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

By email: NFPReform@treasury.gov.au

Dear Madam/Sir

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Consultation Paper: Development of governance standards

Thank you for the opportunity to comment on this Consultation Paper. CPA Australia is one of the world's largest professional accounting bodies, with a membership of more than 144,000 finance, accounting and business professionals and leaders in 127 countries. Our vision is for CPA Australia to be the global professional accountancy designation for strategic business leaders. We make this submission on behalf of our members and in the broader public interest.

CPA Australia supports the development of governance standards that are principles based and enable charities to ensure they are directed and controlled effectively in a transparent way. We see the consequence of good governance as the creation of value for stakeholders and public confidence.

General Comments

CPA Australia is of the opinion that the principles based approach adopted appears to be incongruent with the view that the standards 'reflect a minimum set of outcomes'. The Consultation Paper states: 'The standards are principles based in that the standards specify the outcome that registered charities need to achieve, rather than the mechanism that achieves it. The advantage of principles based governance standards is that they allow registered charities to decide how to achieve the outcome, taking into account their particular circumstances (including their size)'. Yet, it also states: 'While the governance standards discussed in this paper will inform the enactment of minimum legislative standards, the ACNC will work with the sector to encourage and promote 'best practice' over and above this minimum.' We suggest that principle based standards should encompass all aspects of governance, including 'best practice'.

We would encourage the ACNC to adopt a principles based approach that does not reflect minimum requirements but provides principles that would enable entities to achieve good governance. In such a case it would also be beneficial to adopt an 'apply or explain' or 'if not, why not' approach that would enable entities to apply the principles to the extent practicable in order to achieve good governance.

Further, if the governance standards are principles based it would be beneficial to explicitly articulate these principles. This can be done in the title of each standard so that entities clearly understand the principle(s) reflected in each standard.

The approach described in the Consultation Paper is unclear in relation to enforcement and compliance. Section 2.3.5 of the Consultation Paper states: 'Once a charity is registered with the ACNC, it will be responsible for assessing its own compliance with the governance standards. The Commissioner will assume that registered charities are in compliance with the governance standards unless there is evidence to the contrary. A charity would not be expected to demonstrate compliance with all the governance standards upon registering with the ACNC.' This appears to indicate that charities would not have to report compliance and the Commissioner would not be actively ensuring that entities comply with the governance standards. A charity, in assessing its own compliance once registered, may identify deficiencies but the Commissioner would assume that there are no such deficiencies unless there is evidence to the contrary and such evidence will not be provided by the charity, since it would not have to demonstrate compliance. However, section 4 of the Consultation Paper states that charities would have 18 months from the commencement of the governance standards to ensure compliance. So it is not clear whether compliance is assumed in the first 18 months after registration or that compliance will not be mandated for the first 18 months. We are of the opinion that clear transitional arrangements and guidance are necessary to assist charities to transition towards compliance with the governance standards, if they are not already complying.

CPA Australia notes that the enforcement powers of ACNC are generally limited to 'federally regulated entities' which do not represent the vast majority of charities. As a consequence, the ACNC would have to rely on other regulators in order to enforce its own regulations. We are of the opinion that this not only increases complexity but it also potentially undermines the power of the Commission and the achievement of its objectives. We support the introduction of effective regulation but also believe that compliance and effective enforcement is necessary if it is to achieve its objectives. The inability of the Commission to respond appropriately and use its powers to ensure compliance with its regulation is a major issue and its resolution should be prioritised.

Governance is generally seen as the enabler of performance and control in a transparent way. We note that in the draft standards, the focus is on providing confidence to the public. We are of the opinion that public confidence should be the consequence of good governance not the main objective of governance. The achievement of the purpose of the charity in an efficient and transparent manner, the creation of value for stakeholders and improving societal welfare can be the purpose of NFP entities' governance. Making public confidence the object can have the unintended consequence of charities focusing on public trust rather than on the appropriate outcomes and processes that would also result in public trust.

CPA Australia is of the opinion that the terminology used should, to the extent possible, be aligned with commonly used terms in other governance frameworks and the law. The term 'responsible entities' is used while terms such directors or those charged with governance are broadly accepted and used in legal and governance frameworks. Further, the term 'public' is used in the objects of several governance standards. The second object of governance standard 1, for example, states: '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'. As it is currently expressed, it is not clear whether members, donors, employees, volunteers and benefit recipients are included in the term public or whether the objective is to refer to the public in general, as well as the identified key stakeholders. We think it is more appropriate to refer to an entity's stakeholders, as the term 'stakeholders' includes all groups that affect and are affected by the entity and includes the general public.

While we appreciate the intention to consult with the broader NFP sector and other relevant stakeholders when the governance standards apply to other entities in addition to charities, we are of the opinion that the standards should be drafted in a manner that would enable them to apply to all entities so that the sector does not end up with different classes of standards.

Standard 1 – Purposes and NFP nature of a registered entity

In principle, we support this draft governance standard and note that charities should be able to provide a brief and concise description of their purpose and character.

However, in addition to our general comments in relation to the term 'public' and the object of public confidence, CPA Australia suggests replacing the word "comply" from paragraph 45.5(2)(c) as it is overly legalistic and not in the spirit of Standard 1. We do not think the idea of complying with one's character is logical. We suggest 45.5(2)(c) should state: fulfil its purpose in accordance with its character as a not-for-profit entity..

As mentioned in our general comments, the principle of this draft standard is unclear. We suggest that the principle of the standard could be: Clearly identify, disclose and fulfil the purpose of the entity in line with its NFP character.

Standard 2 – Accountability to members

We support a draft governance standard that promotes accountability to members. However, we suggest the articulation of a principle, such as: ensure accountability to members and provide opportunities to them for effective communication.

We would also encourage the consideration of a broader approach that provides members with communication opportunities between the entity and its members.

Standard 3 – Compliance with Australian laws

CPA Australia does not consider appropriate the requirement to comply with Australian laws as the sole purpose of a governance standard because the obligation to do so already exists.

We note that while the commentary to draft governance standard 3 states that the purpose of the standard is: 'to enable the ACNC to take appropriate regulatory action where the breach of the law should not affect entitlement to charitable status, but where the breach should nonetheless result in some regulatory action but not in deregistration of a charity. The purpose of this draft standard is also to enable the ACNC to protect the assets of registered charities and ensure that the interests of those who benefit from their services are not harmed by illegal conduct. However, the draft standard does not cover all possible breaches, but only serious breaches of the law.' The object of the standard states that it is to give public trust and confidence that 'a registered entity is governed in a way that ensures its on-going operations and safety of its assets, through compliance with Australian laws'. We suggest there is a potential discrepancy between the stated object and the intended purpose and also question the assumption that complying with the law will ensure on-going operations and safety of assets.

It is also not clear how an entity, based on ACNC's reasonable belief, may be in breach of this standard even if it is not charged with an indictable offence.

Some concern has been raised by members that this standard may be used in a political fashion to the detriment of a charity's legitimate purposes (for example, to undertake direct action for the prevention of whaling).

As it is currently drafted, the use of the word "safety" in 45.15(1) in terms of assets is confusing. If this means purchasing insurance to minimise risk and comply with, for example, various state work-cover regimes, then it is not very clear. If this is suggesting appropriate asset management this doesn't necessarily fit within 'compliance with Australian laws', but more in line with effective risk management.

Overall, CPA Australia is of the opinion that legal compliance should not be included as an explicit governance standard.

Standard 4 – Responsible management of financial affairs

CPA Australia is of the opinion that this governance standard should reflect the principle of effective oversight and management of affairs. We see financial affairs as interrelated with all other affairs and not as independent. We also consider that resources should be used to 'fulfil' an entity's purpose not 'further' it, as the term 'further' implies an extension of purpose that may not be appropriate for many entities.

CPA Australia suggests that a governance principle that addresses effective oversight and management of affairs including appropriate management of risk, with the provision of adequate guidance, would be more appropriate than this proposed standard.

Standard 5 – Suitability of responsible entities

As mentioned in our general comments the language adopted appears confusing and deviates from the commonly used terminology. Also, generally the distinction is made between governance and management instead of the proposed governance and operation.

It is noted on page 18 that "Other Australian laws may place other limitations on who may be a responsible entity ...". This is certainly the case, as there are instances where enabling legislation of particular entities has a lesser standard than required by Standard 5. For example, persons may be permitted to be involved again in governing an entity after having served a penalty and a period of exclusion. This situation could create a conflict between the particular enabling legislation and the draft Governance Standard if the Commissioner chose not to allow the individual to participate (clause 5).

As mentioned in our general comments, we think that the standards should be principles based, relevant and applicable to all NFP entities not only to charities. Consequentially, we would question whether it is reasonable to expect a local small sporting club to "have processes in place to alert them when an event occurs that makes a responsible entity no longer appropriate to manage an entity".

CPA Australia is of the opinion that the provisions related to disqualified responsible entities should not be part of the governance standards as they do not relate to the governance of the entities but rather the actions of the Commission that may enable better governance.

We think that a public register of disqualified 'responsible entities' requires appropriate controls so that it is accurate and does not include persons listed wrongly. We also would like the Commission to consider the implications for people who have the same name as ones listed on the register.

Standard 6 – Duties of responsible entities

We reiterate our comments in relation to the terminology used. Standard 6 (2)(a) refers to a reasonable "individual" whereas the accompanying material refers to reasonable "person". It is not clear whether the word 'individual' is deliberately intended to be different to 'person'.

In relation to Protection 2, proposed in section 45.110 (1)(b), we are of the opinion that all interests should be disclosed, and in certain circumstances a material interest should not necessarily remove the protection offered.

Timing issues

CPA Australia is of the opinion that consultation and education activities should be the focus of the Commission and other key stakeholders to enable the effective transition of charities towards the application of the governance standards. For this reason we recommend a transition period of two years.

If you have any questions regarding this submission please do not hesitate to contact Dr Eva Tsahuridu, Policy Adviser Professional Standards and Governance, at eva.tsahuridu@cpaaustralia.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alex Malley', with a flourish at the end.

Alex Malley FCPA
Chief Executive Officer