

Development of governance standards

Consultation Paper
December 2012

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ISBN 978-0-642-74868-3

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CONSULTATION PROCESS

Request for feedback and comments

This paper seeks feedback on proposals to introduce governance standards for charities registered with the Australian Charities and Not-for-profits Commission (ACNC).

The consultation period has been set to provide the maximum time for engagement, having regard to consultation occurring over the Christmas and New Year period and the need to provide certainty to the NFP sector on final standards which will commence on 1 July 2013.

Submissions should include the name of your organisation (or your name if the submission is made as an individual) and contact details for the submission, including an email address and contact telephone number where available.

While submissions may be lodged electronically or by post, electronic lodgement is strongly preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Submissions which are not requested to remain in confidence will be uploaded to the Treasury website shortly after they are received.

Closing date for submissions: 15 February 2013

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1. TERMS USED IN THIS PAPER

ACNC: the Australian Charities and Not-for-profits Commission.

ACNC Act: the *Australian Charities and Not-for-profits Commission Act 2012*. This establishes the ACNC and allows governance standards to be made.

General law: is judge-made law as opposed to legislation. The general law is made up of the common law and equity.

Governance: means the set of practices and procedures in place to ensure that an entity operates to achieve its objectives in an effective and transparent manner.

NFP: means not-for-profit.

Principles-based standards: are standards which specify an outcome rather than the means to achieve that outcome. These governance standards are intended to be principles-based. This means that charities can meet the standards in different ways according to their particular circumstances, including their size. The term is discussed further in part 2.3.4 of this paper.

Registered entity (charity): means, initially, a charity (including public benevolent institutions) registered with the ACNC. The term 'registered entity' is used in the ACNC Act and defined in section 300-5 of the ACNC Act. This paper uses the term 'registered charity' to discuss those charities which are registered with the ACNC.

Responsible entity: an individual (or in some limited cases a corporation) who is responsible for running a charity, who is a member of the governing body (including directors or committee members) or trustees (including insolvency trustees and administrators). In some cases, the proposed governance standards relate to responsible entities separately to the charity itself. The term is defined in section 205-30 of the ACNC Act.

2. BACKGROUND

2.1 DEVELOPING GOVERNANCE STANDARDS TOGETHER WITH THE NOT-FOR-PROFIT SECTOR AND GOVERNANCE EXPERTS

The purpose of this paper is to seek comment on the coverage and focus of the governance standards, as well as provide an opportunity to interested stakeholders to shape the draft governance standards.

On 17 May 2012 the Government announced that the governance standards, which form part of the Australian Charities and Not-for-profits Commission (ACNC) regulatory framework, will commence on 1 July 2013, following further consultation.

The *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) establishes a framework for a set of minimum governance standards to apply to registered charities, excepting basic religious charities (as defined in section 205-35 of the ACNC Act). Charities will need to comply with these standards to be, and remain, registered with the ACNC.

The governance standards are intended to reflect a minimum set of outcomes for registered charities, rather than mandate 'best practice governance' or detailed procedures and requirements necessary for effective not-for-profit (NFP) governance. The purpose of these standards is to ensure all stakeholders can be confident that a minimum standard of governance is being met across all charities, whilst providing entities with sufficient flexibility to determine how they go about managing the charity and how to advance the charity's purposes and achieve its objectives. These stakeholders include the broader Australian community, those who benefit from the important services provided by NFPs and those who work or volunteer for a charity.

These standards will also serve to underpin public trust and confidence in the sector — one of the objects of the ACNC Act. The ACNC will provide education and guidance material to help those involved in the governing of charities understand how to comply with these standards.

The Government previously released a consultation paper on the current governance arrangements for the NFP sector on 8 December 2011, seeking feedback on what the core organisational governance principles applying to charities and other NFP entities should be. Feedback from this consultation has helped inform the development of draft governance standards for charities registered with the ACNC, which are included in this paper.

The NFP Sector Reform Council has engaged on the development of the draft standards, hosting Consultation Code workshops around Australia and an online forum in late October 2012. During these workshops, stakeholder views on NFP governance were also sought in order to inform the development of governance standards under the ACNC regulatory framework. The online forum was open until 16 November 2012. In addition, the NFP Sector Reform Council held a specialist roundtable meeting of representatives from the sector on 14 November 2012 to discuss and seek input on a draft of this paper. This paper, and the proposed standards, was modified following that meeting and subsequent feedback received.

This paper builds on the consultation that has taken place so far, and seeks further input and feedback on the coverage and content of governance standards, as well as provides possible wording of draft standards which will form part of the obligations of charities registered with the ACNC.

2.2 DISCUSSIONS WITH STATE AND TERRITORY GOVERNMENTS

On 25 July 2012, the Council of Australian Governments (COAG) agreed to consider, before the end of 2012, the results of a regulatory impact assessment (RIA) on both existing and new governance and reporting standards in the NFP sector, in light of the ACNC Act. A sub-committee of COAG, the Not-for-profit Reform Working Group, is developing a RIA that will consider options for addressing duplication between proposed ACNC governance and reporting standards and pre-existing State and Territory regulation.

In line with the COAG decision, a consultation RIA is scheduled to be released by mid-January 2013 and will invite comments from stakeholders on options to reduce regulatory duplication for charities

complying with Commonwealth, State and Territory regulations. Further information on this consultation will be published on the Treasury's website.

2.3 THE ACNC REGULATORY FRAMEWORK AND GOVERNANCE STANDARDS

2.3.1 Scope of the ACNC governance framework

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.

The governance standards are proposed to apply to registered charities from 1 July 2013.

Entities will need to comply with these standards to become registered with the ACNC and to remain entitled to be registered (subject to the transitional arrangements). More information on transitional arrangements is available in part four of this paper.

The governance standards will be set out in regulations to the ACNC Act. Additional Parliamentary scrutiny procedures in the development of the governance standards were added to the ACNC Act during its passage through Parliament in response to calls from the sector. The ACNC Act requires that appropriate consultation be conducted and the input received from that consultation be considered, before the governance standards are finalised.

2.3.2 What is specified in the ACNC Act?

The ACNC Act provides that:

- there may be specific governance standards that apply differently to different groups of entities (such as those with members);
- there may be governance standards that do not apply to specified kinds of registered entities;
- the governance standards will not apply to entities that are basic religious charities; and
- 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 an Australian law.

The *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* made consequential amendments to the *Corporations Act 2001* to address governance for charities that are incorporated as companies (most often as companies limited by guarantee). As part of these amendments, the consequential amendments 'turn off' certain director duties for those directors of corporations that are registered charities and also registered with the Australian Securities and Investments Commission (ASIC). Under the new regime, the registered charity will be required to take reasonable steps to ensure those on their governing body (their responsible

entities) comply with equivalent governance standards that are specifically tailored for the NFP sector.¹

2.3.3 What are the current governance requirements?

The current governance arrangements for charities in Australia are complex, ad hoc, and can lack transparency in some cases. They depend on:

- 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 charity operates in — different provisions apply across the States and Territories (for example, for incorporated associations) and Commonwealth;
- whether the charity is affiliated with a peak body — such as the Australian Council for International Development which has a code of conduct for its members; and
- the sector in which the charity operates — such as the health and education sectors, which have certain governance requirements that must be complied with for an entity to operate in that sector.

The proposed governance standards aim to consolidate and deliver an element of consistency to the broader governance arrangements for charities.

2.3.4 What are principles-based governance standards and how can an entity comply?

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).

An Australian example of principles-based regulation, which illustrates how an existing regulatory framework uses this regulatory approach, is privacy regulation. In this case, 'National Privacy Principles' set out obligations in relation to information use and protection for certain organisations. The National Privacy Principles are available here: <http://www.privacy.gov.au/materials/types/infosheets/view/6583>.

In deciding what steps are reasonable for the registered charity to implement to satisfy the proposed standards, the registered charity would consider its size, and the extent to which it receives donations, grants and other monies from governments or the public. Other relevant factors

1 The sections of the *Corporations Act 2001* which do not apply to charities and their responsible entities are those which relate to directors duties, namely sections 180, 181, 182, 183 and 185 (to the extent it relates to sections 180 to 183), those that relate to the interests of directors, being sections 191, 192, 193, 194 and those that relate to the meetings of members, Part 2G.2 (other than ss250PAA and 250PAB) and Part 2G.3, to the extent that it relates to meetings of members.

to consider may include the risks inherent in the nature of the activities of the registered charity, and the vulnerability of those benefiting from the registered charity's services.

Once the governance standards have been finalised, the ACNC Commissioner (Commissioner) will release guidance material to assist registered charities in understanding and complying with the governance standards. Guides in a range of formats will be available in line with the ACNC's commitment to accessibility. The guides will explain how registered charities can ensure that processes consistent with these minimum standards can be put in place in a way that is relevant and proportional.

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.

Apart from the work done within the ACNC in examining model rules from various other jurisdictions (including Singapore, the United Kingdom and New Zealand), the ACNC will also be seeking input from the sector. Through engagement with the NFP Sector Reform Council, the ACNC Advisory Board, peak bodies, professional associations and feedback from charities and other NFPs, the ACNC will look to endorse and promote model rules and codes of conduct that demonstrate best practice beyond the minimum governance standards.

Aside from assisting parts of the sector to improve its own practices, having the ACNC endorse these model rules and codes of conduct will promote best practice across the charitable and broader NFP sector as a whole.

2.3.5 What will happen if a charity breaches the governance standards?

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.

The ACNC will consult on its regulatory approach in parallel with this consultation. In accordance with the ACNC's proposed regulatory approach, the ACNC will emphasise education and guidance to facilitate and promote compliance with the governance standards and use its enforcement powers only to address serious cases of non-compliance, including persistent and significant non-compliance.

Under the ACNC Act, the Commissioner *must* consider a range of factors before exercising her powers, including the nature, significance and persistence of any contravention, and what actions the registered entity and the Commissioner could otherwise take (or have taken). The ACNC has graduated enforcement powers that allow it to take a proportionate response to non-compliance. For example, as a first step the Commissioner may (after informal advice has been ignored) issue a formal warning. In some cases, because of constitutional limitations, the Commissioner's powers will be limited.² In those cases, the ACNC will work with other regulators to achieve a proportionate response.

² The enforcement powers are generally limited to 'federally regulated entities', which is defined in section 205-15 of the ACNC Act.

3. POSSIBLE GOVERNANCE STANDARDS

Six draft governance standards are put forward in this paper. The topics of these draft standards are:

- purposes and NFP character of a charity;
- accountability to members (for those charities with members);
- compliance with Australian laws;
- responsible management of financial affairs;
- suitability of responsible entities; and
- duties of responsible entities.

Most registered charities will already be meeting these standards and have practices and procedures in place to cover them. For those entities that need to adjust to meet these standards, transitional arrangements will be put in place which will provide time for the entity to comply (transitional arrangements are discussed in part four of this paper).

Given the various different types of charities within the NFP sector and the associated constitutional implications, the obligation to comply with these standards is placed on the registered charity in all cases, despite standards five and six also referring to the responsible entities of a charity. Where these standards refer to those responsible entities, the obligation coming from the standard is nevertheless placed on the registered charity (as the 'registered entity'). However, in both cases the extent of the registered charity's obligation under the standard is only to take 'reasonable' steps to ensure their responsible entities comply with the principle of the standards. This acknowledges that the ultimate effect of the standards is not directed to the registered charity and thereby provides leeway to ensure that registered charities that take reasonable steps to ensure their responsible entities comply with the standards will not themselves be in breach of the standard.

The underlying rationale and discussion about each of these topics, as well as a draft standard, is discussed below. Feedback and input is sought on the coverage and focus of the topics, as well as the possible wording of the draft standards.

The following draft standards are intended to invite comment. Interested stakeholders are encouraged to consider whether the scope, wording and framing meets the sector's and community's expectations of appropriate minimum governance standards for registered entities; whether the standards cover the appropriate topics and whether the standards can be implemented by all registered entities.

To assist you in commenting on the draft governance standards, the draft governance standards are set out separately in Appendix One, as they would appear in the law, and a table is provided in Appendix Two which sets out the existing governance obligations across the Commonwealth.

3.1 DRAFT GOVERNANCE STANDARD 1: PURPOSES AND NFP CHARACTER OF A CHARITY

To be a charity under existing law, an entity must be NFP and have and pursue charitable purposes only. A governance standard covering the purposes and NFP character of a charity would enable

members, beneficiaries, employees, donors, volunteers and the rest of the public to be able to easily identify the purpose and character of all registered charities, and would commit registered charities, their members and responsible entities, to the purpose and character of the charity. This in turn would provide the public with confidence that the registered charity is acting to prevent any non-compliance with its purposes and NFP character. Donors could be assured that a registered charity is operating for the purposes for which it was granted charitable status, as well as decrease the chance of mission drift within the charity.

Draft governance standard 1: Purposes and NFP nature of a registered entity

45.5 Standard 1—purposes and NFP nature of a registered entity

Object

- 1) The object of this governance standard is:
 - a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and
 - b) 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.

Standard

- 2) A registered entity must:
 - 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.

Note 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 made available on request.

The charitable purposes and NFP character of a charity must be demonstrated in its governing rules or by other means.

Registered charities may comply with this by ensuring that their governing rules or other documents set out their purposes. For example, the governing rules of a registered charity whose purpose is to relieve poverty could say this, in which case, compliance with the relevant component of the standard would be satisfied.

Registered charities would also need to comply with their purposes as an NFP entity. This would be standard practice for registered charities, given they must comply with their charitable purposes and NFP character or risk losing charitable status under *existing* arrangements.

Governing rules are those documents of an NFP entity that set out its purposes and how it is to be run. Governing rules may be included in a constitution, association rules, cooperative rules, memorandum and articles of association, legislation, a trust deed or church law. Governing rules cover a broad range of topics, including rules about an entity's mission, procedures for when an

entity winds up and removal of members and responsible entities. An entity's governing rules may be drawn from more than one source.

Whilst reference is made to governing rules, the form of the document setting out the NFP character and charitable purposes of the registered charity is **not** prescribed. A registered charity is able to comply with this draft standard by demonstrating its purposes and NFP character through other appropriate means.

3.1.1 Making information available

The proposed standard also requires registered charities to make information in relation to their purposes available to the public. The standard does not prescribe how this may be done. Rather, registered charities will be able to choose various ways of making this information available, and are largely expected to already be doing so. For example, for registered charities established by legislation, the legislation setting out their purposes will be a matter of public record, meaning such charities will already be compliant. Further, registered charities may set out their purposes on their websites, or provide the public with the information on request.

The ACNC also maintains a register setting out information in respect of registered charities. In some cases the ACNC Register may set out information which relates to the purposes of registered charities. In such cases, this would be sufficient for this standard.

Does draft standard one establish the appropriate principles?

Is the wording of draft governance standard one appropriate?

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.

The purpose of a governance standard relating to members is to ensure registered charities with members are open and accountable to those members, so that the members are in a position to understand the charity's operations and raise questions relating to its governance.

Accounting to members and ensuring the registered charity is open and transparent may include matters such as the quorum required for a meeting of members, the frequency of member meetings, providing notices of member meetings, voting and allowing members to ask questions at meetings.

It is the responsibility of these registered charities to take reasonable steps to be accountable to their members, and to allow those members adequate opportunity to raise concerns about the governance of the charity.

There are various existing obligations for charities and other NFPs with members. The following are some examples of such obligations.

Under the *Corporations Act 2001*, entities must fulfil numerous requirements which are relevant to this standard. The *Australian Charities and Not-for-profits Commission (Consequential and*

Transitional) Act 2012 will replace some of these requirements for registered charities that are companies when the governance standards come into effect. For example, directors must call and arrange a general meeting upon the request of members with at least five per cent of the vote that may be cast at the general meeting. Furthermore, members with at least five per cent of the votes may give the company notice of a special resolution they propose to move at the meeting, and at all annual general meetings, members must be given a reasonable opportunity to ask questions about or make comments on the management of the company.

The *Corporations Act 2001* also requires companies to keep minute books detailing the proceedings and resolutions of all member and director meetings. Companies must ensure that the minute books for member meetings and resolutions are available free of charge to members.

Legislative obligations also exist in relation to incorporated associations. For example, committee members of incorporated associations in New South Wales must disclose conflicts of interest, the particulars of which must be recorded in a book which is open at all reasonable hours to inspection by any member of the association. 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 presented at each annual general meeting of an incorporated association.

Similarly, in Queensland an incorporated association must hold an annual general meeting within six months after the end date of the association's reportable financial year, at which the financial statements of the association must be presented for adoption by members. The minutes of an annual general meeting and the association's financial documents must also be provided to a member within 28 days of a member requesting them.

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.

Draft governance standard 2: Accountability to members

45.10 Standard 2—accountability to members

Object

- 1) The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.

Standard

- 2) A registered entity that has members must take reasonable steps to ensure that:
 - a) the registered entity is accountable to its members; and
 - b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.

Note 1 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.

Note 2 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.

Registered charities must ensure that they have appropriate means for ensuring accountability to their members, and for allowing those members adequate opportunity to raise concerns about the governance of the charity.

This could include the frequency of members' meetings, providing notice of general meetings and special meetings, conducting votes, polls and quorums.

If a charity is currently meeting the requirements of the *Corporations Act 2001*, it would be complying with the proposed governance standard. As those obligations would be 'turned off' when the governance standards come into effect, the standard would increase the flexibility of registered charities that are companies to decide how best to be accountable to their members in their particular circumstances.

If a charity is currently meeting the requirements of incorporated associations legislation, it would also be complying with the proposed governance standard.

If a charity is currently meeting the requirements relating to members under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), it would also be considered to be in compliance with this governance standard.

Does draft standard two establish the appropriate principles?

Is the wording of draft governance standard two appropriate?

3.3 DRAFT GOVERNANCE STANDARD 3: COMPLIANCE WITH AUSTRALIAN LAWS

All charities (and individuals) must comply with Australian (including State or Territory) laws. In some cases, there are also express legislative requirements to comply with Australian laws. For example, under the *Private Ancillary Fund Guidelines 2009*, an ancillary fund 'must comply with all relevant Australian laws'. However, the consequences of breaching the law will differ. The general law draws a distinction between a charity engaging in illegal activities and one that pursues illegal purposes. An entity with illegal purposes cannot be charitable but an entity that engages in illegal activities may, in some circumstances, remain charitable.

The purpose of this draft standard is therefore 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.

Draft governance standard 3: Compliance with Australian laws

45.15 Standard 3—compliance with Australian laws

Object

- 1) The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).

Standard

- 2) A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:
 - a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
 - b) by way of a civil penalty of 60 penalty units or more.

Note 1 See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2 While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by this standard may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act.

The proposed standard is drafted so that a registered charity would only breach the standard if it engaged in activities that could result in the charity itself being charged with an indictable offence or liable to a civil penalty of 60 penalty units or more under an Australian law.

Indictable offences are offences punishable by imprisonment for a period exceeding 12 months, unless a contrary intention appears in the legislation creating that offence. Under this standard, the penalty units are calculated by reference to the current Commonwealth penalty unit calculations.

The proposed standard would mean that the ACNC could not take regulatory action for minor breaches. As discussed above, under the ACNC Act and the ACNC's regulatory approach, the ACNC will be required to consider proportionality in all of its actions.

As well, the proposed standard only relates to activities that could result in the *registered charity* (and not a responsible entity) being charged with an indictable offence or liable to a civil penalty of 60 penalty units or more under an Australian law. The activities of a responsible entity of the charity are only relevant to the extent that they could result in the charity being charged or liable to such a penalty.

The registered charity 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 proposed standard. For example, if the ACNC reasonably believes a charity has engaged in an offence of fraud, the charity would be in breach of the governance standards and the ACNC could take action (for example, by issuing a

formal warning). However, any action taken by a court (and its consideration of penalties to be imposed) would be taken into account by the Commissioner in deciding whether to action or what action to take.

For information on the consequences of responsible entities being charged with such an offence, see draft governance standards 5 and 6.

Does draft standard three establish the appropriate principles?

Is the wording of draft governance standard three appropriate?

3.4 DRAFT GOVERNANCE STANDARD 4: RESPONSIBLE MANAGEMENT OF FINANCIAL AFFAIRS

Many charities receive donations, taxation concessions and / or government funding. There is a community expectation that they responsibly manage their resources so that they effectively achieve their purpose and protect their resources from misuse. This draft standard addresses this expectation. It requires the registered charity to take reasonable steps to manage its financial affairs in a responsible manner.

For example, the reasonable steps required under this standard should guard against the registered charity risking the loss of its assets through mismanagement. This standard is not meant to discourage registered charities from being innovative but rather to ensure that registered charities consider the management of their financial affairs and, where appropriate, address identified issues in relation to their financial affairs. This may be done in numerous ways.

There are various existing obligations for NFP entities that encompass managing financial affairs. The *Corporations Act 2001* manages financial affairs largely through director duties, including the requirement that directors of corporations must exercise their powers and discharge their duties with the degree of care and diligence a reasonable person would exercise in the circumstances of that corporation and director.

Draft governance standard 4: Responsible management of financial affairs

45.20 Standard 4—responsible management of financial affairs

Object

- 1) The object of this governance standard is to ensure that a registered entity manages its resources responsibly, in a way that effectively furthers its purposes and protects its resources from misuse.

Standard

- 2) A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.

The draft standard requires registered charities to take ‘reasonable steps for the responsible management’ of a charity’s financial affairs. The reasonable steps will vary depending on the circumstances of an entity and its financial affairs.

Steps an entity could take include the general practices of the charity around the spending of funds (for example, who can write cheques or approve expenditure) as well as who bears the risk and what procedures should be followed if, say, fraud occurs.

The charity may also manage its financial affairs by having appropriate insurance in place.

An audit committee may be another part of the arrangements for managing financial affairs for very large registered charities.

The processes required to meet this standard will include those that a registered charity already needs to have in place to meet ACNC reporting requirements, such as having its accounts reviewed or audited.

For example:

A large registered charity is set up for the protection of the environment.

The charity operates with a large number of volunteers, who undertake conservation work for the organisation.

Given the size of the charity, the large number of volunteers, and the outdoor nature of their work, the charity decides to take out insurance to cover the risk that a volunteer is injured. This limits the financial risk to the charity should such an injury occur.

Does draft standard four establish the appropriate principles?

Is the wording of draft governance standard four appropriate?

3.5 DRAFT GOVERNANCE STANDARD 5: SUITABILITY OF RESPONSIBLE ENTITIES

In order for the public, members, volunteers, donors, clients and other stakeholders to have confidence in the proper operation of a registered charity, it is important that they have confidence in the people running it. Accordingly, this draft standard proposes that those people who are disqualified from managing corporations may not manage registered charities (even if the registered charity is not a company).

There are currently various requirements in Commonwealth, State and Territory legislation limiting who can run various types of charities. In some cases, those requirements are more onerous than those proposed under this standard. In such cases, people would still be unable to be a responsible entity of that particular type of charity if they did not meet those other requirements.

For example, under the *Associations Incorporation Act 1985 (SA)*, a person may not be a member of a committee of an incorporated association in South Australia if the person has been convicted of an indictable offence. Likewise, per the *Associations Incorporation Act 1981 (Qld)*, a person who has been convicted summarily and sentenced to imprisonment may not be a member of a Queensland incorporated association’s management committee. Similarly, under the *Public Ancillary Fund*

Guidelines 2011, an individual must not be a director of a trustee or a member of any other controlling body of the fund if he or she has been convicted of a taxation offence that is punishable by imprisonment for a period exceeding 12 months.

The proposed standard is intended to ensure that registered charities are not managed or controlled by people who present a risk to their financial position or the proper pursuit of their purposes.

Draft governance standard 5: Suitability of responsible entities

45.25 Standard 5—suitability of responsible entities

Object

- 1) The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.

Standard

- 2) A registered entity must:
 - a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and
 - b) after taking those steps:
 - i) be, and remain, satisfied that each responsible entity meets the conditions; or
 - ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

Note Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

Examples of reasonable steps

Reasonable steps may include obtaining declarations from responsible entities and the searching of public registers.

- 3) Subject to subsection (5), the conditions for each responsible entity are that it is not:
 - a) disqualified from managing a corporation, within the meaning of the Corporations Act 2001; or
 - b) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).

Note Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

- 4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this standard if:

- a) the entity has been previously suspended or removed as a responsible entity of any registered entity, under Division 100 of the Act; and
 - b) the entity has been given notice of its disqualification by the Commissioner; and
 - c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.
- 5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.
- 6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.

Subdivision 45-D Register

45.150 Register of disqualified responsible entities

- 1) The Commissioner must maintain a register, to be known as the Disqualified Responsible Entities Register, in which the Commissioner must include the following information:
 - a) the name of the entity disqualified by the Commissioner from being a responsible entity of a registered entity, under subsection 45.25 (4);
 - b) the date that the entity was disqualified by the Commissioner;
 - c) whether the disqualification remains subject to review, under Part 7-2 of the Act.
- 2) The Register must be maintained by electronic means.
- 3) The Register must be made available for public inspection, on a website maintained by the Commissioner.

3.5.1 Who is disqualified from managing corporations?

There are several provisions under the *Corporations Act 2001* which may result in persons being disqualified from managing corporations. ASIC is required to keep a register of persons disqualified under most of these provisions. Registered charities can easily search the online ASIC Disqualified Persons Register (for free) to determine if a potential responsible entity has been disqualified under these provisions.

However, persons are also automatically disqualified from managing corporations under section 206B of the *Corporations Act 2001*. The person is disqualified automatically and, as such, will not necessarily be listed on an ASIC register. The following matters result in automatic disqualification:

- if the person is convicted of an offence that is a contravention of the *Corporations Act 2001*, or of an offence that involves dishonesty and is punishable by imprisonment for at least 3 months;

- if the person is 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;
- if the person is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months;
- if the person is an undischarged bankrupt;
- if the person has executed a personal insolvency agreement and the terms of the agreement have not been fully complied with; and
- if, under an order made by a court of a foreign jurisdiction, the person is disqualified from being a director of a foreign company or being concerned in the management of a foreign company.

Registered charities should therefore also consider these matters when selecting responsible entities.

3.5.2 How would a charity comply?

It would be the registered charity's responsibility to take reasonable steps to ensure that all of its responsible entities are not disqualified from managing corporations. It must also consider if each responsible entity remains eligible to manage corporations and take appropriate action if this is no longer the case. This means registered charities should take reasonable steps to be satisfied that their responsible entities are eligible to manage corporations, and have processes in place to alert them when an event occurs that makes a responsible entity no longer eligible or appropriate to manage a corporation.

Reasonable steps may include a search of the ASIC Disqualified Persons Register and requiring responsible entities to sign a declaration that they do not have any relevant criminal convictions. Other checks may be necessary depending on the types of activities being conducted (for example, activities involving children or other vulnerable people) or where the charity has reason to believe a declaration is inaccurate or likely to be false or misleading.

For example:

A registered charity is looking for a new director.

The charity would be expected to check the ASIC Disqualified Persons Register and possibly to have the new director sign a declaration:

- *that he or she had never been convicted of an offence against the Corporations Act 2001 or of an offence involving dishonesty which is punishable by imprisonment for more than 12 months;*
- *that he or she is not an undischarged bankrupt; and that he or she is not currently subject to a personal insolvency agreement which has not been complied with.*

The Commissioner will have an overriding discretion to allow a person to be a responsible entity where the Commissioner believes this is reasonable, despite that person being disqualified from

managing corporations. For example, it may be appropriate for ex-offenders to be a responsible entity of a charity for the rehabilitation of offenders.

Where a person is disqualified from managing corporations, yet having considered this the registered charity desires to appoint the person as a responsible entity, that charity may seek an exemption from the Commissioner to so appoint the person. The Commissioner would be expected to approve such requests where, in the circumstances of the charity, it is reasonable to do so and it is allowed under an Australian law. For example, where a registered charity that seeks to rehabilitate offenders seeks to appoint ex-offenders to management positions, it would likely be reasonable to allow this (however, a person with a previous conviction of fraud is unlikely ever to be considered a reasonable appointment to a position involving management of the finances of the entity).

Does draft standard five establish the appropriate principles?

Is the wording of draft governance standard five appropriate?

3.5.3 Disqualifying responsible entities

The proposed standards enable the ACNC to disqualify persons from being responsible entities. The standards also propose that the ACNC will be able to maintain a register of those persons it has disqualified (just as ASIC maintains such a register). These are largely machinery provisions designed to promote efficiency of the ACNC and in the NFP sector so that the ACNC does not need to remove the same inappropriate person every time he or she seeks to be a responsible entity of different registered charities. This will also makes it easier for registered charities given they will be able to search the ACNC register of disqualified responsible entities before appointing the person as a responsible entity.

As proposed, the ACNC will only be able to disqualify a person where that person has already been suspended or removed in accordance with the ACNC Act. Under the ACNC Act, the Commissioner may only suspend or remove responsible entities where the registered charity is a federally regulated entity and the entity has contravened, or is likely to contravene, the governance standards or the ACNC Act.

The proposed standards further provide that any person that has been disqualified may lodge an objection with the Commissioner. Following receipt of an objection, the Commissioner will reconsider the decision. If the person is still dissatisfied with the decision of the Commissioner following reconsideration, he or she may seek review of the decision through the Administrative Appeals Tribunal or the courts.

Are there concerns with allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register?

3.6 DRAFT GOVERNANCE STANDARD 6: DUTIES OF RESPONSIBLE ENTITIES

Those responsible for a charity play a vital role in ensuring the charity is meeting its objectives and using its resources for its charitable purposes. They must be honest and careful in all their dealings on behalf of the charity, and must always act in the charity's best interests. Most responsible entities will already be subject to similar obligations under the general law and, in some cases, statute.

This draft governance standard is intended to ensure that responsible entities are subject to and, as far as possible, meet those duties. The proposed duties would be substantially the same as the duties of directors under the *Corporations Act 2001*, particularly the provisions which will be replaced by the governance standards in relation to registered charities that are companies. These provisions are: the duty to act with reasonable care and diligence (section 180), a duty not to improperly use information or position (sections 182, 183 and 184), an obligation to disclose matters involving personal interests (sections 191 and 196), obligations in respect of related party transactions (Chapter 2E); and a duty to act in good faith, in the best interests of the company and for a proper purpose (section 181). These duties also apply in some cases by statute to incorporated associations.

However, some responsible entities are also subject to higher duties or standards under other laws. For example, trustees must exercise reasonable care and diligence and act as a prudent person would when investing trust funds. A similar requirement applies to ancillary funds. The proposed standard will not generally affect the application of, or the consequences of breach of, these higher duties or standards.

The obligation to comply with this standard is placed on the registered charity, rather than the responsible entity, consistent with the powers in the ACNC Act.

Draft governance standard 6: Duties of responsible entities

45.30 Standard 6—duties of responsible entities

Object

1) The object of this governance standard is:

- a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:
 - i) the relationship between them and the entity were a fiduciary relationship; and
 - ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and
- b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:
 - i) is acting to prevent non-compliance with the duties imposed on responsible entities; and
 - ii) if non-compliance with the duties imposed on responsible entities occurs—will act to identify and remedy non-compliance with the duties imposed on the entity.

Standard

- 2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:
 - a) to exercise the responsible entity's powers and discharge the responsible entity's duties

with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;

- b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;
- c) not to misuse the responsible entity's position;
- d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
- e) to disclose perceived or actual material conflicts of interest of the responsible entity;
- f) not to allow the registered entity to operate while insolvent.

Note 1 This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2 Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3 For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

- 3) For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:
- a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
 - b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
 - c) if the registered entity is a company—to the members of the registered entity; or
 - d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

Note 1 **Company** is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).

Note 2 Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.

Note 3 Part 7-6 of the Act provides for the approval of forms.

- 4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).
- 5) In this section:

insolvent has the meaning given by subsection 95A (2) of the *Corporations Act 2001*.

Draft protections to standard 6

Subdivision 45-C Protections under governance standard 6

45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.30.

45.105 Protection 1

- 1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies, on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:
 - a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
 - c) another responsible entity in relation to matters within their authority or area of responsibility; or
 - d) an authorised committee of responsible entities that does not include the responsible entity.
- 2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

45.110 Protection 2

- 1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:
 - a) the responsible entity makes the decision in good faith for a proper purpose; and
 - b) the responsible entity does not have a material personal interest in the subject matter of the decision; and
 - c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate; and
 - d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

2) In this section:

decision means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

45.115 Protection 3

1) A responsible entity meets this protection if any of the following are satisfied:

- a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
- b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Note This protection relates to the duty mentioned in paragraph 45.30 (2) (f).

45.120 Protection 4

This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

3.6.1 Duties for responsible entities

A registered charity can choose which steps it takes to apply the duties (as are reasonable) in this draft standard to its responsible entities, provided the responsible entities are made subject to the duties. If the registered charity is already subject to State or Territory legislation that makes these duties applicable (such as the Victorian incorporated associations legislation), the responsible entity will be subject to those duties already. Otherwise, this could be done by way of, for example, letter of appointment, board charter, codes of conduct or governing rules.

Responsible entities must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable individual would exercise if they were in the circumstances of that particular responsible entity. Consistent with the equivalent director duty and case law, this involves a consideration of the circumstances of the individual charity. In this manner, what a responsible entity of a small registered charity must do may be different to what the responsible entity of a large registered charity must do. Other factors to take into consideration are the type of charity and the distribution of functions within the charity.

For example:

A large registered charity delegates much of the review of its technical compliance work to responsible entities with legal and accounting qualifications.

Sally is an accountant on the Board of the charity. In determining the degree of care and diligence Sally should exercise in her conduct of the affairs of the charity, regard may be had to how a board member of a large charity would normally exercise her or his powers and discharge her or his duties.

Responsible entities need to act in good faith in the best interests of the registered charity, considering the purposes of the charity. It also means that where there is a potential or actual conflict, they put the registered charity's interests above their own interests.

Responsible entities must not use their position or information obtained through their position to gain an advantage for themselves or someone else or to cause detriment to the registered charity.

For example:

A registered charity has governing rules which bind its responsible entities to the required duties.

Mike, a responsible entity of the charity, tenders for a new government contract on behalf of the charity.

Mike uses his knowledge of the charity's tender to put in a more competitive tender for his own private company.

The charity would be expected to dismiss Mike and/or take some other action to enforce its governing rules, otherwise it would be in breach of the governance standards. While Mike's actions do not put the charity in breach of the governance standard, as he was bound not to misuse information provided to him in the course of being a responsible entity, inaction by the charity may put it in breach of the standard.

Registered charities need to ensure that their responsible entities disclose material conflicts of interests (even if the conflict is only perceived). A conflict of interests policy may also cover matters such as when a responsible entity can participate in decisions in which the responsible entity has a conflict of interest.

For example:

Class C Inc is looking to engage a professional fundraiser.

One of its responsible entities has a daughter who is a director of a major fundraising company.

The responsible entity should disclose this information because that fundraiser may be a potential tenderer in the process.

There could be many ways in which a responsible entity could meet the disclosure obligations. To ensure that disclosure is made to the most relevant entities (and to ensure an opportunity for disclosure is available for all responsible entities), disclosure must be to:

- if the responsible entity is a director of the registered charity—to the other directors (if any); or
- if the registered charity is a trust, and the responsible entity is a director of a trustee of the charity—to the other directors (if any); or
- if the registered charity is a company (including an association or incorporated association)—to the members of the charity; or

- in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

If a registered charity has both other directors as well as members, the responsible entity would disclose to its members only where it could not disclose to the other directors, such as where all of the directors had the same conflict of interest.

In the case where a registered charity cannot disclose the conflict to its members or other directors, the charity may be able to disclose the conflict to the Commissioner. In light of the possibility of causing unnecessary compliance costs in some circumstances, provision is made for the ACNC to not require disclosure. Accordingly, registered charities will not need to disclose conflicts of interest to the Commissioner where the Commissioner believes the conflict, whilst material, is nonetheless of a low-risk nature that would cause unnecessary compliance costs. The ACNC will publish guidance on which conflicts of interest it will not require disclosure for.

Registered charities must ensure that their responsible entities do not carry on the operations of the charity while it is insolvent. The term ‘insolvent’ is defined in the *Corporations Act 2001*.

3.6.2 Protections for responsible entities

Protections may be appropriate where action taken by the responsible entity may otherwise place a registered charity in breach of proposed governance standard six but it would be unreasonable to expect the responsible entity to have known or prevented the outcome. These protections will therefore mean the registered charity has not breached the governance standards.

For example, the proposed governance standard sets out that a responsible entity must not carry on the operations of a registered charity while it is insolvent. However, it might have been unreasonable, in the circumstances, to expect a responsible entity to have known certain information, or they may have reasonably relied on expert financial advice before undertaking a certain transaction on behalf of the charity.

Accordingly, the governance standards contain a number of protections to ensure that registered charities will not be in breach where their responsible entities are acting in a manner considered reasonable. The protections in all cases are targeted at the actions or state of mind of the responsible entity, similar to the defences available in the *Corporations Act 2001*. A registered charity will be deemed as having taken reasonable steps, and therefore compliant with draft standard six, if the protections apply.

Draft protection one would still require the responsible entity of the registered charity to have independently assessed any advice received before the responsible entity can rely on it, as is currently required under the *Corporations Act 2001*. However, it would protect a responsible entity if it turned out the information relied on was inaccurate, but it would have been unreasonable for the responsible entity to have known that, or had any reason to doubt the source of the information or its accuracy, and the responsible entity had independently assessed the information themselves.

Draft protection two would allow a responsible entity to be able to rely on a decision they have made, in good faith and in the best interests of the registered charity, even if the outcome of the decision does not turn out to have been in the best interests of the charity (for example, following the decision, the economic climate changes, and the outcome of the decision is not as desirable as was expected).

Draft protection four would ensure a registered charity would not be in breach of the governance standard because its responsible entity was absent, and could not have known they were in breach of a standard. For example, if a responsible entity was away for a period due to illness, and during this period the charity entered into a transaction which the absent responsible entity should have disclosed as a possible conflict of interest.

Does draft standard six establish the appropriate principles?

Is the wording of draft governance standard six and the draft protections appropriate?

3.6.3 Protections for volunteer responsible entities

The nature of charities means that responsible entities will often be volunteers.

The governance standard proposes that responsible entities must exercise the same degree of care and diligence that a reasonable individual would exercise if they were the responsible entity of that registered charity. This would mean that being a volunteer responsible entity would be a relevant factor in determining the scope of the duty.

The protections for responsible entities would also apply to volunteer responsible entities. The governance standard and its protections are based on the duties that currently exist under statute and the general law. Although the development of the current law has sought to reflect community standards, the Government seeks further feedback about whether the appropriate standards of conduct are balanced with the importance of encouraging increased volunteer involvement with charities, and whether additional 'safe harbour' protections are appropriate in the case of volunteer responsible entities.

Are there any additional protections which should only be provided to volunteer responsible entities?

If so, what would these protections be?

4. TIMING ISSUES

The governance standards are proposed to commence on 1 July 2013.

It is proposed that registered charities will have *18 months* 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.

If a registered charity has governing rules inconsistent with these standards, and needs to amend these accordingly, it would have *four years* from 1 July 2013 to make these changes to be in compliance with the governance standards. However, registered charities should amend their governing rules as soon as possible to come into compliance with the governance standards. For example, if a registered charity chooses to make its responsible entities subject to the duties in standard six by way of its governing rules.

The ACNC will provide guidance and education to those affected by these changes. However, registered charities need to comply with the governance standards as far as possible during the transition period without breaching their governing rules.

Are the transitional arrangements proposed adequate?

5. NEXT STEPS

Consultation will take place until 15 February 2013.

In addition to accepting written submissions, face-to-face consultation forums facilitated by the ACNC (for which a Treasury officer will attend to respond to queries) will be held around Australia (in capital cities and regional centres) on the draft governance standards in late January — early February 2013. Further information can be found at www.acnc.gov.au.

The Office for the Not-for-Profit Sector within the Department of the Prime Minister and Cabinet (PMC) will also administer an online forum on www.notforprofit.gov.au to facilitate discussion and provide an additional way to provide comments on the draft governance standards.

PMC, the ACNC and Treasury work in close cooperation and comments made and input provided through the online forum, at face-to-face consultations or through formal submissions to this paper will all be considered.

6. APPENDIX ONE — POSSIBLE GOVERNANCE STANDARDS

Division 45 Governance standards

Subdivision 45-A Preliminary

45.1 Simplified outline—how the governance standards apply

The governance standards support registered entities to fulfil their objectives by providing a minimum level of assurance that they meet community expectations in relation to how a registered entity should be managed.

Community expectations in relation to governance may include expectations about how a registered entity goes about managing its affairs, the use of public monies, volunteer time and donations provided to it, how the entity manages the risks that it faces, how the entity promotes the effective and responsible use of its resources and how the entity goes about demonstrating that it is operating transparently and for a proper purpose.

The steps a registered entity will need to take to comply with the standards will vary according to its particular circumstances, such as its size, the sources of its funding, the nature of its activities and the needs of the public (including members, donors, employees, volunteers and benefit recipients of the registered entity).

45.2 Application

For the purposes of section 45-10 of the Act, the governance standards in Subdivision 45-B are specified.

Subdivision 45-B Governance standards

45.5 Standard 1—purposes and not-for-profit nature of a registered entity

Object

- (1) The object of this governance standard is:
 - (a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and
 - (b) 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.

Standard

- (2) A registered entity must:
 - (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.

Note 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 made available on request.

45.10 Standard 2—accountability to members

Object

- (1) The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.

Standard

- (2) A registered entity that has members must take reasonable steps to ensure that:
 - (a) the registered entity is accountable to its members; and
 - (b) the registered entity’s members have an adequate opportunity to raise concerns about the governance of the registered entity.

Note 1 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.

Note 2 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.

45.15 Standard 3—compliance with Australian laws

Object

- (1) The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).

Standard

- (2) A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:
 - (a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
 - (b) by way of a civil penalty of 60 penalty units or more.

Note 1 See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2 While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by this standard may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act.

45.20 Standard 4—responsible management of financial affairs

Object

- (1) The object of this governance standard is to ensure that a registered entity manages its resources responsibly, in a way that effectively furthers its purposes and protects its resources from misuse.

Standard

- (2) A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.

45.25 Standard 5—suitability of responsible entities

Object

- (1) The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.

Standard

- (2) A registered entity must:
 - (a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and
 - (b) after taking those steps:
 - (i) be, and remain, satisfied that each responsible entity meets the conditions; or
 - (ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

Note Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

Examples of reasonable steps

Reasonable steps may include obtaining declarations from responsible entities and the searching of public registers.

- (3) Subject to subsection (5), the conditions for each responsible entity are that it is not:
 - (a) disqualified from managing a corporation, within the meaning of the *Corporations Act 2001*; or
 - (b) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).

Note Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

- (4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this standard if:
 - (a) the entity has been previously suspended or removed as a responsible entity of any registered entity, under Division 100 of the Act; and
 - (b) the entity has been given notice of its disqualification by the Commissioner; and

- (c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.
- (5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.
- (6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.

45.30 Standard 6—duties of responsible entities

Object

- (1) The object of this governance standard is:
 - (a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:
 - (i) the relationship between them and the entity were a fiduciary relationship; and
 - (ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and
 - (b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:
 - (i) is acting to prevent non-compliance with the duties imposed on responsible entities; and
 - (iii) if non-compliance with the duties imposed on responsible entities occurs—will act to identify and remedy non-compliance with the duties imposed on the entity.

Standard

- (2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:
 - (a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;
 - (b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;
 - (c) not to misuse the responsible entity's position;
 - (d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
 - (e) to disclose perceived or actual material conflicts of interest of the responsible entity;
 - (f) not to allow the registered entity to operate while insolvent.

Note 1 This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2 Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3 For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

- (3) For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:
- (a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
 - (b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
 - (c) if the registered entity is a company—to the members of the registered entity; or
 - (d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

Note 1 **Company** is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).

Note 2 Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.

Note 3 Part 7-6 of the Act provides for the approval of forms.

- (4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).
- (5) In this section:
- insolvent** has the meaning given by subsection 95A (2) of the *Corporations Act 2001*.

Subdivision 45-C Protections under governance standard 6

45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.30.

45.105 Protection 1

- (1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies, on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:
- (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
 - (c) another responsible entity in relation to matters within their authority or area of responsibility; or
 - (d) an authorised committee of responsible entities that does not include the responsible entity.

- (2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

45.110 Protection 2

- (1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:
 - (a) the responsible entity makes the decision in good faith for a proper purpose; and
 - (b) the responsible entity does not have a material personal interest in the subject matter of the decision; and
 - (c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate; and
 - (d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.
- (2) In this section:

decision means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

45.115 Protection 3

- (1) A responsible entity meets this protection if any of the following are satisfied:
 - (a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
 - (b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Note This protection relates to the duty mentioned in paragraph 45.30 (2) (f).

45.120 Protection 4

- (1) This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

Subdivision 45-D Register

45.150 Register of disqualified responsible entities

- (1) The Commissioner must maintain a register, to be known as the Disqualified Responsible Entities Register, in which the Commissioner must include the following information:
 - (a) the name of entity disqualified by the Commissioner from being a responsible entity of a registered entity, under subsection 45.25 (4);
 - (b) the date that the entity was disqualified by the Commissioner;

- (c) whether the disqualification remains subject to review, under Part 7-2 of the Act.
- (2) The Register must be maintained by electronic means.
- (3) The Register must be made available for public inspection, on a website maintained by the Commissioner.

7. APPENDIX TWO — GOVERNANCE REQUIREMENTS ACROSS THE COMMONWEALTH

The below are excerpts only, full copies of legislation are available at www.comlaw.gov.au

These tables do not consider provisions of State and Territory incorporated associations and trust legislation.

Proposed standard one — purposes and not-for-profit nature of a registered entity	
Income Tax Assessment Act 1997	<p>Section 30-125 — (1) An entity is entitled to be endorsed as a *deductible gift recipient if:</p> <p>(c) the entity meets the requirements of subsection (6).</p> <p>(6) A law (outside this Subdivision), a document constituting the entity or rules governing the entity’s activities must require the entity, at the first occurrence of an event described in subsection (7), to transfer to a fund, authority or institution gifts to which can be deducted under this Division:</p> <p>(a) any surplus assets of the gift fund (see section 30-130); or</p> <p>(b) if the entity is not required by this section to meet the requirements of section 30-130—any surplus:</p> <p>(i) gifts of money or property for the principal purpose of the fund, authority or institution; and</p> <p>(ii) contributions described in item 7 or 8 of the table in section 30-15 in relation to a *fund-raising event held for that purpose; and</p> <p>(iii) money received by the entity because of such gifts or contributions.</p> <p>(7) The events are: (a) the winding up of the fund, authority or institution; and (b) if the entity is endorsed because of a fund, authority or institution—the revocation of the entity’s endorsement under this Subdivision relating to the fund, authority or institution.</p> <p>Section 30-270 [requirements for DGRs on the Register of Environmental Organisations] — (1) It must not pay any of its profits or financial surplus, or give any of its property, to its members, beneficiaries, controllers or owners (as appropriate).</p> <p>(3) It must have rules providing that, if the public fund is wound up, any surplus assets of the fund are to be transferred to another fund that is on the register.</p> <p>Section 30-300 [requirements of DGRs on the Register of Cultural Organisations] — (5) It must not pay any of its profits or financial surplus, or give any of its property, to its members, beneficiaries, controllers or owners (as appropriate).</p>
Corporations Act 2001	Subsection 125(2) — If a company has a constitution, it may set out the company’s objects.
Corporations (Aboriginal and Torres Strait Islander) Act 2006	Subsection 66-1(2) — The corporation must have a constitution written in English that sets out the corporation’s objects.
Private Ancillary Fund Guidelines 2009	Guideline 10.1 — Its governing rules must include objects that clearly set out and reflect the purpose of the fund.
General law (fiduciary duties/trusts law/charity law)	Trustees must adhere to the terms of the trust. Charitable trusts must not be conducted for a profit to those that are not a class of persons for whom the charity pursues its objects: <i>Re Delius (deceased)</i> [1957] 1 Ch 299, 308.

Proposed standard two — accountability to members

<p>Income Tax Assessment Act 1997</p>	
<p>Corporations Act 2001</p>	<p>Section 140 — (1) A company’s constitution (if any) and any replaceable rules that apply to the company have effect as a contract:</p> <ul style="list-style-type: none"> (a) between the company and each member; and (b) between the company and each director and company secretary; and (c) between a member and each other member; <p>under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.</p> <p>Section 249D — (1) The directors of a company must call and arrange to hold a general meeting on the request of:</p> <ul style="list-style-type: none"> (a) members with at least 5% of the votes that may be cast at the general meeting; or (b) at least 100 members who are entitled to vote at the general meeting. <p>Section 249H — (1) Subject to subsection (2), at least 21 days notice must be given of a meeting of a company’s members. However, if a company has a constitution, it may specify a longer minimum period of notice.</p> <p>Section 249L — (1) A notice of a meeting of a company’s members must:</p> <ul style="list-style-type: none"> (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this); and (b) state the general nature of the meeting’s business; and (c) if a special resolution is to be proposed at the meeting—set out an intention to propose the special resolution and state the resolution; and (d) if a member is entitled to appoint a proxy—contain a statement setting out the following information: <ul style="list-style-type: none"> (i) that the member has a right to appoint a proxy; (ii) whether or not the proxy needs to be a member of the company; (iii) that a member who is entitled to cast 2 or more votes may appoint 2 proxies and may specify the proportion or number of votes each proxy is appointed to exercise. <p>Section 249N — (1) The following members may give a company notice of a resolution that they propose to move at a general meeting:</p> <ul style="list-style-type: none"> (a) members with at least 5% of the votes that may be cast on the resolution; or (b) at least 100 members who are entitled to vote at a general meeting. <p>Section 249P — (1) Members may request a company to give to all its members a statement provided by the members making the request about:</p> <ul style="list-style-type: none"> (a) a resolution that is proposed to be moved at a general meeting; or (b) any other matter that may be properly considered at a general meeting. <p>(2) The request must be made by:</p> <ul style="list-style-type: none"> (a) members with at least 5% of the votes that may be cast on the resolution; or (b) at least 100 members who are entitled to vote at the meeting. <p>Section 250S — (1) The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.</p> <p>Section 251A — (1) A company must keep minute books in which it records within 1 month:</p> <ul style="list-style-type: none"> (a) proceedings and resolutions of meetings of the company’s members; and

Proposed standard two — accountability to members (continued)

<p>Corporations Act 2001 (continued)</p>	<p>(b) proceedings and resolutions of directors’ meetings (including meetings of a committee of directors); and (c) resolutions passed by members without a meeting; and (d) resolutions passed by directors without a meeting; and (e) if the company is a proprietary company with only 1 director—the making of declarations by the director. Section 251B — (1) A company must ensure that the minute books for the meetings of its members and for resolutions of members passed without meetings are open for inspection by members free of charge.</p>
<p>Corporations (Aboriginal and Torres Strait Islander) Act 2006</p>	<p>Section 175-1 — (1) On application by a member of an Aboriginal and Torres Strait Islander corporation, the Court may make an order: (a) authorising the applicant to inspect books of the corporation. The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. Section 201-5 — (1) The directors of an Aboriginal and Torres Strait Islander corporation must call and arrange to hold a general meeting on the request of at least the required number of members under subsection (4). (4) The required number of members for an Aboriginal and Torres Strait Islander corporation is the greater of: (a) 5 members of the corporation; or (b) 10% of the members of the corporation. Section 201-20 — (1) Subject to subsection (2), at least 21 days notice must be given of a general meeting. However, an Aboriginal and Torres Strait Islander corporation’s constitution may specify a longer minimum period of notice. Section 201-35 — (1) A notice of a general meeting must: (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this); and (b) state the general nature of the meeting’s business; and (c) if a special resolution is to be proposed at the meeting—set out an intention to propose the special resolution and state the resolution; and (d) if a member is entitled to appoint a proxy—contain a statement setting out the following information: (i) that the member has a right to appoint a proxy; (ii) whether or not the proxy needs to be a member of the corporation; (iii) that a member who is entitled to cast 2 or more votes may appoint 2 proxies and may specify the proportion or number of votes each proxy is appointed to exercise. Section 201-40 — (1) Notice of a resolution that they propose to move at a general meeting may be given to an Aboriginal and Torres Strait Islander corporation by at least the required number of members under subsection (4). (4) The required number of members for an Aboriginal and Torres Strait Islander corporation is the greater of: (a) 5 members of the corporation; or (b) 10% of the members of the corporation. Section 201-45 — (1) If an Aboriginal and Torres Strait Islander corporation has been given notice of a resolution under section 201-40, the resolution is to be considered at the next general meeting that occurs more than 28 days after the notice is given. (2) The corporation must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a general meeting.</p>

Proposed standard two — accountability to members (continued)

<p>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (continued)</p>	<p>Section 201-50 — (1) Members may request an Aboriginal and Torres Strait Islander corporation to give to all its members a statement provided by the members making the request about:</p> <ul style="list-style-type: none"> (a) a resolution that is proposed to be moved at a general meeting; or (b) any other matter that may be properly considered at a general meeting. <p>(8) The required number of members for an Aboriginal and Torres Strait Islander corporation is the greater of:</p> <ul style="list-style-type: none"> (a) 5 members of the corporation; or (b) 10% of the members of the corporation. <p>Section 201-165 — (1) The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the corporation.</p> <p>Section — 220-10 — (1) An Aboriginal and Torres Strait Islander corporation that is registered as a large corporation must make available for inspection by members, at its registered office, the minute books for the meetings of its members and for resolutions of members passed without meetings. The books must be made available for inspection each business day from at least 10 am to 12 noon and from at least 2 pm to 4 pm.</p> <p>(2) An Aboriginal and Torres Strait Islander corporation that is registered as a small or medium corporation must make available for inspection by members, at its document access address, the minute books for the meetings of its members and for resolutions of members passed without meetings. The books must be made available within 7 days of a member’s written request for inspection.</p> <p>(3) A corporation must make minutes available under subsections (1) and (2) free of charge.</p> <p>(4) A member of an Aboriginal and Torres Strait Islander corporation may ask the corporation in writing for a copy of:</p> <ul style="list-style-type: none"> (a) any minutes of a meeting of the corporation’s members or an extract of the minutes; or (b) any minutes of a resolution passed by members without a meeting.
<p>Private Ancillary Fund Guidelines 2009</p>	
<p>General law (fiduciary duties/trusts law/charity law)</p>	<p>Beneficiaries are entitled to information about the trust, including to view the accounts held by the trustee: <i>Spellson v George</i> (1987) 11 NSWLR 300; <i>Manning v Commissioner of Taxation</i> (1928) 40 CLR 506. This includes a right to the particulars of any investments made, and verification of those investments: <i>Re Tillott</i> [1982] 1 Ch 86.</p> <p>Beneficiaries are entitled to inspect documents that are assets of the trust: <i>Re Fairburn</i> [1967] VR 633.</p> <p>Beneficiaries may bring proceedings to compel performance of the trust, including by removing trustees, although this will not be allowed lightly: <i>Miller v Cameron</i> (1936) 54 CLR 572.</p>

Proposed standard three — compliance with Australian laws	
Income Tax Assessment Act 1997	
Corporations Act 2001	Section 206B — (1) A person becomes disqualified from managing corporations if the person: (b) is convicted on indictment of an offence that: (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months;
Corporations (Aboriginal and Torres Strait Islander) Act 2006	Section 279-5 — (1) A person becomes disqualified from managing Aboriginal and Torres Strait Islander corporations if the person: (b) is convicted of an offence that: (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months;
Private Ancillary Fund Guidelines 2009	Guideline 48 — The fund must comply with all relevant *Australian laws, all legally binding directions given to it by the Commissioner and all the requirements contained in these Guidelines. Guideline 16 — An individual must not be a director of a trustee or a member of any other controlling body of the fund if he or she has been convicted of a taxation offence (within the meaning of Part III of the Taxation Administration Act 1953) that is an indictable offence. 16.1. If an existing director is convicted of such an offence, he or she must cease to be a director within 1 month after the conviction.
General law (fiduciary duties/trusts law/charity law)	Charitable status is determined by purposes, not necessarily activities. An illegal purpose cannot be charitable given it is contrary to public policy: <i>Re Collier (deceased)</i> [1998] 1 NZLR 81, 91. Engagement in illegal activities, in itself, does not make a charity lose its charitable status (but it may evidence a non-charitable purpose, or the harm may outweigh the public benefit).

Proposed standard four — responsible management of financial affairs

<p>Income Tax Assessment Act 1997</p>	
<p>Corporations Act 2001</p>	<p>Section 300B — (1) The directors' report for a financial year for a company limited by guarantee must:</p> <ul style="list-style-type: none"> (a) contain a description of the short and long term objectives of the entity reported on; and (b) set out the entity's strategy for achieving those objectives; and (c) state the entity's principal activities during the year; and (d) state how those activities assisted in achieving the entity's objectives; and (e) state how the entity measures its performance, including any key performance indicators used by the entity. <p>Section 301 — (1) A company, registered scheme or disclosing entity must have the financial report for a financial year audited in accordance with Division 3 and obtain an auditor's report.</p> <p>(3) A company limited by guarantee may have its financial report for a financial year reviewed, rather than audited, if: (b)(ii)... the consolidated revenue of the consolidated entity for the financial year is less than \$1 million.</p> <p>Section 249V — (1) A company's auditor is entitled to attend any general meeting of the company.</p> <p>Section 250RA — (1) If a listed company's auditor for a financial year is an individual auditor, the auditor contravenes this subsection if: (a) the auditor does not attend the company's AGM at which the audit report for that financial year is considered.</p>
<p>Corporations (Aboriginal and Torres Strait Islander) Act 2006</p>	<p>Section 333-20 — If:</p> <ul style="list-style-type: none"> (a) a section 333-5 report in relation to an Aboriginal and Torres Strait Islander corporation is a financial report; and (b) the corporation is required by: <ul style="list-style-type: none"> (i) regulations made for the purposes of section 333-15; or (ii) a determination by the Registrar under section 336-1 or 336-5; <p>to have the report, or a part of the report, audited;</p> <p>the corporation must obtain an auditor's report in relation to the report or that part of the report.</p> <p>Section 201-80 — (1) If an Aboriginal and Torres Strait Islander corporation has an auditor, the auditor is entitled to attend any general meeting of the corporation.</p>
<p>Private Ancillary Fund Guidelines 2009</p>	<p>Guideline 30 — The trustee must prepare and maintain a current investment strategy for the fund.</p> <p>30.1 — An appropriate investment strategy should set out the investment objectives of the fund and detail the investment methods the trustee will adopt to achieve those objectives.</p> <p>30.2. The strategy must reflect the purpose and circumstances of the fund and have particular regard to (but not be limited to):</p> <ul style="list-style-type: none"> • the risk involved in making, holding and realising, and the likely return from, the fund's investments, having regard to the fund's objects and its expected cash flow requirements (including distribution requirements); and • the composition of the fund's investments as a whole, including the extent to which the investments are diverse or involve the fund being exposed to risks from inadequate diversification; and • the liquidity of the fund's investments, having regard to its expected cash flow requirements (including distribution requirements); and • the ability of the fund to discharge its existing and prospective liabilities; and • the investment requirements imposed by *State laws or *Territory laws.

Proposed standard four — responsible management of financial affairs (continued)

<p>Private Ancillary Fund Guidelines 2009 (continued)</p>	<p>Guideline 24 — The trustee must keep, or cause to be kept, proper accounts in respect of all receipts and payments of the fund and all financial dealings connected with the fund, and must retain those accounts for a period of at least 5 years after the completion of the transactions or acts to which they relate.</p> <p>Guideline 28 — Each *financial year the trustee must arrange for an auditor to audit:</p> <ul style="list-style-type: none"> • the financial statements of the fund; and • compliance with these Guidelines by the fund and the trustee. <p>28.1. The auditor must be registered under Part 9.2 of the Corporations Act 2001.</p> <p>28.2. The auditor must provide the fund with an audit report in accordance with the *auditing standards.</p> <p>28.3. The audit must be finalised before the fund is required to give to the Commissioner its *income tax return for the relevant *financial year.</p>
<p>General law (fiduciary duties/trusts law/charity law)</p>	<p>State legislation extends the investment powers of trustees.</p> <p>Trustees have a duty to properly invest trust funds — the trustee must exercise reasonable care and diligence and act as a prudent person of business would, having regard to the range of investments authorised by the trust and the fact that the funds being invested are the property of others.</p> <p>Professional trustees have higher duties, to the level of skill of their profession: <i>Bartlett v Barclays Bank Trust Co Ltd (No 1)</i> [1980] Ch 515.</p> <p>Trustees should not engage in speculative investments: <i>Sidley v Huntly</i> (1900) 21 LR (NSW) Eq 14.</p> <p>At least in NSW, there is a trustee duty to insure the trust property as a prudent person would do in relation to his/her own property: <i>Pateman v Heyen</i> (1993) 33 NSWLR 188. The position is not as clear in other states.</p>

Proposed standard five — suitability of responsible entities

<p>Income Tax Assessment Act 1997</p>	
<p>Corporations Act 2001</p>	<p>Section 206B — (1) A person becomes disqualified from managing corporations if the person:</p> <ul style="list-style-type: none"> (a) is convicted on indictment of an offence that: (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or (ii) concerns an act that has the capacity to affect significantly the corporation’s financial standing; or (b) is convicted of an offence that: (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or (c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months. The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country. <p>(2) The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for:</p> <ul style="list-style-type: none"> (a) if the person does not serve a term of imprisonment—5 years after the day on which they are convicted; or (b) if the person serves a term of imprisonment—5 years after the day on which they are released from prison. <p>(3) A person is disqualified from managing corporations if the person is an undischarged bankrupt under the law of Australia, its external territories or another country.</p> <p>(4) A person is disqualified from managing corporations if:</p> <ul style="list-style-type: none"> (a) the person has executed a personal insolvency agreement under: (i) Part X of the <i>Bankruptcy Act 1966</i>; or (ii) a similar law of an external Territory or a foreign country; and (b) the terms of the agreement have not been fully complied with. <p>(5) A person is disqualified from managing corporations at a particular time if the person is, at that time, disqualified from managing Aboriginal and Torres Strait Islander corporations under Part 6-5 of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>.</p> <p>(6) A person is disqualified from managing corporations if the person is disqualified, under an order made by a court of a foreign jurisdiction that is in force, from: (a) being a director of a foreign company; or (b) being concerned in the management of a foreign company.</p> <p>Section 206C — (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:</p> <ul style="list-style-type: none"> (a) a declaration is made under: <ul style="list-style-type: none"> (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or (ii) section 386-1 (civil penalty provision) of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> that the person has contravened a civil penalty provision (within the meaning of that Act); and (b) the Court is satisfied that the disqualification is justified. <p>(2) In determining whether the disqualification is justified, the Court may have regard to: (a) the person’s conduct in relation to the management, business or property of any corporation; and (b) any other matters that the Court considers appropriate.</p> <p>Section 206D — (1) On application by ASIC, the Court may disqualify a person from managing corporations for up to 20 years if:</p> <ul style="list-style-type: none"> (a) within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and (b) the Court is satisfied that: (i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and (ii) the disqualification is justified.

Proposed standard five — suitability of responsible entities (continued)

**Corporations Act 2001
(continued)**

(3) In determining whether the disqualification is justified, the Court may have regard to: (a) the person's conduct in relation to the management, business or property of any corporation; and (b) any other matters that the Court considers appropriate.

Section 206E — (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person:

(i) has at least twice been an officer of a body corporate that has contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or (ii) has at least twice contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of a body corporate; or (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and

(b) the Court is satisfied that the disqualification is justified.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and (b) any other matters that the Court considers appropriate.

Section 206EAA — (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person is disqualified under the law of a foreign jurisdiction from: (i) being a director of, or being concerned in the management of, a foreign company; or (ii) carrying on activities that the Court is satisfied are substantially similar to being a director of, or being concerned in the management of, a foreign company; and

(b) the Court is satisfied that the disqualification under this subsection is justified.

(2) In determining what is an appropriate period for which to disqualify the person, the Court may have regard to the period for which the person is disqualified under the law of the foreign jurisdiction.

(3) In determining whether the disqualification is justified, the Court may have regard to: (a) the person's conduct in relation to the management, business or property of a foreign company; and (b) any other matters that the Court considers appropriate.

Section 206F — (1) ASIC may disqualify a person from managing corporations for up to 5 years if:

(a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):

(i) the person has been an officer of 2 or more corporations; and

(ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts; and

(b) ASIC has given the person: (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and (ii) an opportunity to be heard on the question; and

(c) ASIC is satisfied that the disqualification is justified.

(2) In determining whether disqualification is justified, ASIC:

(a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and

Proposed standard five — suitability of responsible entities (continued)	
Corporations Act 2001 (continued)	<p>(b) may have regard to: (i) the person’s conduct in relation to the management, business or property of any corporation; and (ii) whether the disqualification would be in the public interest; and (iii) any other matters that ASIC considers appropriate.</p> <p>(5) ASIC may give a person who it has disqualified from managing corporations under this Part written permission to manage a particular corporation or corporations. The permission may be expressed to be subject to conditions and exceptions determined by ASIC.</p>
Corporations (Aboriginal and Torres Strait Islander) Act 2006	<p>The same disqualification provisions as the <i>Corporations Act 2001</i> apply. See sections 279-5 (automatic disqualification), 279-15 (court power of disqualification for contravention of civil penalty provision), 279-20 (court power of disqualification for insolvency and non-payment of debts), 279-25 (court power of disqualification for repeated contraventions of the Act) and 279-30 (Registrar’s power of disqualification).</p>
Private Ancillary Fund Guidelines 2009	<p>Guideline 16 — An individual must not be a director of a trustee or a member of any other controlling body of the fund if he or she has been convicted of a taxation offence (within the meaning of Part III of the <i>Taxation Administration Act 1953</i>) that is an indictable offence.</p> <p>16.1 — If an existing director is convicted of such an offence, he or she must cease to be a director within 1 month after the conviction.</p>
General law (fiduciary duties/trusts law/charity law)	<p>A bankrupt trustee may be removed, but must still show proper grounds, such as dishonesty: <i>Miller v Cameron</i> (1936) 54 CLR 572.</p> <p>Trustees guilty of positive misconduct may be removed through courts’ inherent jurisdiction over trusts. There should be an act or omission which endangers the trust property, evidences a want of honesty, a want of proper capacity to execute the trustee’s duties, or a want of reasonable fidelity: <i>Letterstedt v Broers</i> (1884) 9 App Cas 371, 386.</p> <p>State statutory provisions include powers to remove trustees that have been declared bankrupt, gone into liquidation, been convicted of a serious indictable offence and are otherwise unfit or incapable of acting (see, for example, sections 6(2) and 70(3) of the <i>Trustee Act 1925</i> (NSW)).</p>

Proposed standard six — duties of responsible entities

<p><i>Income Tax Assessment Act 1997</i></p>	
<p><i>Corporations Act 2001</i></p>	<p>Section 180 — (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:</p> <ul style="list-style-type: none"> (a) were a director or officer of a corporation in the corporation’s circumstances; and (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer. <p>Section 181 — (1) A director or other officer of a corporation must exercise their powers and discharge their duties:</p> <ul style="list-style-type: none"> (a) in good faith in the best interests of the corporation; and (b) for a proper purpose. <p>Section 182 — (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:</p> <ul style="list-style-type: none"> (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation. <p>Section 183 — (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:</p> <ul style="list-style-type: none"> (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation. <p>Section 185 — Sections 180 to 184:</p> <ul style="list-style-type: none"> (a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a). <p>Section 191 — (1) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.</p> <p>(1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the director of a company has a material personal interest in a matter that relates to the affairs of the company.</p> <p>(3) The notice required by subsection (1) must:</p> <ul style="list-style-type: none"> (a) give details of: (i) the nature and extent of the interest; and (ii) the relation of the interest to the affairs of the company; and (b) be given at a directors’ meeting as soon as practicable after the director becomes aware of their interest in the matter. <p>The details must be recorded in the minutes of the meeting.</p> <p>Section 193 — Sections 191 and 192 have effect in addition to, and not in derogation of:</p> <ul style="list-style-type: none"> (a) any general law rule about conflicts of interest; and (b) any provision in a company’s constitution (if any) that restricts a director from: <ul style="list-style-type: none"> (i) having a material personal interest in a matter; or (ii) holding an office or possessing property; involving duties or interests that conflict with their duties or interests as a director. <p>Section 588G — (1) This section applies if:</p> <ul style="list-style-type: none"> (a) a person is a director of a company at the time when the company incurs a debt; and (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be;

Proposed standard six — duties of responsible entities (continued)

<p>Corporations Act 2001 (continued)</p>	<p>and (d) that time is at or after the commencement of this Act. (2) By failing to prevent the company from incurring the debt, the person contravenes this section if: (a) the person is aware at that time that there are such grounds for so suspecting; or (b) a reasonable person in a like position in a company in the company’s circumstances would be so aware. (3) A person commits an offence if: (a) a company incurs a debt at a particular time; and (aa) at that time, a person is a director of the company; and (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and (c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and (d) the person’s failure to prevent the company incurring the debt was dishonest. (3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph (3)(a). (3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).</p>
<p>Corporations (Aboriginal and Torres Strait Islander) Act 2006</p>	<p>The same duties as the <i>Corporations Act 2001</i> apply. See sections 265-1 (degree of care), 265-5 (good faith), 265-10 (misuse of position), 265-15 (misuse of information), 265-25 (criminal offences) and 268-1 (disclosure of interests). Section 531-1 applies section 588G of the <i>Corporations Act 2001</i> to CATSI corporations.</p>
<p>Private Ancillary Fund Guidelines 2009</p>	<p>Guideline 13 — The trustee of the fund must exercise the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others.</p>
<p>General law (fiduciary duties/trusts law/charity law)</p>	<p>Largely equivalent general law duties to those in sections 180, 181, 182, 183 and 191 of the <i>Corporations Act 2001</i> also exist under the general law. The core obligations of a trustee may not include duties of care and skill, prudence and diligence but do entail, at least, a duty to perform the trust honestly and in good faith: <i>Armitage v Nurse</i> [1997] 2 All ER 705, 713. Fiduciary duties are proscriptive, they do not impose positive legal duties on the fiduciary to act in the interests of a beneficiary or in good faith etc.: <i>Pilmer v Duke Group Ltd</i> (2001) 207 CLR 165, 198. Trustees have a duty not to profit from their position, which encompasses misusing information obtained in the course of acting in a position: <i>Boardman v Phipps</i> [1967] AC 46. Trustees have a duty to properly invest trust funds — the trustee must exercise reasonable care and diligence and act as a prudent person of business would (<i>Re Speight</i> (1883) 22 Ch D 727, 739-740), having regard to the range of investments authorised by the trust and the fact that the funds being invested are the property of others. Professional trustees have higher duties, to the level of skill of their profession: <i>Bartlett v Barclays Bank Trust Co Ltd (No 1)</i> [1980] Ch 515. Trustees have other duties, including to acquaint themselves with the terms of the trust document, execute the trust according to its terms and the law, protect and preserve trust property, exercise discretionary powers in good faith, upon real and genuine considerations and according to the purpose for which that power was conferred, and not to delegate their powers or discretions except in accordance with the trust document or legislation.</p>

Protections to proposed standard six

<p><i>Income Tax Assessment Act 1997</i></p>	
<p><i>Corporations Act 2001</i></p>	<p>Subsection 180(2) — A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:</p> <ul style="list-style-type: none"> (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation. <p>The director’s or officer’s belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.</p> <p>(3) business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.</p> <p>Section 189 — If:</p> <ul style="list-style-type: none"> (a) a director relies on information, or professional or expert advice, given or prepared by: <ul style="list-style-type: none"> (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person’s professional or expert competence; or (iii) another director or officer in relation to matters within the director’s or officer’s authority; or (iv) a committee of directors on which the director did not serve in relation to matters within the committee’s authority; and (b) the reliance was made: <ul style="list-style-type: none"> (i) in good faith; and (ii) after making an independent assessment of the information or advice, having regard to the director’s knowledge of the corporation and the complexity of the structure and operations of the corporation; and (c) the reasonableness of the director’s reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty; <p>the director’s reliance on the information or advice is taken to be reasonable unless the contrary is proved.</p> <p>Section 190 — (1) If the directors delegate a power under section 198D, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.</p> <p>(2) A director is not responsible under subsection (1) if:</p> <ul style="list-style-type: none"> (a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company’s constitution (if any); and (b) the director believed: <ul style="list-style-type: none"> (i) on reasonable grounds; and (ii) in good faith; and

Protections to proposed standard six (continued)

<p>Corporations Act 2001 (continued)</p>	<p>(iii) after making proper inquiry if the circumstances indicated the need for inquiry; that the delegate was reliable and competent in relation to the power delegated.</p> <p>Section 588H — (1) This section has effect for the purposes of proceedings for a contravention of subsection 588G(2) in relation to the incurring of a debt (including proceedings under section 588M in relation to the incurring of the debt).</p> <p>(2) It is a defence if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.</p> <p>(3) Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the person:</p> <p>(a) had reasonable grounds to believe, and did believe:</p> <p>(i) that a competent and reliable person (the other person) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and</p> <p>(ii) that the other person was fulfilling that responsibility; and</p> <p>(b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.</p> <p>(4) If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.</p> <p>(5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt.</p> <p>(6) In determining whether a defence under subsection (5) has been proved, the matters to which regard is to be had include, but are not limited to:</p> <p>(a) any action the person took with a view to appointing an administrator of the company; and</p> <p>(b) when that action was taken; and</p> <p>(c) the results of that action.</p>
<p>Corporations (Aboriginal and Torres Strait Islander) Act 2006</p>	<p>The same defences as the <i>Corporations Act 2001</i> apply. See sections 265-1(2) (business judgment rule), 265-45 (reasonable reliance on information or advice provided by others), 265-50 (responsibility for actions of delegate) and 531-1 (defence to insolvent trading).</p>
<p>Private Ancillary Fund Guidelines 2009</p>	
<p>General law (fiduciary duties/trusts law/charity law)</p>	<p>Full, informed consent is a defence to a conflict of interest or duty: <i>Maguire v Makaronis</i> (1997) 188 CLR 449.</p>