

1 February 2013

The Manager  
Philanthropy and Exemptions Unit  
Indirect, Philanthropy and Resource Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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Dear Manager

### **Development of governance standards: Response to the consultation paper of December 2012**

Catholic Health Australia (CHA), on behalf of Catholic health and aged care organisations who collectively operate one in ten of the nation's hospital and aged care beds and provide home care to many thousands of Australians, is comfortable that the six proposed governance standards can be legislated for use by not-for-profit organisations. Catholic health and aged care organisations already comply with the intent of the proposed standards. For those organisations which might not, we consider the timeframes proposed to work towards compliance are reasonable. While being able to work with the proposed standards, we believe there are four opportunities to refine the standards and clarify the context of their operation prior to their adoption in legislation, as follows.

#### **1 – Uncertain interaction of association, corporation, and trust laws**

The proposed Standards, particularly Standards 5 and 6 deal with matters currently addressed in the *Corporations Legislation*. It appears as though Standards 5 and 6 seek to mirror as best as is possible the intent of current corporations law, although whilst the corporations law places duties on individuals it appears Standards 5 and 6 propose to place obligations on entire charities. It further appears that charitable associations would face a slightly higher obligation than that required by association law, and charitable trusts a slightly lower obligation than that required by trust law. In pointing out this changed approach to director's duties, CHA does not necessarily argue against the intent of seeking to consolidate the three different legal obligations of charitable directors into a single framework, but we do identify several consequences:

- Whereas the discussion paper details those provisions of the *Corporations Legislation* that will presumably cease to apply in relation to charities at the commencement of the

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proposed Standards, it is not entirely clear how in time those *Corporations Legislation* provisions that will continue to apply to charities will interact with the new Standards.

- Directors of charitable associations and trusts will be subject to changed director duties, which will need to be satisfied in addition to existing obligations of association and trust law. Whilst this does not appear an overly onerous task, it is duplicative and requires new director education of changed duties.
- The excising of provisions from the *Corporations Legislation* and their consolidation into the proposed Standards, together with the new powers of the Australian Charities and Not-for-Profits Commission (ACNC) gives rise to the likely evolution of a new body of charitable governance common law. Whilst this is in and of itself may prove in time to not be particularly problematic, it does give rise to potential governance uncertainty. To the extent that changing existing legislation and replacing it with new legislation creates uncertainty and potential for court intervention to determine the legislative intention of new statute, CHA recommends the issue of either an explanatory memorandum to accompany the proposed *Bill* to give effect to the Standards or the issue of an ACNC practice note or directive to clarify the Commissioner's view on how the changed governance arrangements are to be interpreted.
- The placing of existing *Corporations Legislation* director duties onto charitable entities themselves appears to be proposed for reasons of jurisdictional administrative need, rather than for benefit to charitable organisations or for the protection of their consumers or public supporters. This significant change to the operation of director duties from being individual to collective requires further justification, and if justified, should be subject of significant director education as to its consequences for practice and enforcement. Again, CHA recommends the issue of either an explanatory memorandum to accompany the proposed *Bill* to give effect to the imposition of director duties on the collective, the issue of an ACNC practice note or directive to clarify the Commissioner's view on how this significant change will be best complied with.

## **2 – Commonwealth, State, Territory duplication and consistency**

The Regulatory Impact Statement (RIS) prepared by the sub-committee of the Council of Australian Governments starkly details issues of inconsistency and duplication of charitable regulation within the Federation. We are of the view that finalisation of the *Bill* to implement the proposed governance standards should await consultation on RIS to consider if the proposed standards should be amended in response to identified duplication and inconsistency. In raising this matter, we acknowledge that awaiting finalisation of consideration of the RIS may in fact be the intention of the Treasury and Government.

## **3 – ACNC role in resolving member disputes**

Proposed Standard 2 defines obligations to members. The obligations are reasonable, and consistent with both current associations and corporation's law. Not defined is the role the ACNC would play in ensuring compliance. It may be that the Standard gives rise for the opportunity for member disagreements to be referred to the ACNC for adjudicating, which we do not understand to be the ACNC's role, or the intent of the draft standard. The small potential for this unintended consequence to arise could be reduced by the Standard being amended to require entities to "have a procedure"

rather than “*take reasonable steps*” to be accountable. The test for a “*procedure*” is if it exists, whereas the test for “*reasonable steps*” is both subjective and open to contention. Ideally, the role of the ACNC should simply be to determine if a procedure exists that has been adopted by a majority of members, rather than to investigate and then determine what may or may not have been reasonable within a given set of circumstances.

#### **4 – ACNC role in managing financial affairs**

Proposed Standard 4 defines financial obligations. The obligation is reasonable, yet the proposed “*reasonable steps*” approach is like in Standard 2; subjective and open to contention. Ideally, the Standard would be drafted to require the entity to have a “*procedure*” for financial management. Similar to Standard 2, a subjective test may require the ACNC to investigate and determine the reasonableness of a management decision giving rise to the potential for the ACNC to be drawn more deeply into operational matters than would be desired. A requirement to have a “*procedure*” is more easily proven and would lessen the ACNC’s burden in investigating possible breaches.

Subject to consideration of the matters outlined, we are happy for the Standards to proceed for consideration by the Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Martin Laverty', with a stylized flourish at the end.

**Martin Laverty**  
Chief Executive Officer