

19 September 2018

Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

via email to ExternalConductStandards@treasury.gov.au

To whom it may concern

Consultation on the external conduct standards

The Australian Institute of Company Directors (**AICD**) welcomes the opportunity to provide feedback on the external conduct standards (**ECS**) for charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 43,000 includes directors and senior leaders from business, government and the not-for-profit (**NFP**) sectors.

The ECS will make an important contribution to the standards of governance of registered entities (**Charities**) that operate outside Australia. It is vital that Charities take appropriate steps to ensure that their extraterritorial affairs are appropriately managed, particularly with regard to preventing fraud, corruption and other forms of financial crime, and protecting vulnerable people.

However, there are several aspects of the ECS that are unclear or which could be improved including through:

- Refining the application of the ECS to make it clear that Charities who operate in Australia and partner with other parties who operate in foreign jurisdictions are not captured by the ECS unless their partnership concerns activities intended to be captured by the ECS;
- Removing repetition of requirements listed elsewhere in the ACNC's legislative framework; and
- Improving the way risk is referred to in the ECS through focusing on the development of appropriate controls rather than on 'minimising risk.'

The AICD's position in relation to this detail is summarised in the paragraphs below.

Application to third parties

The ECS apply to Charities that operate outside Australia or who work with third parties that operate outside Australia. However, Charities may operate with third parties on domestic issues even if those same third parties are also operating outside Australia.

For example, if a charity partners with another charity to deliver a service in Australia, but their partner also operates other services outside of Australia, the charity may unintentionally be captured by the ECS without due reason.

The AICD recommends that the application of the ECS be refined to clarify that they apply to Charities whose work with third parties is for the purposes of carrying out activities or sending funds to foreign jurisdictions and who otherwise meet the definition of an entity that would be captured by the ECS.

Repetition of other requirements

'Standard 1 – Activities and control of resources (including funds)' (**ECS1**) aims to ensure that Charities operate on an NFP basis and in furtherance of their charitable purpose. However, this is already a obligation of registered Charities under the *Australian Charities and Not-for-profits Commission Regulation 2013* (**Governance Standards**). As such, ESC1 unnecessarily restates the law.

The AICD recommends that r50.25 (3)(a) and (b) be removed.

This formulation may be intended to capture Charities designated as 'basic religious charities' (**BRC**) who are exempt from the governance standards under Section 45-10(2A)(4) of the *Australian Charities and Not-for-profits Commission Act 2013* (Cth) (**ACNC Act**). However, it is clearly the legislative intent of the ACNC Act to exclude BRCs from the requirements set out under the Governance Standards, and therefore against the spirit of the law to include components of the Governance Standards in the ECS.

To address this, the AICD recommends that the government accept recommendation 16 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (**ACNC Review**) which would apply the Governance Standards to BRCs, thereby evading this problem.

A similar scenario arises in 'Standard 3 – Anti-fraud and anti-corruption' (**ECS3**) which relates to disclosure of conflicts of interest by certain parties, including responsible entities. The Governance Standards already require that responsible entities disclose conflicts of interest and so it is unnecessary to repeat this in ECS3.

Accordingly, the AICD recommends that responsible entities be excluded from r50.30(2)(b).

Appropriate controls against fraud and corruption

Standard 3 (r50.30(1)(a)) requires Charities to 'minimise any risk of corruption, fraud, bribery, or other financial impropriety' through their work. Many activities of Charities operating outside Australia are inherently high risk, including regarding the misconduct listed in ECS3.

However, from a risk management perspective, it is not desirable to 'minimise risk'. This implies that all risk should be avoided, in this instance by not undertaking the activity that poses the risk. It would be

an adverse policy outcome if charities withdrew from high risk situations which deliver significant public good because the ECS required them to 'minimise risk'.

Instead, the ECS should enable Charities to take appropriate risk and to encourage them to maintain reasonable internal control procedures to address the risk of corruption, fraud, bribery or other financial impropriety.

The AICD recommends that r50.30(1)(a) be amended to replace the concept of 'minimising risk' with the requirement that Charities maintain reasonable control procedures to manage risk.

Next steps

We hope our comments will be of assistance. If you would like to discuss any aspect of this submission, please contact Lucas Ryan GAICD, Senior Policy Adviser, on (02) 8248 6671 or lryan@aicd.com.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Louise Petschler', with a long horizontal flourish extending to the right.

LOUISE PETSCHLER MAICD

General Manager, Advocacy