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Building Stronger Communities

Through Stronger Community Organisations

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**Submission from Our Community in response to the
Consultation Paper on the Governance Standards for the
not-for-profit sector.**

Please find enclosed our submission.

Yours sincerely


DENIS MORIARTY
Group Managing Director

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Introduction

Australia has 600,000 not-for-profit organisations. The vast majority govern themselves perfectly satisfactorily. Some of them, however, are badly governed; some are very badly governed indeed. Few of this latter group, however, suffer from the particular problems this reform is designed to address.

The proposed reforms would require charities to take reasonable steps to ensure that the registered entity is accountable to its members. This is admirable, necessary, and praiseworthy. If it is to be effective, however, it will require a considerable investment in public education and a willingness to give advice on contentious issues.

For the past decade Our Community has been operating a free advice service for Australian not-for-profit organisations, and we have a large and informative database on what can go wrong with them.

In our experience, disputes within organisations seldom arise from deficiencies in their constitutions. Disputes are, indeed, generally carried through entirely without reference to the constitution. They do not generally arise from policies, either, even if the organisation has official written policies, which most do not.¹

Disputes tend to arise either because

- a) there are no relevant written rules, policies or procedures
- b) because there are such rules, policies or procedures but members have no knowledge whatsoever of what they are, or
- c) because there are such rules, policies or procedures but the administration has decided to ignore them.

Only the first of these problems can be addressed by improved drafting, and both of the remaining problems will lead charity members to contact the ACNC to ask for guidance.

The vast majority of these cases, too, have nothing to do with compliance with state or federal Acts.

The ACNC is designed to work on the basis that constitutions are contracts between the organisation and its members, and it has followed each of the state regulators without exception in being reluctant to allow itself to become involved in intervening in the internal disputes of not-for-profits². This is certainly a correct decision, and for government agencies to take on themselves the adjudication of differences within civil society would raise substantial issues of political philosophy.

¹ Very few complainants avail themselves of the organisation's grievance resolution procedure, if only because they do not see themselves as personally aggrieved; they see themselves as attempting, on behalf of all the members, to make the administration act properly.

² "The ACNC does not deal with internal disputes in charities unless there is a serious risk to public trust and confidence. For example, if the dispute is likely to result in a breach of the ACNC Act."

Nonetheless, the combination of a theoretical commitment to increasing accountability and a practical inability to provide remedies in case of breach is going to place the ACNC in an uncomfortable position. People are going to be approaching the ACNC to ask whether specific cases within particular associations are in accordance with the governance standards established by the ACNC Act. Is the ACNC proposing to advise them?

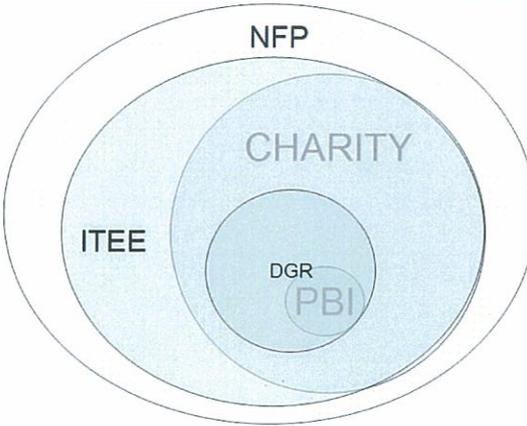
The ACNC's current advice services are directed primarily to questions of compliance with the reporting requirements of the Act, where answers may be given with little ambiguity and considerable certainty. Compliance with governance standards is another matter entirely.

If the ACNC declines to comment on enquiries as to whether certain sets of circumstances comply with or breach the standards – or if, which is much the same thing in the short or medium term, the ACNC waits until a sufficient range of case law accumulates for enquirers to be referred to – then the effect of the standards in pressuring organisations to reform themselves will be considerably diminished. More immediately, the expectations of many complainants will be disappointed.

The proposed standards are not self-enforcing, and they will not except in the most extreme of cases to be enforced by the ACNC. It must be expected that this will create considerable friction, and the Commission must prepare expedients to lubricate these disagreements. The Commission, for example, draws the attention to the Victorian mediation scheme: what does it propose to advise those whose states have no such scheme? Is the Commission ready to advise state governments to institute such schemes?

In these circumstances the Commission will need to conduct major educational initiatives both on what the Governance Standards imply and on the means by which members of charities can achieve these changes within their organisations without the assistance of the ACNC.

<p>2.1. The <i>Australian Charities and Not-for-profits Commission Act 2012</i> (ACNC Act) establishes a framework for a set of <u>minimum</u> governance standards to apply to registered charities, excepting basic religious charities (as defined in section 205-35 of the ACNC Act).</p>	<p>Governance standards should apply to every charity, without exception. If ‘basic religious charities’ are unable to conform to these standards they should not be regarded as charities, and any tax benefits that it is thought advisable to give them should be awarded under a separate scheme.</p>
<p>2.3.1. Initially, the ACNC will only regulate charities, and as such the governance standards will only apply to registered charities. Any expansion of the ACNC to cover a broader part of the NFP sector would involve detailed consultation with stakeholders.</p>	<p>The ACNC should as soon as possible commence the process of bringing all registrable Australian bodies under its remit, removing these responsibilities from the states.</p>
<p>2.3.3 What are the current governance requirements?</p> <p>The current governance arrangements for charities in Australia are complex, ad hoc, and can lack transparency in some cases. They depend on:</p> <ul style="list-style-type: none"> • whether or not the charity is an incorporated entity — this will affect whether the general (judge-made) law applies by itself or whether it has been supplemented by specific legislative provisions; • the type of entity — such as whether it is unincorporated, a trust or a company limited by guarantee, subject to the legislation governing that entity type; • the jurisdictions in which the 	<p>When the document declares that “The proposed governance standards aim to consolidate and deliver an element of consistency to the broader governance arrangements for charities” this, while a worthy objective, is incapable of being achieved by the current proposal, and it is misleading even to suggest that it might. The factors mentioned – incorporation, entity type, jurisdiction – will continue to make for irremovable inconsistency even among charities, still more the not-for-profit sector, and only a wider and more ambitious project that actually recasts the basic classifications can correct this.</p>

<p>charity operates in — different provisions apply across the States and Territories (for example, for incorporated associations) and Commonwealth;</p> <ul style="list-style-type: none"> • whether the charity is affiliated with a peak body.... and • the sector in which the charity operates.... <p>The proposed governance standards aim to consolidate and deliver an element of consistency to the broader governance arrangements for charities.</p>	
<p>Standard 1— Purposes and NFP nature of a registered entity</p> <p>A registered entity must:</p> <ol style="list-style-type: none"> 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. <p><i>Note</i> Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register, in an Australian law on www.comlaw.gov.au or www.austlii.edu.au, or is otherwise</p>	<p>This standard permits too much variation from what should be an unbreakable rule. A registered entity should make information about its purposes available to the public, including not only members, donors, employees, volunteers and benefit recipients but everybody else in Australia.</p> <p>Information in relation to the purposes of a registered entity should be required to be available to the public on the Australian Charities and Not-for-profits Register.</p> <p>The extra burden on a charity involved in copying its purposes from the relevant legislation on to the Register once is so minimal that it can be disregarded.</p> <p>To allow charities to set out their purposes on their own website would be to place more trust than is justified both on the commitment of</p>

<p>made available on request.</p>	<p>all charities to transparency and on their ability to manage internet technology.</p> <p>To make basic information available on request is no substitute for a requirement to post it on the Register, and would represent a substantial watering-down of the standard.</p> <p>If a charity is genuinely ready to comply with the intentions of this standard, there exists no conceivable reason why they might wish to withhold this information from the Register. There is in consequence no reason why they should be permitted to.</p>
<p>3.2. Draft governance standard 2: Accountability to members This governance standard would only apply to registered charities that have members. Examples of charities with members include incorporated associations and companies limited by guarantee. On the other hand, charitable trusts do not have members.</p>	<p>The ACNC should at some early date consider whether charitable trusts meet the standards of accountability that should be required of entities receiving financial concessions, and indeed should review whether the Trust concept is in the twenty-first century any longer an appropriate format for charitable purposes.</p> <p>The problem of enforcing good governance on organisations that have no members requires more discussion than is provided here. It would be naïve and unproductive to work on the basis that all such organisations are satisfactorily run.</p>
<p>Legislative obligations also exist in relation to incorporated associations..... Incorporated associations in New South Wales must also hold an annual general meeting within six months after the close of the association's financial year, and financial statements must be</p>	<p>These differences between states draw attention again to the problems presented by differing state legislation to organisations with branches in several states. Such anomalies underline the importance of seeking a referral of powers in the area of NFP regulation to the</p>

<p>presented at each annual general meeting of an incorporated association.</p>	<p>Commonwealth, enabling a common regulation Australia-wide.</p>
<p>The standard would simplify the arrangements for registered charities that are companies, while allowing flexibility by only requiring reasonable steps for the registered charity's specific circumstances.</p> <p>1) A registered entity that has members must take reasonable steps to ensure that:</p> <p>a) the registered entity is accountable to its members; and</p> <p>b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.</p> <p><i>Note 1</i> The steps that a registered entity may take to ensure it is accountable to its members include holding annual general meetings, providing members with an annual report (including financial information and achievements towards its purpose) and providing for elections for its responsible entities.</p> <p><i>Note 2</i> The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns include holding an annual general meeting with a question and answer session and providing an opportunity for members to propose resolutions and to vote upon those resolutions.</p>	<p>Our Community believes that in this instance flexibility is less important than certainty. The more precise formulations listed in the Notes – meetings, reports, elections - should be incorporated in the mandatory standards.</p> <p>Unless this is done,</p> <p>1) members working within their organisations for transparency and accountability will be deprived of any meaningful leverage;</p> <p>2) organisations that need no reform will comply without argument, while those that would repay closer investigation will be able to delay reform indefinitely.</p> <p>At the least, any organisation seeking to be relieved of the obligations detailed in the Notes should be obliged to detail their reasons to the ACNC, which should retain the power to refuse their request.</p>
<p>Standard 3— Compliance with Australian laws</p>	

<p>A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:</p> <p>a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or</p> <p>b) by way of a civil penalty of 60 penalty units or more.</p>	<p>There seems little point in incorporating in any law a command to obey the law. If anything goes without saying, that surely does. We might otherwise insert a further provision to the effect that</p> <p>“A registered entity must not breach Standard 3” , and so on <i>ad infinitum</i>.</p> <p>If it is desired to place additional restrictions on the Commissioner’s powers to intervene – and this would result in a considerable diminution of the flexibility of the provision – then the phrasing should be</p> <p>“The Commissioner shall not exercise their enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act, where a breach by the entity does not constitute</p> <p>a) an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or</p> <p>(b) a civil penalty of 60 penalty units or more.”</p>
<p>Standard 4-- Responsible management of financial affairs</p>	<p>In this area the reasonableness standard seems the proper criterion.</p>
<p>Standard 5-- Suitability of responsible entities</p>	<p>These differences between states draw attention again to the problems presented by differing state legislation to organisations with branches in several states. Such anomalies underline the importance of seeking a referral of powers in the area of NFP regulation to the Commonwealth, enabling a common regulation Australia-wide.</p>

	<p>That said, the criteria for disqualification seem adequate, although the implication of S.3 (b) that such disqualification shall be for no more than 12 months seems to limit the powers of the Commissioner in extreme cases.</p> <p>The provision that</p> <p><i>“The Register must be made available for public inspection, on a website maintained by the Commissioner”</i> should represent the normal expectation for every aspect of the information gathered by the ACNC.”</p> <p>The provision that the charity has the responsibility to take reasonable steps to ensure that responsible entities are not debarred by the Standards is unlikely to place a heavy burden on those charities where extreme financial precautions cannot be justified.</p>
<p>Standard 6— Duties of responsible entities</p>	<p>This section merely restates general law responsibilities and should not place any additional burden on the sector.</p> <p>It is not necessarily the case that this fact will be perceived by the public, and it is possible that there will be some additional reluctance from volunteers to take on governance roles in NFPs. It would be desirable for the ACNC to mount a campaign to encourage involvement in NFP governance, and desirable also that the Commonwealth should offer encouragement by, at the minimum, allowing volunteer expenses to be tax deductible.</p> <p>It should be stressed that <i>in practice</i> malicious prosecutions, or unfounded prosecutions, or unsympathetic prosecutions that fail</p>

	<p>to appreciate the particular circumstances of NFP management, or indeed <i>any prosecutions at all of NFP responsible entities</i>, are virtually unknown in this country. No criticism of these standards should be given any weight unless the complainant can come up with some precedent for their fears of official abuse.</p>
<p>It is proposed that registered charities will have <i>18 months</i> from the commencement of the governance standards to make any necessary changes (for example, to internal procedures), to meet the governance standards, except in relation to changes required to a registered charity's governing rules.</p>	<p>Difficulties will arise under this sector if and only if</p> <ul style="list-style-type: none"> (a) the (state) Model Rules for incorporated associations, or the (federal) equivalent for companies, are insufficient to comply with these standards. This does not appear to be the case; however, if the ACNC has any doubt about this conclusion then it must voice its concerns at the earliest possible opportunity. (b) the state or federal regulators have approved variations to the models that do not comply with these standards. Here the lack of transparency of existing reporting arrangements makes it difficult to assess these risks. However, the ACNC should at the earliest possible opportunity analyse state legislation to identify the areas where difficulties might arise. <p>It must be emphasised that not-for-profit governing bodies are largely ignorant of the finer details of administrative law and will require an enormous amount of assistance if they are not to panic.</p> <p>The material that the ACNC has</p>

Governance Standards for the Australian Not-for-Profit Sector

	<p>mounted online represents a good start in this enterprise, but much more work both by the ACNC and by sectoral leaders will be necessary.</p>
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