



Australian Conservation Foundation

Submission on “Development of governance standards”

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Australian Conservation Foundation Submission

1. Background

The Australian Conservation Foundation (“ACF”) welcomes the opportunity to make this submission on the “Development of governance standards” Consultation Paper (“Consultation Paper”).

About ACF

ACF is a national, community-based environmental organisation that has been a strong voice for the environment for almost 50 years, promoting solutions through research, consultation, education and partnerships. ACF works with the community, business and government to protect, restore and sustain our environment.

The ACF is an incorporated association under the laws of the Australian Capital Territory and is a specifically named and listed environment recipient for DGR.¹ It is endorsed by the ATO for income tax exemption², GST concessions and FBT rebate³.

ACF has been granted an exemption from state tax payroll tax in Victoria, Western Australia, New South Wales, Queensland and the ACT and for land tax in Victoria.

In this submission ACF does not respond to every consultation question.

Instead this paper focuses briefly on issues of direct daily impact and concern to ACF as a nationally focussed environment NFP charity and those of other environment NFPs with which ACF enjoys a close working relationship. ACF’s Strategic Vision to 2020 commits ACF to supporting communities and economies that are sustainable in practice: to this end ACF sees governance and management as a critical framework.

¹ Section 30-55 (2) *Income Tax Assessment Act 1997 (Cth)* (ITAA)

² Subdivision 50-B, Section 50-50 (b) *ITAA*

³ The majority of environment charities and not for profits gain DGR status under the process set out for listing in the Register of Environment Organisations maintained by the Minister for SEWPAC.

2. ACFs response to the consultation on draft standards

ACF is a registered charity and will need to implement changes, briefings and a process of monitoring and compliance with its obligations as a 'registered entity.'

Members of ACF's Board ~ which carries out the functions of the 'Committee of Management' under the *Association's Incorporation Act 1991 (ACT)* ~ is governed primarily by common law duties of directors and also, by their commitment to ACF's internal governance framework. A detailed manual on the role and duties of Board Members includes ACF policies and procedures for good governance which have been approved by the Board.

ACF and other charities will need to budget for and find either external or internal professional and administrative expertise to reconcile their organisations' current practices, their relevant manuals (if any) and Board policies. Consultation will be necessary with committees and members, given the latter are generally responsible for electing or appointing appropriately skilled Board members to fulfil their organisations' governance needs.

Time and resources for training will need to be found to brief Boards on the impact of the governance requirements and, to the extent that there are new obligations, how they impact on their organisations' pre-2013 governance obligations and standards.

Wording to help all charities and the Register of Environmental Organisations charities (REOs) in particular (few of whom have access to in-house legal advice) ACF urges government to review the choice of terminology. If it is possible to adopt wording that is familiar and recognisable to charity board members, administrators and volunteers this would greatly assist understanding and help readers compare and contrast the standards with those that apply to their organisations at present. If at all possible, the references to

'registered entities' and 'responsible entities' should be substituted with language referring to 'registered charity' and 'director, committee of management member or secretary'

Standard 1 Purposes and NFP nature or a registered entity

Technology has impacted the sector but smaller charities and REOs may lack access to the kind of web development resources needed to match the efforts of better resourced charities in providing information and demonstrating its purpose and character. There is a role for the ACNC website: it could create a portal that charities could use for uploading information, similar to the way publicly listed companies 'publish' disclosures and announcements to the market through their portal on the Australian Stock Exchange website.

Standard 2- Accountability to members

The observations made by Chartered Secretaries Australia in their submission dated 13 February 2013 (at page 5) regarding technology as an effective channel of communication for member engagement are powerful. There are indeed many more ways now where members can be in dialogue with a charity.

Whilst technology can arguably deliver some forms of engagement that an AGM cannot, it is important to be mindful of the digital divide that may emerge between charities, where charities based in remote or rural areas of Australia may struggle to find volunteers with the skills and time available, or they may have less access to broadband and technology tools at competitive rates compared to their city counterparts and as a result may be unable to deliver high levels of member engagement.

Standard 3 Compliance with Australian laws

ACF endorses the notion that charities should pursue their activities lawfully but the threshold of 60 penalty units for civil penalties may be insufficient in order to rule out charities breaching this standard because of lesser civil offences.

The potential for a charity's reputation and its financial position to be undermined where unfounded allegations of unlawful behaviour are made is significant, in particular for charities dependant on donations from the public. Given the financial and public impact on a charity, more information is needed about the kinds of circumstances that might generate a breach, in the absence of an actual charge or proven offence.

It is noted that the Consultation paper references the ACNC Act which provides "...the governance standards cannot prevent a registered entity from undertaking an activity where that activity furthers, or is in aid of, its purpose, and that activity is advocating or attempting to change the law or government policy except where that activity is in breach of Australian law...'

For charities engaged in public advocacy these provisions generate some questions about how the Commissioner may respond to peaceful protests. When linked to the capacity of the Commissioner to act in the absence of a proven offence, there is a risk that this could impede participation in lawful civil action and protests as a means of communicating awareness.

Standard 4: Responsible management of financial affairs

The standard should recognise that charities resources are wider than financial resources and the standard should reference non-financial risks as well as financial risks.

The principles of efficiency and sustainability should also be fundamental principles applied by charities in managing its affairs and resources.

Standard 5 Suitability of Responsible Entities

Free access to a banned or disqualified persons register would be essential.

Standard 6

ACF is an incorporated association and as such would be expected to 'take reasonable steps' to ensure its Board members are 'subject to' the duties in this standard.

It is suggested that this could be achieved by reviewing the current Board charter or by a separate legal instrument such as a letter of appointment.

Would a mere Board Code of Conduct that has no sanctions (having regard to the size and scale of the organisation) be considered a 'reasonable step' or is there a higher standard for large charities?

If a Board member fails to act in accordance with breaches this standard, ACF will be obliged to identify and, furthermore, enforce or act on the failure: this is a significant new obligation.

The impact of shifting the burden onto charities in acting on and enforcing sanctions in the case of any sub-standard governance performance by Board members, may be seen in changes to terms of Directors' and Officers' insurance, the deductibles and the premiums – this is, as yet unknown, but a relevant concern.

The 'responsible entities' provisions do not appear to cover the activities or conduct of other relevant decision makers and governance officers, such as the Public Officer, the Honorary

Secretary and other 'officers' of ACF, leading to the potential for confusion and as a result, non-compliance.

Charities are in a position to manage and address concerns about Board performance, however, there are concerns about the practical implications of a standard that imposes enforcement on the registered entity (the charity) and ACF's view is that directors should be bound and responsible in their own right. Enforcement should be by the appropriate regulatory agency.

For the charity to carry out this process it would need to fund the investment in skills and resources, so as to be able to properly carry out any investigations into allegations of breach by Board members. It would likely result in legal and other costs to administer a process that would afford Board members natural justice, confidentiality and independence in investigation and decision making.

If the charity incurs financial disadvantage because of the wilful or negligent failure of the Board member (responsible entity) the question arises: is the charity obliged under any indemnity policies, for example, to recover the loss from the responsible entity/Board member whose behaviour was in question?

Appointment or election to board membership is usually the prerogative of members (in ACF's case, the Board is appointed by ACF's Council, which in turn, is elected by members). The potential that the Board itself (through its other members) or the charity, under the direction of the executive, could remove a single Board member would seem to deny members this right to appoint and remove the Board.

The effect on the membership and volunteers could be significant if there was a perception that a registered entity (charity) had arbitrarily acted against a long-serving Board member.

In regional and sparsely populated communities, there may also be some challenges for a registered charity to take action against one of its members without a degree of pressure on privacy and reputational impact, both on the charity itself and any persons concerned.

A degree of neutrality and independence from the organisation can address some of these challenges: an appropriate standard would be to allow the charity to refer the question of standard compliance by Board members (responsible entities) to the Commissioner for determination.

The obligations for disclosure of conflicts of interest could be clarified in relation to incorporated associations in Standard 45.30 – 3) c) to articulate that the duty to disclose to the members is not required where the charity has a Board with other Board members that are not conflicted.

5. Conclusion

ACF is supportive of the principles for the sector and the attempt to bring some uniformity, however, it is hoped that the concerns raised above can be considered and addressed.

Work can be done to simplify and use familiar terms to assist charities in reconciling the proposed standards with their current arrangements.

Sari Baird
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