulation of the NFP sector was conducted alongside the Strengthening Community Organisations Project (SCOP) run by the Department for Planning and Community Development (DPCD). Where the SSA Review sought to identify opportunities to reduce unnecessary regulation of the NFP sector, the SCOP took a longer-term focus on the sustainability of the sector into the future. (Further detail on both reports is provided in the final section of this paper.) In keeping with Victoria’s commitment to broadly based regulation reform, the VCEC’s 2006-07 review of food regulation, addressed the NFP and community sectors alongside business.

The majority of NFPs are Incorporated Associations and they are regulated by Consumer Affairs Victoria (CAV) a division within the Department of Justice. Those NFPs which are companies limited by guarantee/shares are regulated by the Australian Securities and Investment Commission (ASIC). Fundraising registration is handled by CAV, but raffles are administered by the Victorian Commission for Gambling Regulation (VCGR). State taxation exemptions are handled by the State Revenue Office (SRO).

DPCD has a broad whole-of-government responsibility for co-ordination of policies and initiatives across the community and voluntary sector and administers a number of grants programs for specific government programs. DPCD has responsibility for particular groups such as Indigenous Victorians and Youth. While it may support and advocate for particular groups, and for the community and voluntary sector as a whole, it is not a regulator and does not have responsibility for general governance oversight and regulatory compliance.
Two major reports have shed light on the regulatory environment in which NFPs operate in Victoria. The research report *A Better Framework: reforming not-for-profit regulation* (Woodward & Marshall 2004) focussed on companies limited by guarantee, however the findings apply broadly to the sector. Woodward and Marshall found that the regulatory framework surrounding the NFP sector is ‘complex and riddled with inconsistencies’; that current State/Territory incorporated associations regimes do not meet the needs of many NFPs such as peak bodies and small organisations that operate nationally (i.e. across multiple jurisdictions); that attitudes of many NFPs to public disclosure are minimalistic; that the Corporations Act is more suitable for commercial entities than NFPs; and that many NFPs have governance difficulties such as recruiting Directors. It noted that NFPs differ from for-profits in their reliance on volunteers, their exemption from income tax, and the range of stakeholders to consider.

‘The particular needs of the NFP sector have been overlooked in the company law reform process, and the dual State/Federal regime is causing problems…The sector needs a national regulatory framework based on sound public policy, rather than disclosure requirements that vary vastly depending on jurisdiction and the nature of the legal structure adopted.’ (Woodward & Marshall 2004, p. 2)

The *Improving Not-for-Profit Law and Regulation: Options Paper* (The Allen Consulting Group 2005) commissioned by the then Department for Victorian Communities (now DPCD) argued there is currently a significant compliance burden on NFPs in Victoria. It posited that ‘complex, inconsistent and poorly targeted regulation reduces access to high quality relevant information about the sector, limiting transparency and accountability’ (p. vi). The report identified the priority areas for reform as simpler more consistent arrangements in areas such as fundraising, reporting requirements and incorporation within and across jurisdictions. Options to improve the relationship of the sector with government include sector-specific regulations and tools, and the establishment of either a dedicated regulator for the sector or the co-ordination of current regulators.

The heaviest impact of regulation falls on those NFPs in Victoria which are delivering services paid for by Government. The SSA review found that most NFPs support accountability but would like to see it proportionate to the funding and the risks inherent in the activity. The review found inconsistent terminology and reporting requirements within and across departments and a mixture of one-size-fits-all approaches to reporting and duplicate reporting requirements across levels of government. It found that capacity varied across NFPs and that small and medium sized organisations struggled with the volume, rate and nature of reporting requirements. The report made recommendations to improve both the structures within which NFPs operate and the systems and processes used by government as it relates to them. These recommendations will be discussed in more detail in the final section below on good practice regulation of NFPs.

In a contemporaneous review the Queensland Auditor-General examined the frameworks and systems used to shape and sustain relationships with non-government organisations with a particular focus on grants and service agreements (Auditor-General of Queensland 2007). His findings were similar to the SSA review with recommendations to enhance governance arrangements including clarifying roles and responsibilities, moving to common standards and aligning grant approval delegations to risk; to improve information systems including collecting and using the right information, evaluating risks and reducing red tape; and recommendations related to increasing transparency and public disclosure.

### 3.4 regulatory practice in Australia

Regulation is growing apace and, while regulation can be justified in many areas, the efficiency of that regulation often leaves much to be desired and its cumulative compliance burden on business and the economy has escalated beyond what is justifiable. A major part of the problem lies in the way regulation is formulated and designed (Banks 2006, p. 1)

To a large extent, the growth of red tape reflects a general attitude of risk aversion in regulatory and administrative decision-making, both in Australian and overseas…Red tape diverts scarce tax payers’ funds away from the provision of advice and the delivery of government programmes…Reducing red tape will not only save money, but will contribute to a whole-of-
The Australian government and the business community agree that improvements are needed to the volume and nature of regulation in Australia. At the national level, the 2006 Australian Government Taskforce on Reducing Regulatory Burdens on Business identified a forward agenda of some 11 specific reforms to address regulations that are unnecessarily burdensome, complex, redundant or duplicative. The Taskforce Chair, Gary Banks, noted that since 1990 the Australian Government has passed more pages of legislation than in the nine preceding decades since Federation (Banks 2006, p. 4). The Australian Government is now moving to improvements in the practice of its Public Service with recent publications such as the 2007 report, Reducing Red Tape in the Australian Public Service, reinforcing central and line agency initiatives.

The former Coalition Government also contributed to regulatory reform through the Council of Australian Governments (COAG). In February 2006 COAG agreed to:

- establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition;
- undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community;
- identify further reforms that enhance regulatory consistency across jurisdictions or reduce duplication and overlap in regulation and in the role and operation of regulatory bodies; and
- in-principle, aim to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden.

COAG also agreed to address six priority cross-jurisdictional ‘hot spot’ areas where overlapping and inconsistent regulatory regimes are impeding economic activity:

- rail safety regulation;
- occupational health and safety;
- national trade measurement;
- chemicals and plastics;
- development assessment arrangements; and
- building regulation.

A further four hot spot areas were agreed in July 2006:

- environmental assessment and approvals processes;
- business name, Australian Business Number and related business registration processes;
- personal property securities; and
- product safety.

The former Government also directed the Productivity Commission to develop a methodology for benchmarking regulatory performance between Australian jurisdictions and review potential new areas to focus on reducing regulatory red tape. In addition, it introduced programs to reduce the regulatory burden on small and home based business such as the $50m grants to local government.

The incoming Labour Government has also recognised the need for regulatory reform. Labor announced a 10-point policy program to reduce red-tape:

1. A ‘one in, one out’ principle for all new Commonwealth regulation;
2. Harmonising regulations imposed on businesses that operate across state and territory jurisdictions within five years;
3 Giving the Productivity Commission the task of estimating the costs and benefits of regulation reforms as a basis for providing incentive payments for reform;
4 Implementing BAS simplification as described in the Banks report;
5 Raising the threshold for mandatory GST registration from $50,000 to at least $75,000;
6 Announcing BAS Easy as an option for small business;
7 A Small Business Advisory Council being able to comment on Regulatory Impact Statements (RIS) with comments to be included in the RIS;
8 A common commencement date for new regulation, such as 1 July;
9 A superannuation clearing house; and
10 Cutting red-tape in financial services. (Australian Labor Party 2007)

Keen to ensure no loss of momentum the Business Council of Australia has not only produced a manifesto on regulation reduction, it also keeps a scorecard! (Business Council of Australia 2007) Not only is the principal advocacy body for big business championing improved regulatory practice, but its regulators including the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Efficiency Commission (ACCC) both support government initiatives to improve regulation.

The legislation regulating the establishment and monitoring of incorporated associations and co-operatives and fundraising activity in Australia is enacted at the state and territory level. The Australian Tax Office (ATO) is sometimes referred to as the de facto regulator of charities as it ascribes them charitable status for the purpose of tax exemptions. While the 1995 Industry Commission Report, Charitable Organisations in Australia, took a comprehensive view of Community Service Welfare Organisations (CSWOs) few of their recommendations were accepted by Government.

During its period of office from 1996 – 2007, the Howard Government’s NFP policy focus appeared to be on philanthropy with the creation of new legal entities, such as the Prescribed Private Foundation (PPF) to facilitate charitable giving. The Prime Minister’s Community Business Partnership focussed much of its agenda on philanthropy as well. The former Government’s abandonment of the 2001 Charities Definition Inquiry illustrates as much its ambivalence to the advocacy role of NFPs as the effectiveness of the lobbying of influential Churches and large NFPs. (The Rudd Government announced a removal of this prohibition on advocacy in its first six weeks in office.) The establishment of the Taskforce on Reducing the Regulatory Burden on Business in 2005 reflected a policy priority on the business sector. It is noteworthy that some of the recommendations flowing from the Taskforce’s report (Regulation Taskforce 2006) relate to both the business and NFP sectors.

In their 2005 overview of self regulation, Bartle and Vass note in Figure 3 the Australian government’s regulatory spectrum from no regulation through to formal legislation and its preference for the minimum effective regulation to achieve desired outcomes:

**Figure 3: Regulatory stages**

(Bartle & Vass 2005, p. 22)

Again the emphasis is on business and reducing the regulatory burden on business.

At the Department level there are a host of initiatives to reduce the administrative burden on NFPs, with the Australian Public Service Commission taking a lead, and others such as the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) actively working to reduce red tape.
Governance issues such as Departments providing transparency for the rationale for including certain NFPs on committees, and a public record of their involvement (Johns and Roskam 2004) are as much issues for state governments as the Australian Government. However, the general thrust of the Australian Government has been to leave the regulation of NFPs to the states and territories, and concern itself with the regulation of business and the promotion of philanthropy.

The Rudd Government has added Deregulation to the Finance Minister’s portfolio and title signalling its determination to pursue reform in this area. Minister Lindsay Tanner met with his state and territory counterparts early in the Government’s term in January 2008 and announced a reduction to Specific Purpose Payments from the Commonwealth. This will immediately reduce red tape as the requirements for compliance (such as installing and using flag poles in schools) and the administrative requirements (such as monitoring and data collection) will be removed or reduced.

The Government also appointed a Minister and Parliamentary Secretary for Social Inclusion and has located the Social Inclusion Unit within the Department of Prime Minister and Cabinet. The Minister, Julia Gillard, announced in January that the restraint on community and NFP bodies in receipt of government grants from advocating for their causes would be lifted and that the Parliamentary Secretary, Senator Ursula Stephens, would oversight an initiative to identify unnecessary red tape in government agreements with the sector. In February Senator Stephens announced moves to harmonise Fundraising legislation across Australia’s jurisdictions, signalling resolve and policy momentum.

3.5 regulating NFPs in the United Kingdom (UK)

The voluntary and community sector (VCS) is characterised by an ethos that blends public benefit, a response to unmet needs, a desire to help and an interest in neighbours and communities...Regulation is necessary to protect the public from the excesses of the market and to protect standards in public services. However, we believe that the voluntary and community sector and those working within it need a more proportionate approach to regulation. (Better Regulation Task Force 2005b, p. 3)

The regulatory principles and practice associated with the Westminster System of Government have been influential on Anglophone countries such as Australia and other Commonwealth democracies. More recently many European countries, including England, have observed and emulated the improvements to regulatory practice initiated in Holland, especially the regulatory reduction measurement methodology, the Standard Cost Model.

Arguably the UK has long led the way in the regulation of charities with the passing of the Charitable Uses Act in 1601 (popularly known as The Statute of Elizabeth), the creation of the UK Charity Commission in 1853, the establishment of a Central Register of Charities under the 1960s Charities Act, and the strengthening of the public benefit test in the Charities Act 2006. Over the past decade the administration and regulation of charities have been under the spotlight as part of the UK government’s broad regulatory reform initiatives, as part of its public commitment to increasing the role of the community and voluntary sector in service delivery, and as part of its efforts to enhance and support the work of charities. Figure 4 below illustrates the likely long term impact of the Government’s policy to engage NFPs more fully in service delivery.
The UK established a Minister for the Third Sector and an Office of the Third Sector in May 2006. The Office of the Third Sector works as an advocate for the third sector and draws together sector-related work across government. In contrast to the Office of the Third Sector advocacy and co-ordination role, the work of the Charities Commission is to promote compliance with charity law and equip charities to work better. Its 500 staff monitor some 190,000 charities to ensure they are run for public benefit, are independent, well governed and accountable. It operates on principles of accountability, independence, proportionality, fairness, consistency, diversity, equality and transparency. The work of these bodies was enhanced by the development of GuideStar UK in 2003. GuideStar UK is an independent charity which has compiled a single, free, easily accessible source of information about every charity and voluntary organisation in the UK.

An exercise to clarify and confirm the relationship between the Government and the community and voluntary sector in 1998 to improve their relationship for the benefit of each other resulted in a Compact. Some 25,000 voluntary and community organisations were consulted in the development of the Compact. The Compact includes codes of good practice, including on volunteering and on funding and procurement. For its part the voluntary sector is relatively well organised with organisations such as the Association of Chief Executives of Voluntary Organisations (ACEVO) and the Charity Trustee Networks advocating on behalf of the sector.

The UK Government has overseen a series of initiatives aimed at improving the regulatory environment in which NFPs work. The Better Regulation Task Force’s 2005 Report, Better Regulation for Civil Society identified areas to improve regulatory practice and adopt more proportionate regulation for the community and voluntary sector (CVS). The Taskforce’s prediction that the role of the NFP sector will grow over time in the UK is illustrated in Figure 3 above. Amongst the suite of recommended changes are:

- proposals to move from a one-size-fits-all approach to inspection to a more flexible model which allows inspectors in certain circumstances to waive standard requirements in favour of suitable alternatives
- co-ordinating and simplifying criminal records checks
- encouraging self-regulatory and co-regulatory approaches and
- reviewing the administrative burden imposed by government contracts.
A related 2005 report, the National Audit Office’s (NAO) Working with the Third Sector assessed the effectiveness of government departments’ efforts to improve the regulation of the NFP sector (called third sector organisations in this report) in relation to a 2002 HM Treasury review of CVS service delivery. The NAO found a need to improve data on service delivery, to improve relations between Departments and the sector, to clarify funding definitions and distribution practices, and to reduce monitoring requirements.

Given their relevance to the Victorian context, some areas in the NAO Report warrant further exploration. For example the NAO found inconsistent practice and confusion over when to use grants and contracts. It recommended that Departments clarify whether they are giving (providing general support to a worthy project), shopping (using competitive tendering to get value for money for service delivery), or investing (seeking a long term outcome from a CVS organisation). The NAO report advocated a range of measures to improve the administration of funding from providing internet-based information and electronic applications, adopting a two stage application process, using shorter and simpler forms, providing guidance seminars and helplines, clarifying eligibility criteria, providing feedback, building in funding for the bid-planning process, and ‘passporting’ – sharing information on NFPs between funders. Findings from the SSA NFP Review suggest that similar approaches to reducing the administrative burden of regulation would be welcome in Victoria.

The UK has retained its vigilance in assessing improvement to the regulation of the community and voluntary sector. The Audit Commission’s July 2007 report, Hearts and Minds: Commissioning from the Voluntary Sector, assessed local efforts to improve the voluntary sector’s ability to deliver public services. It found the room for improvement to funders’ commissioning practice and to voluntary organisations’ capacity to cost their services and measure value for money. The report argues for ‘intelligent commissioning’ which understands user needs, the particular service market and good procurement practice. As is the case in Victoria, these administrative aspects of the regulatory burden have a disproportionate impact on small and medium NFPs.

Voluntary organisations of all sizes share the government’s aspirations for improved public services. However, small and medium-sized organisations are concerned about their ability to contribute because they feel unable to compete for contracts or because their experience of contracting practice has not, in their view, enabled them to bring particular capabilities to bear...It is clear that the public and voluntary sectors are becoming increasingly interdependent because the voluntary sector is drawing so much of its income from public service contracts. (Audit Commission 2007, p. 18)

Taking a national perspective and concentrating on large charities, the National Audit Office’s August 2007 report, Public funding of Large National Charities, noted the ‘baroque complexities of current funding arrangements’ and the need for coherence and consistency in funding practice. Large charities varied in the number of funding streams they accessed, but all reported inconsistent, inefficient and excessively complex arrangements which absorbed around 2 per cent of income on compliance. Despite central government attempts to reduce red tape over a number a years through guidance and best practice, change has been slow. The report urges central agencies such as the Office for the Third Sector and HM Treasury to accelerate the pace of improvement, or enact structural change such as reassigning commissioning responsibilities. It notes the dilemma of the central agencies having policy leadership while national and local government departments have implementation responsibility. While the national context of the UK does not translate directly to Victoria, many of the findings in this report are evocative of the SSA Review findings, and together with the July 2007 Audit Commission Report, give evidence-based insights to the complexity of the administrative requirements placed on NFPs.

The UK is unique in its long history of formal support for charitable bodies and its ongoing efforts to improve the support to and regulation of the sector. It has established structures which separate the policy and advocacy functions (championed by the Office for the Third Sector) from the compliance and regulatory roles (undertaken by the Charities Commission.) It does not have the complication of differing legislative and regulatory requirements found in a federation such as Australia, but it does have added complexity due its membership of the European Union and the role of local authorities in enforcing regulatory compliance. The Government’s commitment to the sector is clear with an agreed Compact, a
dedicated Minister and office for the sector, as well as a dedicated regulator. Capacity is enhanced with the availability of a comprehensive database on the sector, due consideration of the issues in the sector by government instrumentalities, constructive research from think tanks and universities, and NFP sector bodies which support capacity building. The UK provides a good model of what a well governed NFP sector might look like.

### 3.6 regulating NFPs in New Zealand

In 2001, the New Zealand Government released a Statement of Good Intentions for an Improved Community-Government Relationship with community, voluntary and iwi/Maori bodies. In 2002, it released two reports of the Working Party on Registration, Reporting and Monitoring of Charities and announced the establishment of a Charities Commission. The New Zealand Charities Commission was formally established in July 2005. Its role is to promote public trust and confidence in the sector, register charities, oversight their activities including via annual reports, ensure compliance with the Charities Act and encourage good governance practice. The early work of the Charities Commission has focussed on establishing a data base of charities and registering them.

There has been a focus on the formal contractual relations between community, voluntary and iwi/Maori organisations. In 2003, the Treasury revised its 2001 Guidelines for Contracting with Non-Government Organisations for Services Sought by the Crown. The guidelines were focussed more on improving contracting practice than reducing the regulatory burden, with a view to achieving better outcomes for both government and community organisations. The Auditor-General published Principles to underpin management by public entities of funding to non-government organisations in 2006. Prepared as a good practice manual, and focussed as much on capacity-building and risk management as on managing public resources, the guide advocated a principles-based approach centred around the interrelated principles of lawfulness, accountability, openness, value for money, fairness and integrity. Both the Treasury and Auditor-General’s guide complement approaches within government departments to improve the management of service delivery by community bodies.

A whole-of-government approach has been developed within the Ministry of Social Development where integrated contracts have been trialled for those entities delivering services using funding from more than one government program (Pomeroy 2007). The Funding for Outcomes project formalised a collaborative approach between government and NFP service providers through a mandated approach to integrate contracts. It has shifted the focus from outputs to outcomes reporting, enabled providers to get involved in the development of the contract, clarified expected results, established an integrated report template and established pre-approved standard terms and conditions as well as a contract variation template. More importantly it has changed work practice in participating departments.

The focus of regulating the NFP sector in New Zealand is on maintaining accountability. Research into the accountability of voluntary organisations to government funders in New Zealand found an inverse of the classic principal-agent theory (Cribb 2006). When asked to whom they were accountable, voluntary organisations delivering government programs first identified their clients, then staff, followed by the Board and finally those to whom many of them were financially reliant – government departments. These findings were confirmed repeatedly during the consultations for the SSA NFP review in unprompted comments from NFP attendees.

*Walking the fine line between keeping powerful stakeholders happy and resources flowing as well as staying true to the organisation’s purpose of serving clients and communities is considered the key voluntary sector management challenge.* (Cribb 2006, p. 55)

Cribb (2006) argues for improved approaches to managing the accountability of community and voluntary organisations which recognise the congruence which generally exists between their missions and that of Government. She argues for a more relational approach which does not compromise the Government’s need for quality control and risk management and does not undermine the community and voluntary sectors’ strengths of innovative practice and community connectedness.
Regulating the Community and Voluntary sector in New Zealand is less complicated than Australia due to its smaller size and dual tiered government structure. Regulators and regulatees tend to know one another and there is good interaction between research, policy and practice. While the new Charities Commission is yet to make its mark other instrumentalities such as the Auditor General’s Office are working to improve accountability and regulatory practice.

3.7 the need to focus on regulatory practice

Regulation reform (alongside human capital and competition) has achieved a high national profile in Australia. It is a key element of the agreed agenda of the Council of Australian Governments (COAG). There is consensus that ‘red tape’ is choking business, and that reforms should be accelerated and jurisdictional differences minimised in moves to ‘co-operative federalism’.

But these national reform priorities are not necessarily being extended to the NFP sector. This is in contrast to countries like the UK, where the importance of the NFP sector is well recognised and improving regulation in that sector has received considerable focus.

While, arguably the Victorian Government has taken the lead in improving regulatory practice, both through its leadership of the National Reform Agenda and its inclusion of the NFP and community sectors in its regulatory improvement initiatives, there has not been the same national political and community momentum for reform in the NFP sector as there is for business regulation. Therefore, to achieve the benefits of reform, proactive and concerted action is needed.

Such action would be worthwhile. Regulatory reform in the NFP sector is necessary and the benefits of reform are wide ranging. As the sector is used increasingly to deliver government services, regulatory costs affect the clients who rely on these organisations. Government, which needs to deliver services as efficiently and effectively as possible could benefit from improved regulatory oversight; and business, who pays higher taxes if government activities are inefficient is a potential beneficiary. Therefore, there are considerable benefits in considering approaches to good regulatory reform in the NFP sector.

4 approaches to good practice regulation for NFPs

To the extent that government regulation is designed and implemented in such a way that it does encourage, enable or enforce entities to engage in open self-regulation, then that regulation is likely to be more efficient than other options. That is designing and implementing regulation to promote open self-regulation can reduce the overall regulatory burden by working with self regulation to the extent possible rather than government imposing requirements that may create unnecessary burdens. (Parker 2007, p. 6)

Community organisations could have a formative influence on the next generation of government services, the next generation of social investment and the next generation of local governance systems. But to grasp these opportunities, they need the support and partnership of governments, companies and community members... (Stronger Community Organisations Project 2007, p. iv)

The SSA’s 2007 review of the regulation of the NFP sector found that NFPs were operating in a confusing regulatory and reporting framework, both across levels of Government and between Victorian Government departments. There was a lack of coordination across Government, (including processes, regulatory functions and information sharing); duplication and inconsistencies in funding arrangements and often poor communication and feedback. In addition, the impact of new legislation and regulations on service providers was often onerous, especially on the small and medium sized NFPs. The Review identified four areas for reform:

- Reforming the legislative and regulatory framework of the Associations Incorporation Act 1981 and Fundraising Appeals Act 1998
• Developing whole-of-government approaches to grant applications for NFPs as well as introducing common financial definitions and a standard chart of accounts
• Simplifying service agreements, including the introduction of common minimum data set requirements and harmonising standards and accreditation processes
• Improving information and support systems across government.

The Government considered these recommendations alongside those of the Stronger Community Organisations Project (SCOP). This contemporaneous report took a long term purview on the sustainability of the NFP sector. It identified the scope and nature of the sector, noted the contribution the sector makes to the community and the economy, analysed the trends, challenges and opportunities and advocated that improvements be made. The 21 recommendations can be grouped into four broad areas:

• Raising the profile and recognition of the sector
• Maximising the participation and inclusion of community organisations in local planning and as a means of increasing people’s participation in civic life
• Enhancing the capacity of community organisations through means such as improved workforce planning, agreed funding principles and greater use of local community infrastructure and
• Promoting improved collaboration and coordination through new partnership models with business, philanthropic community and government organisations.

The SSA review recommended updating the dedicated legislation for the NFP sector and enhancing the levels of regulatory support. This improved regulatory support could include improved information and guidance such as updating the web site, providing email information on legislative changes and associated compliance obligations, and providing face to face professional development. Red tape reductions in the administrative requirements made by government departments proposed in the SSA review include adopting whole of government approaches such as a standard chart of accounts, consolidating forms, rationalising data collections and adopting consistent approaches for electronic transactions.

Addressing both the legislative aspects of the regulatory burden together with the administrative elements has the potential to create a ‘circuit breaker’ for NFPs. They are encased by general and sector-specific legislation, and, those delivering government services, find themselves with an undue administrative and accountability burden as well. There are strong arguments in the SSA Review for Government Departments to lighten the administrative requirements on NFPs, while maintaining effective oversight of government expenditure.

Given the evidence in the SSA Review of confusing and duplicative requirements for incorporated associations and fundraising bodies across state borders, there would value in uniform national legislation and national regulation. The Victorian Government’s policy to draft model legislation with a view toward national harmonisation is the first step in this direction. There would be value in a jurisdiction championing the need for nationally consistent regulation and regulatory oversight, and Victoria would be well placed to take on this role.

There has been a significant reform program recommended through these complementary reports. Both note the increased use of NFPs by Government to deliver services to the community and the challenges for both Government and the NFP sector. Recommendations in the SSA report seek a balance between greater levels of self regulation for NFPs and adequate accountability for government. For example, the recommendation that the default period of registration for a fundraiser be extended from one to three years is balanced by the requirement that registered fundraisers post their financial accounts on their website.

This is occurring in an environment where many commentators are advocating further regulatory reform, through greater self-regulation and co-regulation. When implemented effectively, such regulatory approaches can simultaneously improve regulatory outcomes and reduce regulatory costs. The main impediment to effective self-regulation is the sector’s capacity to engage meaningfully with regulatory
processes. There is a shared responsibility for the sector itself to build governance capacity from within and for the government to support such initiatives. Introducing the reforms recommended by the SSA and SCOP would reduce current regulatory complexity, increase tools and information available to NFPs to assist them to engage with regulatory processes, simplify regulatory processes and improve the sector’s resources and skills base. Such changes would make it increasingly possible to implement greater self-regulatory and co-regulatory processes.

4.1 regulatory disposition

This paper has looked at changes in regulatory theory and practice and surveyed the literature on the regulation of NFPs by governments in a select number of Anglophone jurisdictions. It is worthwhile considering how future regulation in the NFP sector could develop. The classification of regulatory practice into a regulatory pyramid provides a clear hierarchy of approaches from self regulation at the base with little government intervention in an activity, to command and control at the peak with defined government powers and oversight. By enabling entities to opt into open self-regulatory or co-regulatory approaches, regulators are presuming the existence of goodwill and capability, buttressed by transparency and accountability. NFP entities can earn autonomy from regulators by demonstrating their capacity to openly self-regulate or co-regulate (Chapman, Miller & Skidmore 2003).

The SSA’s own review of government regulation of the NFP sector in Victoria accords with reports from other Anglophone jurisdictions that there is an undue administrative burden on the NFP sector and a case for lighter touch regulation. It evaluated regulatory approaches against the Victorian Government’s regulatory principles and the UK Government’s Hampton Principles. It commissioned Christine Parker to apply the concept of open self-regulation to the NFP sector (Parker, 2007) and noted the benefits of flexible, adaptive approaches when they are accompanied by regulatory practice which enable, or enforce, transparent and accountable practice in NFPs.

Government needs to have a repertoire of regulatory instruments to be responsive and flexible in its regulatory approaches. NFPs’ underlying values and philosophy are strongly focused on their members or clients interests, and close links between members and decision makers in NFPs create a natural level of self-regulation. These forces outside government regulation should be taken into account in choosing the best regulatory approach. Given the explicit commitment to partnership between government and the NFP sector, co-regulatory approaches situate the Government’s regulatory disposition toward a mode which recognises the strengths and capabilities of the NFP sector and the need to provide transparency for the public whose tax or donor dollars have supported NFPs. Such a regulatory approach is compatible with the regulatory principles and practice in the Victorian Guide to Regulation (Department of Treasury and Finance 2007). For some NFPs this will require further capacity building as advocated in the SCOP report.

There are other benefits in striving to move towards more co-regulatory and ‘open self regulatory’ approaches as they can reduce the regulatory burden, including administrative requirements and management costs (Bartle & Vass 2005; Better Regulation Task Force 2005b; Parker 2007). The NFP sector would benefit in the long term from responsive regulatory approaches as they enable appropriate monitoring while encouraging sound internal regulation. The hallmarks of the NFP sector, its community embeddedness and innovative capacity, could be protected.

Co-regulation can avoid some of the pitfalls of pure self-regulatory approaches including ensuring that self-regulators act in the public interest, avoiding anti-competitive practice, requiring adequate transparency, avoiding the zealous operators who increase their own burden, and evaluating the effectiveness of the approach. The UK Better Regulation Task Force argue that ‘there is scope for self regulation or co-regulation to complement classic regulation’ (Better Regulation Taskforce 2005b, p. 46), however ‘Government should avoid action which makes self-regulation overtly or indirectly ‘mandatory’, imposing it on sectors…Encroachment of self-regulation into areas covered by ‘classic’ regulation requires clear delineation of the respective responsibilities of statutory regulators and ‘self-regulating’ regimes’ (p. 48). Arguably one of the factors that make self-regulation work is the risk of black letter regulation if the industry does not effectively self-regulate.
Ultimately whatever regulatory approach is adopted by government will need to take account of its relationship with NFPs delivering services on its behalf; an assessment of the governance and administrative capability within the sector; and a judgement on the balance between lightening the regulatory burden and ensuring adequate regulatory oversight of quality, safety, fairness and sustainability. In this context risk management is shared between the government and the NFP service deliverer.

4.2 regulatory oversight

Similar issues arise about the appropriate level of self-regulation in the context of an increasing use by government of NFPs to deliver services to citizens, such that the oversight of service quality, safety and sustainability becomes public issues. Government has a duty to ensure it is engaging NFPs (and private providers) which are capable and effective. For their part, NFPs need to ensure they have adequate governance and administrative capability to undertake the contracted work. The dilemma for many NFPs is they end up in bifurcated accountability and reporting relationships both to their own Boards and to Government.

The regulatory oversight of the NFP sector should share with the public and business sectors broadly common approaches and principles. Regulatory approaches should be responsive to the context of the organisation, while managing risk, allowing the core mission to be achieved and ensuring quality and safety. Co-regulatory approaches which enable entities to ‘earn autonomy’ from the regulator have the potential to reduce the regulatory burden while ensuring good practice and appropriate accountability. Such approaches are consistent with the Hampton Principles which use risk assessment as the basis for all regulators’ enforcement and compliance program and adopt ‘light touch’ reporting for compliant entities through to intervention and sanctions for those which are non-compliant. This regulatory approach supports government intervention only when it can be demonstrated that a problem exists and that the NFP is unable to rectify the situation itself.

In envisaging the regulatory oversight of the NFP sector, it is helpful to separate compliance with sector-specific legislation, and compliance with the regulation associated with the conduct of services paid for by Government. In the context of delivering government services, the arguments for the ‘light touch’ regulation proposed by the Hampton review are even stronger in the case of NFPs than they are for business. Generally, NFP and government objectives are closely aligned. NFPs’ underlying values and philosophy are strongly focused on their clients interests, which (as discussed above in the context of regulation more generally) creates a natural level of self-regulation. Again this should be taken into account in choosing the most appropriate approach to monitoring service delivery contracted to NFPs.

This paper has investigated regulatory theory current approaches to the regulation of the NFP sector and emerging approaches to good practice regulation. It foresees a future where government and the NFP sector will clarify their relationship and confirm any partnership agreements; where the sector will build capacity from within and government will strengthen its information, advisory and support services; and where legislation and its attendant regulation will lighten the administrative burden for NFPs. In this scenario, governments will retain the full repertoire of regulatory approaches but increasingly be able to use co-regulatory and open self-regulatory approaches for those NFPs who have earned the autonomy of lighter touch regulation.

5 conclusion

Regulatory design, oversight and practice is changing to accommodate the critique from the business and NFP sectors of an undue administrative burden, and to enable complex social problems to be tackled and interconnected global markets to thrive. Victoria has led the way in giving comparable attention to the regulation of the NFP sector as it has to business. Responsive regulatory approaches and attuned regulatory oversight have the potential to improve the quality of compliance, reduce the regulatory burden and enable NFPs to thrive. The beneficiaries will be those community members receiving a service delivered by a NFP; the NFP attending to its core mission; the government reducing
the regulatory requirements; and the conduct of regulatory practice as it moves to more attenuated, co-produced, responsive regulatory approaches.
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