

15 February 2013

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Dear Sir/Madam

Consultation Paper - Development of Governance Standards

Thank you for the opportunity to provide our views on the above consultation paper. Our comments arise from our deep understanding and involvement with the not-for-profit (NFP) sector as well as our consultations therewith in respect to the NFP Reform.

1. About Moore Stephens

- 1.1 We are writing on behalf of the Moore Stephens Australia network of eight independent firms of business advisors and chartered accountants.
- 1.2 Moore Stephens has a deep understanding of its clients and the environment in which they operate. We have had a long-standing commitment and involvement with the NFP sector, having been involved with NFP organisations for the past 50 years. We currently provide various professional services, including assurance, accounting, tax and advisory services, to a range of NFP organisations, including:
 - religious organisations;
 - large charities; and
 - Universities and TAFE colleges.

As a consequence of our long-standing commitment to and involvement with NFP organisations, we have taken a strong interest in regulatory changes impacting the sector, and have been active in recent years in providing submissions to the Government's various committees and consultations to support the sector through the current reform phase.

2. Introduction

- 2.1 We refer you to our comments outlined in our submission dated 25 January 2012 on the earlier consultation paper on this topic and in particular our support for a set of principle based governance standards that reflects the need for the sector to ensure that stakeholders can rely on the compliance framework when ensuring the mission and objectives of the various organisations are carried out appropriately.
- 2.2 Thus we welcome both the principle based approach of the draft governance standards included in the consultation paper and they are generally drafted in a form that is not excessive in nature. In our view the draft standards should not result in a significant additional burden for the majority of entities registered with the ACNC, whilst promoting public trust and confidence and good governance within the sector.
- 2.3 In our view the proposed standards as drafted reflect a constructive, common sense and prudent approach to the development of governance standards for the whole sector. Accordingly we have no

reason to believe that there will not be welcomed and broadly supported by the sector in their current form.

- 2.4 We are not aware of any obvious conflicts between the draft governance standards and any other regulatory obligations that might apply to charities. Nevertheless we note that for many charities including those in receipt of government support, for example residential aged care facilities, the existing governance obligations far exceed those proposed in the consultation paper. This is also the case for charities with Public and Private Ancillary Fund status through the Guideline Regulations issued by the Australian Taxation Office, whereby the requirements applying in the areas of investment management, qualifications for responsible persons and others matters far exceed the proposals in the consultation paper. Given our view as to the adequacy of the proposals set in the consultation paper we suggest that this is an opportunity for the ACNC to work with other Government departments and agencies in seeking a reduction in requirements of this nature in other instances as part of the broader objective of reducing red tape for the sector.
- 2.5 In presenting our recent Moore Stephens national seminar series to inform our clients about the ACNC it became apparent that there continues to be concern with the range and quantum of new regulations impacting the sector which may see the pool of those willing to volunteer to be responsible for the running and governance of registered entities diminish given the risks involved. Therefore it is critically important in drafting the regulations that this risk is recognised and thus with any relating penalties not being so onerous so as to reduce this pool of talent available to registered entities.
- 2.6 In our earlier governance consultation submission we suggested that a 'one size fits all' framework may not be appropriate and that it is our view that the degree of governance to be applied in relation to the responsible management of financial affairs of an ACNC registered entity should in part be determined by the following:
- Does the organisation solicit or obtain funds from the general public (who are not affiliated or who are outside its immediate circle) and/or for which the general public or specific donors are able to receive a tax deduction for the payment?
 - Does the organisation receive funding or support such as grants funding from government organisations, private ancillary funds or organisations covered above?
 - Does the organisation receive tax concessions (beyond general income tax exemptions)?
 - Does the organisation receive mutual income or income from a section of the public which are affiliated or within the immediate circle of the organisation and for which no tax deduction is available?

This categorisation of the level of responsible financial management is consistent with the definition of *Contribution* included in the ACNC Act which must be taken into account by the Commissioner when exercising her duties under the Act. Whilst we support the principle based approach reflected in the draft standards in respect to the financial management of charities we recommend further consideration by the Commissioner to the issuing of best practice governance guidelines reflecting the above categorisation and the various sub-types/sectors of charities that are registered under the Act

- 2.7 In the following paragraphs we provide responses to the questions raised on the draft governance standards included in the consultation paper where we consider ourselves appropriately qualified to comment.

3 Standard 1—purposes and NFP nature of a registered entity

3.1 Standard

A registered entity must:

- 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**
- b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and**
- c) comply with its purposes and its character as a not-for-profit entity.**

3.2 Does draft standard one establish the appropriate principles?

Yes.

It is our understanding that the Annual Information statements (AIS) under the ACNC Act will require certain details to be included in demonstrating how a registered entity has fulfilled its purpose during the particular year to which the statement relates. It is important that the level of information to be reported in the AIS in this context is not overly onerous given the limited resources of many small registered entities. Accordingly we recommend where possible that this is achieved with as little narrative as possible with the majority being achieved by way of confirmation of certain facts and details, along similar lines to the current arrangements in the United Kingdom. This approach provides the flexibility for narrative where the Registered Entity wishes to provide commentary to further explain its position but will also allow for ease of comparability between similar organisations.

3.3 Is the wording of draft governance standard one appropriate?

Yes

4 Draft governance standard 2: Accountability to members

4.1 Standard

A registered entity that has members must take reasonable steps to ensure that:

- a) the registered entity is accountable to its members; and**
- b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.**

4.2 Does draft standard 2 establish the appropriate principles?

Yes

4.3 Is the wording of draft governance standard 2 appropriate?

In our view, for member organisations, it would be appropriate to specifically require that an annual meeting of members be held subject to quorum requirements. The process by which such a meeting might be held may vary over time given the advances in technology and communication tools. In our experience such a meeting is the one opportunity whereby member stakeholders take an active involvement in gaining an understanding of the activities of the organisation and in questioning those charged with governance in respect to all facets of the organisation including governance arrangements. Thus in our view it is critical that this opportunity is a specific requirement of the governance standards for member organisations.

5. Draft governance standard 3: Compliance with Australian laws

5.1 Standard

A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:

- a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or**
- b) by way of a civil penalty of 60 penalty units or more.**

5.2 Does draft standard 3 establish the appropriate principles?

Yes.

All registered entities with which we communicate on a regular basis demonstrate clearly that they recognise their obligations to comply with Australian laws and have processes in place in seeking to ensure such compliance.

We support the focus on significant breaches of compliance with other laws providing a balance of good governance and allocation of resources to the underlying purpose of the organisation.

5.3 Is the wording of draft governance standard 3 appropriate?

This is a legal matter for which we do not believe we are appropriately qualified to answer.

6. Draft governance standard 4: Responsible management of financial affairs

6.1 Standard

A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.

6.2 Does draft standard 4 establish the appropriate principles?

Whilst the broad intention of this draft governance standard is eminently sensible we are concerned as to the meaning and range of interpretations that might result therefrom. In our view it would be more appropriate for the underlying purposes of this standard to be reflected in the duties of responsible entities as part of draft governance standard 6. We have set out in paragraph 6.3 suggestions as to matters that might be incorporated within draft governance standard 6 for this purpose.

We note the significant requirements that are already included in the ACNC Act and/or draft regulations and governance standards in respect to the financial management of a registered entity. These include the requirement to maintain proper books and records, solvency and financial statements declarations by responsible entities as well as for responsible entities to act in the best interests of the registered entity. In our view these principles are well developed from a legal interpretation perspective and accordingly should also be the primary basis applied in the governance and responsible management of the financial affairs of a charity, rather than introducing a new standard that is open to a wide range of interpretations.

Should this standard continue as a separate standard we would recommend that consideration be given to providing additional guidance and best practice guidelines to registered entities as to the extent and manner of activities, processes and procedures which the Commissioner considers would satisfy these obligations on a sub-type/sector or activity basis.

6.3 Is the wording of draft governance standard 4 appropriate?

Whether or not the requirements of this standard are to be incorporated into the duties of the responsible entities we recommend that the wording includes a reference to the prudent management of the financial affairs and assets of a registered entity. Given the importance of the stewardship role of responsible entities in governing registered entities in our view is critically important that such entities are managed with an appropriate level of prudence although without limiting the entrepreneurial needs of the sector.

7. Draft governance standard 5: Suitability of responsible entities

7.1 Standard

A registered entity must:

- a) **take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and**
- b) **after taking those steps:**
 - i) **be, and remain, satisfied that each responsible entity meets the conditions; or**
 - ii) **if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.**

7.2 Does draft standard 5 establish the appropriate principles?

Yes

7.3 Is the wording of draft governance standard 5 appropriate?

This is a legal matter for which we do not believe we are appropriately qualified to answer.

7.4 Are there concerns with allowing the ACNC to disqualify responsible entities and maintain disqualified responsible entities register?

This is a legal matter for which we do not believe we are appropriately qualified to answer.

8. Draft governance standard 6: Duties of responsible entities

8.1 Standard

- 1. **A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:**
 - 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;**
 - b) **to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;**
 - c) **not to misuse the responsible entity's position;**

- d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
- e) to disclose perceived or actual material conflicts of interest of the responsible entity;
- f) not to allow the registered entity to operate while insolvent.

2. For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:
- a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
 - 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
 - c) if the registered entity is a company—to the members of the registered entity; or
 - d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

8.2 Does draft standard 6 establish the appropriate principles?

8.2.1 Based on the wording of the draft standard it is our understanding that the onus is solely on the registered entity to take reasonable steps to ensure that its responsible entities are subject to and comply with their duties. This is in contrast to the arrangements under the Corporations Act which primarily places the onus directly on directors to undertake their duties in an appropriate and responsible manner. In our view the Corporations Act more clearly and appropriately places the onus of responsibility where it should be, that is on the officers carrying out their duties as officers.

8.2.2 While we recognise the volunteer nature of many responsible entities, in our view it is inappropriate transfer this responsibility primarily to the registered entity and thus removing this responsibility in full from the responsible entity. The absence of any onus on the responsibility entity increases the risk that they will not perform their duties with sufficient care and responsibility while leaving the registered entity exposed to not complying with the law. Thus we recommend that further consultation is held with the sector and its legal advisers in seeking to find a greater balance in the wording of this standard between the direct responsibilities of the responsible entity and that of the registered entity.

8.3 Is the wording of draft governance standard 6 and the draft protections appropriate?

Please refer to our comments in response to the above question.

8.4 Are there any additional protections which should only be provided to volunteer responsible entities?

As outlined in our submission on the earlier consultation paper it is our view that there should be no specific differentiation between the protections available to volunteers as from our experience the roles of volunteer responsible entities are just as critical as those of remunerated responsible entities. Accordingly, if protections for volunteers are greater, there is a significant risk of duties not being undertaken with sufficient care. It might also result in two classes of responsible entities for a registered entity thus negatively impacting on the good governance of a registered entity. In our view, if good governance for registered entities is not to be diminished, the differentiation in expectations through the differing skills of the responsible entities should be sufficient protection for volunteers

8.5 If so, what would these protections be?

Not applicable given our response to the previous question.

9. Timing Issues - Are the transitional arrangements proposed adequate?

We note the 18 month transitional period proposed in the consultation paper for all matters other than in respect to governance rules. Given that registered entities should ideally have in place any necessary changes prior to the commencement of a financial year on which full compliance is being reported following these changes being made, in our view it would be more appropriate to have a full year transition period, be that a 1 or 2 year period. This would see matters required to be addressed by either 1 July 2014 or 1 July 2015 and thus with full compliance being capable of being reported for either the first full year ended 30 June 2015 or 2016, or substituted accounting period as may be applicable.

If you have any queries please contact the contributors to this submission listed below.

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Yours faithfully



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