

15<sup>th</sup> February 2013

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

NFP Sector Tax Concession Working Group Secretariat

The Treasury

Langton Crescent

**PARKES ACT 2600**

NFPReform@treasury.gov.au

Dear Sir/Madam,

**Response to Discussion Paper**

Please find enclosed WHK's submission in response to your discussion paper dated December 2012.

WHK is a multidisciplinary professional services firm, with a high level of involvement in the not-for-profit sector through our engagement as auditors, tax advisors and accountants to a large number of organisations, particularly in regional Australia.

WHK strongly supports the current suite of reforms in the NFP sector, and welcomes the level of recognition now being afforded to the many worthwhile NFP organisations and their invaluable contribution to the Australian community and economy.

In our view, the proposed Governance Regulations will provide for the development of sound practices relevant to the tier of entity overtime. In particular the proposed Regulations will address the specific individual and intrinsic risk factors of each registered entity having due regard to industry/activity sector considerations and the relevant size and complexity.

We have indicated in the attached detailed response schedules that there are some concerns as to the adequacy of guidance in relation to:

- Risk identification particularly for registered entities in the second tier that provide community service obligation level activities in remote locations.
- The development and implementation of clear minimum skill sets for responsible entities as a guide to registered entities assessment of capacity of responsible entities to address identified registered entity risks.;
- A concern that a separate Register for Exemptions from disqualification will be needed for both the entity permitted to act as a responsible entity and for each registered entity for which such an exempted responsible entity person has been approved. Without this there is a significant risk of undermining public confidence, particularly in areas where the pool of potential responsible entities is limited and where a preponderance of exemptions may undermine the overall strength of the ACNC Governance processes.

We welcome the opportunity to participate in this important reform process. Please refer any questions to Tina Shaw, Senior Manager, at Tina,Shaw@whk.com.au.

RESPONSE SCHEDULE – PROPOSED CORPORATE GOVERNANCE REGULATIONS

CONSULTATION QUESTION	LEGISLATIVE PROPOSAL	RESPONSE TO ACNC
Does draft standard one establish the appropriate principles?	<p><b>45.5 Standard 1—purposes and not-for-profit nature of a registered entity</b></p> <p><i>Object</i></p> <p>(1) The object of this governance standard is:</p> <p>(a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and</p> <p>(b) to give the public, including members, donors, employees, volunteers and benefit recipients of the registered entity, confidence that the registered entity is acting to further its purposes.</p> <p><i>Standard</i></p> <p>(2) A registered entity must:</p> <p>(a) be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity; and</p> <p>(b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and</p> <p>(c) comply with its purposes and its character as a not-for-profit entity.</p> <p><i>Note</i> Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register, in an Australian law on <a href="http://www.comlaw.gov.au">www.comlaw.gov.au</a> or <a href="http://www.austlii.edu.au">www.austlii.edu.au</a>, or is otherwise made available on request.</p>	<p>Agree, this settles that the Governing Rules (or equivalent document) as the principal reference for minimum standards.</p> <p>It also permits registered entities to address any issues not presently in their incorporating documents by the adoption of Codes of Conduct and Policy and Procedures documents during the transitional period.</p> <p>“Responsible entities” will therefore have an appropriate basis for making the Declarations of compliance required under these Governance Rules and, in so far as the fiscal policies are part of the Governance framework, under the financial regulations as presently proposed.</p>
Is the wording of draft governance standard one appropriate?		<b>Yes</b>
Does draft standard two establish the appropriate principles?	<p><b>45.10 Standard 2—accountability to members</b></p> <p><i>Object</i></p> <p>(1) The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.</p> <p><i>Standard</i></p> <p>(2) A registered entity that has members must take reasonable steps to ensure that:</p> <p>(a) the registered entity is accountable to its members; and</p> <p>(b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.</p> <p><i>Note 1</i> The steps that a registered entity may take to ensure it is accountable to its members include holding annual general meetings, providing members with an</p>	<p>Agree. However until such time as amendment of constitutional documents are completed entities will need to continue to comply with the provisions of their present ones.</p> <p>Utilisation of Policy approved processes for member communication in the transitional period will assist in determining practical and suitable formats for future communication and reporting.</p> <p>This will significantly benefit registered entities engaged in community service obligation provision where the service users may be under a legal disability as regards their capacity to participate in elections or other operational aspects.</p> <p>This will be valuable in situations where the risk management of a registered entity can be best achieved by a formal Board selection process to provide members with some assurance of capability of those to whom governance will be entrusted.</p>

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	<p>annual report (including financial information and achievements towards its purpose) and providing for elections for its responsible entities.</p> <p><i>Note 2</i> The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns include holding an annual general meeting with a question and answer session and providing an opportunity for members to propose resolutions and to vote upon those resolutions.</p>	<p>The Corporations Act may need to be amended to enable Draft Governance Standard 2 to be effective for companies limited by guarantee as Section 292 does not require small companies limited by guarantee to prepare financial report and directors report unless requested to do so by more than 5% of members Section 294A or at ASIC s request Section 294B and there are members choice for annual financial information under Section 316A that pose issues with transparency and accountability to members of companies limited by guarantee</p>
Is the wording of draft governance standard two appropriate?		<b>Yes</b>
Does draft standard three establish the appropriate principles?	<p><b>45.15 Standard 3—compliance with Australian laws</b></p> <p><i>Object</i></p> <p>(1) The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).</p> <p><i>Standard</i></p> <p>(2) A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:</p> <p>(a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or</p> <p>(b) by way of a civil penalty of 60 penalty units or more.</p> <p><i>Note 1</i> See section 4AA of the <i>Crimes Act 1914</i> for the current value of a penalty unit.</p> <p><i>Note 2</i> While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by this standard may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act.</p>	<p>This provides significant clarity regarding the extension of the class of stakeholders beyond the traditional area of membership and regulatory compliance alone.</p> <p>The adoption of additional Codes of Conduct and Policy &amp; Procedures frameworks as a transition to the amendment of constitutional documents will allow each registered entity to address issues specific to its nature and operations.</p> <p>Educational assistance by way of pro forma Governance Statements and suggested minimum disclosures of social responsibility and operational outcomes data would be of assistance to entities in complying with this standard.</p> <p>This draft governance standard aligns the organisations activities and governing body oversight with the community expectations of compliance with Australian laws.</p>
Is the wording of draft governance standard three appropriate?		<b>Yes</b>
Does draft standard four establish the appropriate principles?	<p><b>45.20 Standard 4—responsible management of financial affairs</b></p> <p><i>Object</i></p> <p>(1) The object of this governance standard is to ensure that a registered entity manages its resources responsibly, in a way that effectively furthers its purposes and protects its resources from misuse.</p> <p><i>Standard</i></p> <p>(2) A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.</p>	<p>When read in conjunction with the consultation document and financial reporting regulations this proposal establishes appropriate principles.</p> <p>This draft governance standard requires that the organisations activities and governing body oversight have to be aligned with the organisational objectives/purpose and promotes appropriate stewardship of the organisations financial resources towards the organisational objectives/purpose.</p>

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Is the wording of draft governance standard four appropriate?		Yes subject to the addition of references to the Financial reporting requirements of the ACNC Act as they are eventually settled,
Does draft standard five establish the appropriate principles?	<p><b>45.25 Standard 5—suitability of responsible entities</b></p> <p><i>Object</i></p> <p>(1) The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.</p> <p><i>Standard</i></p> <p>(2) A registered entity must:</p> <p>(a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and</p> <p>(b) after taking those steps:</p> <p>(i) be, and remain, satisfied that each responsible entity meets the conditions; or</p> <p>(ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.</p> <p><i>Note</i> Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.</p> <p><i>Examples of reasonable steps</i></p> <p>Reasonable steps may include obtaining declarations from responsible entities and the searching of public registers.</p> <p>(3) Subject to subsection (5), the conditions for each responsible entity are that it is not:</p> <p>(a) disqualified from managing a corporation, within the meaning of the <i>Corporations Act 2001</i>; or</p> <p>(b) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).</p> <p><i>Note</i> Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.</p> <p>(4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this standard if:</p> <p>(a) the entity has been previously suspended or removed as a responsible entity of any registered entity, under Division 100 of the Act; and</p> <p>(b) the entity has been given notice of its disqualification by the Commissioner; and</p> <p>(c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.</p> <p>(5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular</p>	<p>Partial agreement. The proposed standard deals with conditions disqualifying a “responsible entity”. Mechanisms are in existence and proposed within these standards, for identifying persons and corporate entities disqualified under present legislative provisions.</p> <p>However, the standard should be strengthened to provide minimum standards, associated by tier of activity, for positive qualification of a “responsible entity”. This will significantly assist registered entities in their risk assessments prior to assessing the adequacy of the skills of their “responsible entities” .</p> <p>Where an otherwise “disqualified” party is permitted to act as a responsible entity there may be some public concern as to the number of registered entities in relation to which such permission is granted to a specific party. This could also translate into significant concern regarding the registered</p>

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	<p>registered entity if the Commissioner believes it is reasonable to do so in the circumstances.</p> <p>(6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.</p>	<p>entities that may have more than one responsible entity that has received such approval. The inclusion of a number of “responsible entities” subject to this approval within the governance body of a registered entity may significantly increase the risk profile of the registered entity..It is unlikely public confidence would be maintained if the majority or all of the responsible entities were subject to this sub-section and likely that such a situation would potentially result in the withdrawal of other ‘responsible entities” not subject to this sub-section</p>
<p>Is the wording of draft governance standard five appropriate?</p>		<p>Yes with respect to disqualification. As above minimum standards of knowledge for qualification matters should also be addressed .</p>
<p>Are there concerns with allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register?</p>		<p>Yes. There should be provision for maintaining a Register of “responsible entity” permissions under proposed standard section 45.25 (5). And also for registered entities in respect of which that section has been invoked.</p>
<p>Does draft standard six establish the appropriate principles?</p>	<p><b>45.30 Standard 6—duties of responsible entities</b></p> <p><i>Object</i></p> <p>(1) The object of this governance standard is:</p> <p>(a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:</p> <p>(i) the relationship between them and the entity were a fiduciary relationship; and</p> <p>(ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and</p> <p>(b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:</p> <p>(i) is acting to prevent non-compliance with the duties imposed on responsible entities; and</p> <p>(iii) if non-compliance with the duties imposed on responsible entities occurs— will act to identify and remedy non-compliance with the duties imposed on the entity.</p> <p><i>Standard</i></p> <p>(2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:</p>	<p>General agreement. Guidelines should include appropriate requirements relevant to each tier of registration under the ACNC Act for “responsible entities” to demonstrate the level of knowledge and understanding appropriate to the registered entity.</p> <p>The variety of organisational structures in the not for profit sector that arise from Federal and State based legislation (Corporations Act, Cooperatives Legislation and Associations Act as examples) impose existing legislative impacts on duties of directors, committee members and Board which would require harmonisation of Draft Governance Standard 6 with jurisdictional legislation to remove the risk of compliance with Draft Governance Standard 6 and non compliance with jurisdictional requirements and case law precedents.</p> <p>Draft Governance Standard 6 and the draft protections are appropriate but will require harmonisation with the underlying legislative requirements of the organisations legislative base.</p>

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	<p>(a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;</p> <p>(b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;</p> <p>(c) not to misuse the responsible entity's position;</p> <p>(d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;</p> <p>(e) to disclose perceived or actual material conflicts of interest of the responsible entity;</p> <p>(f) not to allow the registered entity to operate while insolvent.</p> <p><i>Note 1</i> This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.</p> <p><i>Note 2</i> Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.</p> <p><i>Note 3</i> For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.</p> <p>(3) For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:</p> <p>(a) if the responsible entity is a director of the registered entity—to the other directors (if any); or</p> <p>(b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or</p> <p>(c) if the registered entity is a company—to the members of the registered entity; or</p> <p>(d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.</p> <p><i>Note 1</i> <b>Company</b> is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).</p> <p><i>Note 2</i> Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.</p> <p><i>Note 3</i> Part 7-6 of the Act provides for the approval of forms.</p> <p>(4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).</p> <p>(5) In this section:</p> <p><b>insolvent</b> has the meaning given by subsection 95A (2) of the <i>Corporations</i></p>	

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	<i>Act 2001.</i>	
Is the wording of draft governance standard six and the draft protections appropriate?		Yes
Does draft standard six establish the appropriate principles?	<p><b>Subdivision 45-C Protections under governance standard 6</b></p> <p><b>45.100 Reasonable steps taken to ensure compliance with duties</b></p> <p>If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.30.</p>	Yes
	<p><b>45.105 Protection 1</b></p> <p>(1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies, on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:</p> <ul style="list-style-type: none"> <li>(a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or</li> <li>(b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or</li> <li>(c) another responsible entity in relation to matters within their authority or area of responsibility; or</li> <li>(d) an authorised committee of responsible entities that does not include the responsible entity.</li> </ul> <p>(2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.</p>	Agree
	<p><b>45.110 Protection 2</b></p> <p>(1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:</p> <ul style="list-style-type: none"> <li>(a) the responsible entity makes the decision in good faith for a proper purpose; and</li> <li>(b) the responsible entity does not have a material personal interest in the subject matter of the decision; and</li> <li>(c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate; and</li> <li>(d) the responsible entity rationally believes that the decision is in the best interests of the registered</li> </ul>	Agree

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	<p>entity.</p> <p>(2) In this section:</p> <p><b>decision</b> means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.</p>	
	<p><b>45.115 Protection 3</b></p> <p>(1) A responsible entity meets this protection if any of the following are satisfied:</p> <p>(a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or</p> <p>(b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.</p> <p><i>Note</i> This protection relates to the duty mentioned in paragraph 45.30 (2) (f).</p>	Agree
	<p><b>45.120 Protection 4</b></p> <p>(1) This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.</p>	Agree
Is the wording of draft governance standard six and the draft protections appropriate?		Yes
<p>Are there any additional protections which should only be provided to volunteer responsible entities?</p> <p>If so, what would these protections be?</p>		No further issues to be raised on protections