

GOVERNANCE STANDARDS

ACNC

ANFPAN Conference
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Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 1)

- Draft regulations released April 12, 2013
- to commence 1 July 2013 or when approved by both Houses
- Subsection 45-10(1) of the Act provides that the Regulations may specify standards (the ***governance standards***)
- to **become** registered and
- to **remain** entitled to be registered under the Act

Governance standards - Purposes

- to meet community expectations
- in relation to how a registered entity should be governed and
- to operate in an effective and transparent manner.

Meeting the Standards

- The Standards are generally **principle-based**, specifying the outcome to be achieved, rather than detailing how an entity must meet the Standards, in its particular situation
- Registered entities cannot choose whether to meet the Standards,
- but they **can choose how they meet the Standards**,
- taking into account **their specific situation**

STANDARD 1

Purposes & Not-for-Profit nature

- a registered entity must be able to demonstrate its purposes and its character as an NFP entity,
- make information about its purposes available to the public, and
- act in accordance with its purposes and its character as an NFP entity.

Demonstrating purposes and character as an NFP entity

- by ensuring that their governing rules or other documents set out their purposes
- May not be in a document called a constitution
- May be rules, memoranda and articles of association, legislation, a trust deed or church law.
- Must provide governing rules and an extract of their purposes to ACNC

Complying with purposes and character as an NFP entity

- Examples
- accounting systems to ensure **donations** are being **directed** to the purposes of the entity
- a medium registered entity will assess the **remuneration** of its **staff** against benchmarks from that particular part of the NFP sector.
 - Demonstrating not for the profit or gain of its managers or members through excessive remuneration.

Making information available about purposes and character as an NFP entity

- A Charity may set out its Purposes on its website, or provide the public with the information on request.
- having an extract of the governing rules on the Register would be **sufficient**.
 - where the Commissioner is satisfied that the extract on the Register is consistent with the governing rules of the registered entity and complies with Standard 1,

Extract on ACNC Register

- a short extract of the registered entity's governing rules
- which will allow the public to understand the purpose of the entity
- without having to consider the entirety of the entity's governing rules
- ? Voluntarily disclosed by the registered entity

Governance Standard 2 – accountability to members

- a registered entity must take reasonable steps to ensure
 - that it is accountable to its members and
 - that members have an adequate opportunity to raise concerns about the governance of the registered entity.
-
- only applies to registered entities that have ***members*** (trusts do not have members)

Reasonable steps ?

- requiring that a quorum be met for a meeting of members (ie: not Board Meetings)
 - setting the frequency of member meetings,
 - providing notices of member meetings,
 - voting at meetings and
 - allowing members to ask questions at meetings.
-
- As per current requirements of Corporations Act Associations Acts & CATSI Act

Governance Standard 3 – compliance with Australian laws

- a registered entity **must not**
- **engage** in conduct, or
- **omit** to engage in conduct,
- that may be dealt with as an indictable offence under an Australian law, or
- by way of a civil penalty of 60 penalty units or more.
 - See Commonwealth penalty unit calculations.

A failure to comply with the law

- puts the public (including members, donors, employees, volunteers and benefit recipients of the registered entity) at risk
- the registered entity **does not need to be actually charged** with an indictable offence, or given a penalty of 60 penalty units or greater, to be in breach of this Standard.

Standard 3 allows the Commissioner

- to take a proportionate approach to protect
 - public trust and confidence, and
 - **the assets** of the registered entity, and
- ensure the registered entity continues to operate in a manner that is sustainable and consistent with its purposes
- BUT EXAMPLE IS WEAK
- A FORMAL WARNING ON EVIDENCE OF FRAUD

Governance Standard 4 – suitability of responsible entities

- a registered entity must BE SATISFIED & REMAIN SATISFIED that
- each of its responsible entities is not disqualified from managing a corporation, (the Corporations Act 2001), or
- disqualified by the Commissioner, at any time in the preceding 12 months, from being a responsible entity of a registered entity

Responsible entity

- Normally if a company
- a **director** of the registered entity;
- BUT
- “company” given a wide meaning
- Includes incorporated and unincorporated entities

"director" , of a "company"

- if incorporated--a director of the company, or an individual who performs the duties of a director of the company; (? **Shadow Directors**) or
- if not incorporated--a member of the committee of management of the company, or an individual who performs the duties of such a member;
- regardless of the name that is given to his or her position, or whether or not he or she is validly appointed to occupy, or duly authorised to act in, the position.

the Commissioner may disqualify

- Where the person
- has been **previously suspended or removed** as a responsible entity of any registered entity, under Division 100 of the Act; **and**
- has been **given notice** of their disqualification by the Commissioner; **and**
- the Commissioner reasonably believes that the **disqualification is justified** having regard to the objects of the Act.

Register of disqualified responsible entities

- the Commissioner to maintain a register that will include
- the **name** of the disqualified person,
- the **date** the person was disqualified, and
- whether the disqualification can be subject to **review**.
- **Register will be on ACNC website**
- section 45.150 (in Subdivision 45-E)

Period of disqualification

- persons will often cease to be a disqualified responsible entity **12 months after** the Commissioner gives them **notice** of their disqualification
- unless the Commissioner disqualifies them for an **additional 12 months**

Ensuring that responsible entities are not disqualified from managing corporations

- prior to appointment ,in preceding 12 months and regularly thereafter,
- Search of the ASIC Disqualified Persons Register
- Requiring responsible entities to sign a declaration that they do not have any relevant criminal convictions
- seeking a commitment from its responsible entities that they will advise if their circumstances change and they be disqualified from managing a corporation

Automatic disqualification

- convicted of a contravention of the Corporations Act 2001, or
- of an offence that involves **dishonesty** and is punishable by imprisonment for **at least three** months
- convicted on indictment of an offence that concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of a corporation; ????

Automatic disqualification

- convicted of an offence against the law of a **foreign country** that is punishable by imprisonment for a period greater than **12** months;
- an undischarged **bankrupt** (search ITSA)
- Not fully complying with a **personal insolvency** agreement and the terms of the agreement
- **disqualified** from being a **director** of a **foreign company** or being concerned in the management of a foreign company

Taking reasonable steps to remove a responsible entity

- include
- calling a meeting of members to vote on the removal of the responsible entity,
- calling upon the responsible entity to resign, or
- ultimately, as a last resort, taking court action against the responsible entity or
- seeking a regulators' assistance

Disqualifying responsible entities

- The Commissioner will only be able to disqualify an entity where that entity has already been suspended or removed in accordance with the Act.

Suspension or removal

- The Commissioner may only suspend or remove responsible entities where
- the registered entity is a federally regulated entity and
- the person has contravened, or is likely to contravene, the Standards or the Act.
- The person may object to the Commissioner or the AAT or the courts

A federally regulated entity

- a **constitutional corporation**; or
- a trust, where all of the trustees are constitutional corporations; or
- a body corporate that is taken to be registered in a Territory under section 119A of the Corporations Act 2001 ; or
- a trust, if the proper law of the trust and the law of the trust's administration are the law of a Territory; or
- an entity, the core or routine activities of which are carried out in or in connection with a Territory.

constitutional corporation

- a corporation to which paragraph 51(xx) of the Constitution applies (ie: **trading** or financial corporations formed within the limits of the Commonwealth); or
- a body corporate that is incorporated in a Territory.

"trading corporation"

- where trading is a **substantial or significant part of its activities**, and that determination is irrespective of the purpose for which the corporation was formed (*Quicken v O'Connor*)
- trading activities" are those which involve some form of **buying and selling** and which generate revenue, **regardless of whether it is carried out at a profit** (*R v Federal Court of Australia; Ex parte WA National Football League* ("Adamson's case"))

some examples of trading activities

- providing services to clients or customers, in return for a fee or charge;
- providing services to members in return for a fee or subscription;
- selling goods (from a shop, market stall, etc);
- selling goods through telemarketing;
- presenting a performance, event or other public spectacle and charging for admission;
- hiring out or servicing equipment in return for a fee;

some examples of trading activities

- selling food and drink, for example at a bar or canteen;
- selling merchandise and souvenirs;
- fundraising, through auctions, raffles, lotteries, sale of chocolates, etc;
- providing a car park in return for a fee;
- conducting social functions for which a charge is imposed on those who attend;
- deriving income from investments;
- renting out property, or provision of other forms of accommodation for a charge.

Governance Standard 5 – duties of responsible entities

- Exercise degree of **care and diligence** that a reasonable individual would exercise if they were a responsible entity of the registered entity;
- Act in **good faith** in the best interests of the registered entity, to further the purposes of the registered entity
- **Not misuse** their **position** as a responsible entity

Duties of responsible entities

- **Not to misuse information** obtained in the performance of their duties;
- **Disclose** perceived or actual material **conflicts of interest**;
- Ensure the **financial affairs** of a registered entity are **managed** in a responsible manner; and
- Not to allow the registered entity to operate while **insolvent**.

Taking reasonable steps to apply the duties

- having the duties set out in
- a contract of employment/letter of appointment,
- as part of a board charter,
- a code of conduct based on the duties, or
- specifying the duties of the responsible entities in the registered entity's governing rules

Ensuring responsible management of financial affairs

- it is reasonable to expect that a responsible entity will ensure that **appropriate and tailored financial systems** and
- **procedures** have been put in place, around the **spending of funds** (for example, who can write cheques or approve expenditure) as well mitigating risk of **Fraud**
- by having appropriate **insurance**
- Use of an **audit committee** in large organisations

Protections under Governance

Standard 5

- Subdivision 45-C
- protections that apply to action taken by a responsible entity may otherwise result in a registered entity being in breach of Standard 5
- protections, in all cases, are targeted at the actions or state of mind of the responsible entity and are similar to the **defences** available in the *Corporations Act 2001*.

Protection 1

Rely on information provided

- responsible entity can rely on information provided by
 - an employee of the registered entity,
 - a professional adviser,
 - another responsible entity and
 - an authorised committee of responsible entities.
- **Requires** the responsible entity independently assessing any advice received before they can rely on it even if inaccurate.

Protection 2

The business judgement rule

- Allows a responsible person to rely on a **decision they have made, in good faith and in the best interests** of the registered entity, even if the outcome of the decision does not turn out to have been in the best interests of the registered entity .
- **“The business judgement rule”**
- BUT must be exercising due care and diligence

Protection 3 Insolvency

- duty to prevent **insolvent trading** is **not breached** if
- the responsible entity had reasonable grounds to expect, and did expect, that the registered entity **was solvent**, and **would remain solvent**, at the time when a debt was incurred; or
- if the responsible entity took all reasonable **steps to prevent** the registered entity from incurring the debt.

Protection 4 Absence

- a registered charity would not be in breach of Standard 5 because its responsible entity was **absent**, and could not have known they were in breach of a standard
- Example
- The charity enters a transaction in which the absent responsible entity should have disclosed as involving **a possible conflict of interest**

Transitional relief

- for registered entities that are required to **amend their governing rules** in order to comply with a requirement in the Governance Standards **to 1 July 2017**
- If an **incorporated association** is complying with State /Territory Act duties of responsible persons, they comply with Standard 5 to 1 July 2017