



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

13 February 2013

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

By email: NFPReform@treasury.gov.au

Dear Treasury

***Development of governance standards:
Consultation paper***

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance.

Our Members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act). Many of our Members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with companies limited by guarantee. CSA itself is a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information.

CSA welcomes the opportunity to comment on the *Development of governance standards: consultation paper* (consultation paper) and the governance standards contained within (the standards). We were involved in the Roundtable Discussion held by the NFP Reform Council on the draft discussion paper, and welcome the significant changes evidenced in the consultation paper and draft governance standards issued for public comment.

General comments

CSA Members are of the view that the proposed standards are consistent with those currently in place for NFP entities and commercial entities in the private sector.

CSA is also of the view that the draft standards are:

- not onerous for the NFP sector
- not prescriptive as they provide sufficient flexibility for each registered charity to comply according to their particular size and circumstances
- an appropriate benchmark for the sector, and
- appropriate in their expectations of individuals and registered charities.

However, our main concern is that the standards are very legalistic in nature and confusing to read for those without a legal background. Our Members found the standards difficult to read and comprehend at times, particularly the standards relating to responsible entities and their duties. Given the expertise of our Members, we are very concerned that if this audience found the standards confusing, it is more than likely that a director or member of a management committee of a charity who may have no experience of governance standards or of legal materials will find them incomprehensible. We recognise that some directors in the NFP sector will have the relevant experience, but there will be many who do not. It is for this reason that we have suggested alternative approaches to the wording of the standards in the following pages.

CSA also recommends that the Australian Charities and Not-for-profits Commission (ACNC) develop and issue guidance notes on the standards, with a variety of examples of how registered entities can comply with them. The examples should reflect the diversity of the sector. The guidance notes should be in plain English, and clearly set out what is meant by 'registered entity' and 'responsible entity'.

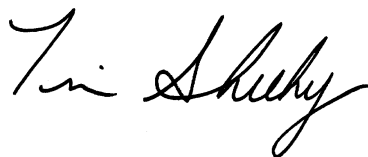
Further guidance on the governance standards could be provided by the ACNC through the provision of:

- fact sheets
- checklists
- case studies to illustrate compliance and breaches of compliance
- model rules
- podcasts
- YouTube videos
- online forum (this can provide an alternative opportunity for dialogue by like-minded individuals in the sector as well as a means for the regulator to canvass and understand the everyday challenges the sector will be dealing with)
- a help line.

CSA also recommends that the final version of the standards include in '45.1: Simplified outline — how the governance standards apply' a small explanation that the standards should be read together and not separately. At present, without such a signpost, there is the potential for those without experience in dealing with legislation and regulations to read one standard only, without understanding that its relationship to other standards is central to the overall governance of a registered charity. For example, the requirement for a registered entity to 'further its purposes', as set out in the Object of Draft Standard 1 is dealt with in Draft Standard 6 2(b).

Our detailed comments on the draft standards are set out on the following pages.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

Detailed comments on the draft standards

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

CSA is of the view that Draft Standard 1:

- establishes the appropriate principles
- includes appropriate wording.

CSA supports the inclusion in the draft standard of the requirement that a registered entity must:

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.

Not all charities will have governing rules in the form of a constitution or association rules. The purposes of some types of charitable bodies and various Aboriginal and Torres Straits Island organisations are set out in their empowering legislation, while many unincorporated associations may have a mission statement setting out their purpose. It is therefore appropriate that the draft standard allow a NFP entity the capacity to demonstrate its purpose by reference to means other than the governing rules of the entity.

However, CSA recommends that, over time, all registered charities should contain their purpose and NFP nature in one document that stakeholders can access easily. CSA strongly recommends that such a document should be the governing rules of the entity, which would be available to the public on the ACNC's website.

That is, even those registered charities whose purpose and NFP nature is to be found in legislation or in a mission statement would be required, within two years of the commencement of the governance standards, to create governing rules setting out their purpose and NFP nature. CSA sees benefits to the organisation, its stakeholders and the sector as a whole in entities making binding statements about their governance structures, processes and practices that:

- are easily accessible by all stakeholders on the ACNC website
- have been developed by the responsible entities of the registered charity, thus ensuring that their understanding of the purpose and NFP nature of the entity is clear, even if that purpose and nature were written in legislation or elsewhere originally.

CSA is of the view that a requirement for all registered entities to create governing rules setting out their purposes and NFP nature will provide:

- the transparency to the public, including members, donors, employees, volunteers and benefit recipients of the registered entity, confidence that the registered entity is acting to further its purpose, without requiring the public to go beyond the ACNC website to make an assessment as to whether the activities of a registered entity match its stated purpose. That is, the public interest aspect of this standard would be satisfied by disclosure of these matters on the ACNC website, which would become a one-stop shop for information about every registered entity in Australia
- sufficient time for any registered entity that does not have governing rules to create such rules and disclose them on the ACNC website.

CSA would like to develop a template for governing rules that could be used by smaller registered entities which currently do not have such rules. It would be provided to the ACNC to make freely available to any registered entity and could be modified according to the particular needs of a registered entity. CSA is also happy to work with the ACNC to develop a 'ready-made' example of a constitution, complete with places for the members to sign (along the lines of the model rules issued by Consumer Affairs Victoria for incorporated associations), to ensure smaller NFP organisations can easily develop a governing document without recourse to costly

legal advice. The document should contain standard definitions; and cover becoming/terminating a member; meetings; minutes; the appointment of responsible entities; disputes; and amendment of the rules. Any NFP entity should be able to adopt the model rules or amend them, subject to ACNC approval.

However, CSA notes that the proposed statutory definition of charity has not yet been introduced, and nor has the bill passed in the House of Representatives introducing tax reform, which includes specific wording that is required to be used to confirm NFP status. CSA is not able to develop any template for governing rules until such time as these matters have been resolved.

Moreover, we continue to be concerned that how an entity expresses its purpose may affect its charitable status, and this will in turn be affected by both the statutory definition of charity and the bill introducing tax reform, both of which are yet to be finalised (although we note with relief the decision by the government that the budget measure 'Better targeting of NFP tax concessions' will now commence on 1 July 2014).

We also note, as set out in our general comments, that the requirement for a registered entity to 'further its purposes', as set out in the Object of Draft Standard 1 is dealt with in Draft Standard 6 2(b). We reiterate that a small explanation should accompany the final standards to the effect that they must be read together and not separately.

Draft governance standard 2: Accountability to members

CSA is of the view that Draft Standard 2:

- establishes the appropriate principles
- includes appropriate wording.

CSA is of the view that the draft standard is sufficiently flexible to encourage:

- those member-based registered entities that have not held annual general meetings (AGMs) previously to do so
- registered entities that are also companies limited by guarantee that have operated with a requirement to hold an AGM annually to explore other means of engaging with members that could significantly improve member engagement overall.

In relation to the flexibility provided by the governance standard to registered entities that are also companies limited by guarantee to consider member engagement conducted other than through the AGM, CSA is not suggesting a curtailment of member engagement, but an expansion of it. CSA points to our views set out in our recent submission to the Corporations and Markets Advisory Committee (CAMAC) on *The AGM and shareholder engagement* on how member engagement can be facilitated outside the AGM.

Those entities that wish to improve member engagement will consider how best to provide for it and this may include different forms of e-communication, including creating blogs to speak to the entity's activities (and providing for comment on the blogs), and setting up social media discussion groups (such as via LinkedIn) where members can ask questions about the organisation. They may hold 'town hall' meetings or other informal member meetings where discussion of performance in relation to purpose and plans for the future can take place. If an AGM does not take place, and voting is contentious, or members are dissatisfied with the entity's performance since the last member meeting, the immediacy of social media means that any individual can express their views and find an audience. Social media is not always a forum that registered entities can control — if an entity chooses not to engage actively with its members, members will find ways to make their views heard and it will be to the entity's disadvantage.

Our support for other modes of engaging with members other than an AGM in its current form are set out in our submission to CAMAC, but in summary we note that:

- the AGM was created in an era of horse and coach; pen and ink; limited printing and a fledgling postal service, all of which dictated that members (or their duly appointed representatives) would physically meet with directors annually
- today, we live in a vastly different world than the 19th century one that existed when the rules for the AGM were enshrined. Members can be dispersed geographically and can number in the thousands. Technology has opened up many other effective channels of communication for member engagement
- member attendance at AGMs has been in decline for many years. Due to the linkage with the financial statements, the AGM is required to look at historical data, when members most want to discuss the future of the organisation. The debate at AGMs is usually of little value
- the decision-making function of the AGM does not work. At present, the outcome of resolutions is determined before the event of the meeting, as members have voted either by proxy or by direct vote (where available).

Draft governance standard 3: Compliance with Australian laws

CSA is of the view that Draft Standard 3:

- establishes the appropriate principles
- includes appropriate wording.

CSA notes that most governing rules will include a provision that the entity must engage in lawful conduct.

CSA is of the view that this standard will encourage those registered charities that do not already have governing rules to put them in place, which we support. We reiterate our recommendation that all registered charities should contain their purpose and NFP nature in one document that stakeholders can access easily. CSA strongly recommends that such a document should be the governing rules of the entity, which would be available to the public on the ACNC's website. CSA recommends that the governing rules should include a provision concerning the requirement for lawful conduct of the registered entity.

Draft governance standard 4: Responsible management of financial affairs

CSA is of the view that Draft Standard 4 establishes the appropriate principles.

However, CSA recommends a change to the wording of this standard.

Currently the title of the standard and its wording refer only to the management of 'financial affairs'. However, the object of this standard is 'to ensure that a registered entity manages its resources responsibly' and protects those resources from misuse. That is, there is a disconnection between the title and the standard, and the object.

CSA is concerned that there is no explicit reference to risk management, which addresses the responsible management of non-financial risks as well as financial risks. The processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support, expenditure and staff and volunteers is central to a governance framework. As such, the current drafting can feed a perception that responsible management is limited to financial matters alone. For many of those with responsibility for registered entities, who may be uninitiated as to their duties, they could well understand this to mean that they must ensure the entity has a balance sheet and a bank account. However, without risk management processes in place to responsibly manage the affairs of the organisation, such individuals could well be in derogation of their duties as responsible entities.

CSA recommends that the inclusion of additional words to note that responsible management is required of both financial affairs and operations would address this potential perception problem that the standard purely addresses matters such as a balance sheet and bank account.

CSA recommends that the drafting be slightly expanded to include additional words as follows (new words shown in red):

- 45.20 Standard 4 — responsible management of financial affairs **and operations**.
- Standard (2) A registered entity must take reasonable steps to manage its financial affairs **and operations** in a responsible manner.

CSA also recommends including two Notes to the standard: one to address a more wide-ranging perspective on the management of financial affairs (the standard addresses fraud, but the management of financial affairs is much broader than protecting against fraud); and one to provide guidance on risk management, as follows:

Note 1: Financial affairs could include issues of fraud, protection of assets and meeting any terms attached to funding received.

Note 2: The steps that a registered entity may take to ensure responsible management of operations can include the design and implementation of risk management and internal control systems (for both financial and non-financial matters).

***Draft governance standard 5: Suitability of responsible entities, and
Draft governance standard 6: Duties of responsible entities***

CSA is of the view that Draft Standard 5 and Draft Standard 6 establish the appropriate principles.

However, CSA recommends changes to the wording of these two standards.

Principles of standards

On the matter of principles, CSA is strongly of the view that basing standards 5 and 6 on the Corporations Act is appropriate. Directors' duties under the Corporations Act are governed by a complex interrelationship between case law and legislation, which gives rise to duties under the common law, equity and statute.

The Corporations Act standard is well understood, and supported by a substantial body of case law. It is an expansive area of the law that has developed not only as cases have been decided in Australia, but also in other jurisdictions, particularly the UK.

CSA also notes that the Commonwealth has no power to exclude trust law, and basing the standard on the Corporations Act would not diminish duties those involved in charities have under trust law.

The figure below illustrates this interrelationship and its impact on the duties of directors.

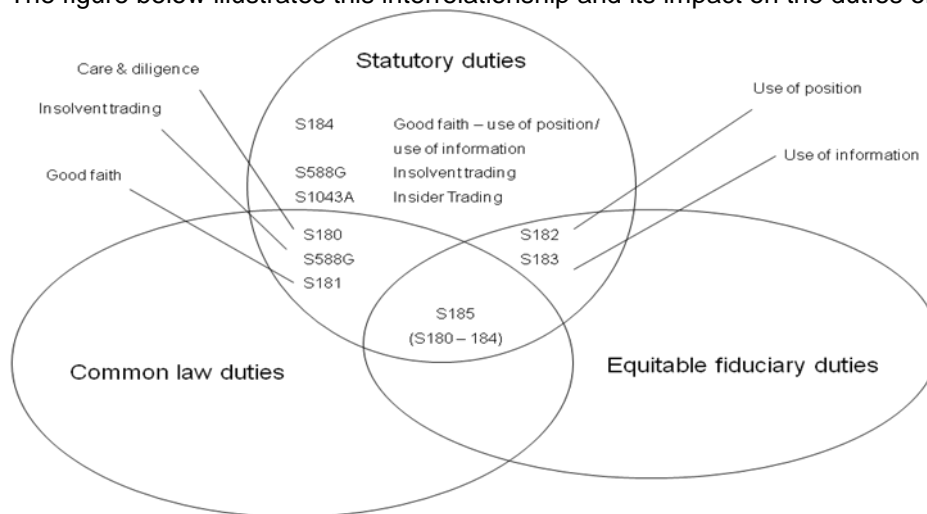


Figure 1: Adams' overview of officers' duties (Adams, 1992, revised in 2004)

CSA is also of the view that the draft standards are:

- not onerous for those with governing responsibilities in the NFP sector
- not prescriptive as they do not set a higher standard than the Corporations Act
- an appropriate benchmark for the sector, and
- appropriate in their expectations of individuals and registered charities.

We are also of the view that the draft standards take into account the registered entity's circumstances. In the context of the Corporations Act duty of care and diligence this can include the size and nature of the entity's operations, the composition of the board, the competence of the entity's management, the competence of the entity's advisers, and the distribution of responsibilities between the directors and directors and officers. CSA is of the view that these factors are equally relevant to determining whether responsible entities have exercised the requisite degree of care and diligence and believes that the draft standards 5 and 6 provide the flexibility for such matters to come into play when determining compliance.

CSA Members believe that the requirements can be met in straightforward matters of good practice. For example, we note that the requirement that a registered entity must ensure that its responsible entities are made subject to the duties set out in draft standard 6, or the requirement that a registered entity must take reasonable steps to ensure that its responsible entities comply with their duties (draft standard 6) can be met in a letter of appointment for a director, member of a management committee or trustee.

Application

The paper states that draft standard 6 places the obligation to comply with this standard is on the registered charity, rather than the responsible entity, consistent with the powers in the ACNC Act. However, CSA continues to have concerns with the standard imposing the duties of responsible entities on the registered entity, and thus making the entity legally bind the directors. Our view is that directors should be bound and responsible in their own right and this should not be left to civil actions under common law. Moreover, it imposes an onerous obligation on the registered entity.

Wording

The terminology introduced by the legislation — responsible entity — remains a key concern for CSA and its Members. The NFP sector is very diverse and there are many individuals with

governing responsibilities who are uninitiated in a deep understanding of the duties and responsibilities attached to such a role. The lack of sophistication of many in the NFP sector will see a variety of individuals who need to understand the standards in general and this pair in particular experience considerable difficulty understanding that the term ‘responsible entity’ refers to directors, or members of management committees or trustees.

We recognise that a glossary has been included in the consultation paper setting out the definition of the term ‘responsible entity’, which is the term used in the legislation. Indeed, we had recommended the use of a glossary ourselves, but our review of the draft standards, in particular these two standards, has led us to revise our belief that a glossary alone will be sufficient to allow those with governing responsibilities to readily understand their obligations under the new regulatory framework. Not all of those who need to understand the term ‘responsible entity’ will read the glossary.

The terminology used in the legislation — responsible entity — is rendered even more confusing by the use of the term ‘registered entity’ to refer to the organisation itself. CSA is concerned that those who most need to understand these particular governance standards could recoil from reading them due to the complexity of the language.

Adding to the complexity is the fact that the term ‘responsible entity’ has a different meaning under the Corporations Act.

CSA recommends a number of alternative approaches to resolving this confusion. Our recommended approaches are all intended to ensure that the directors, or members of management committees or trustees of registered entities, who are those with responsibility to ensure their organisation complies with the governance standards, can readily understand their obligations without recourse to expensive legal advice.

Our recommended approaches apply to both Standards 5 and 6.

Our alternative approaches are to:

1. include additional wording in the titles and objects to advise people to refer to the glossary definition
2. include a Note setting out the glossary definition so that readers do not have to refer outside the standards to understand the term ‘responsible entity’
3. **reverse the wording of both standards to include the everyday language of ‘directors’, ‘members of the management committee’ and ‘trustees’, with a reference to an explanation in the glossary that all such individuals are responsible entities — while this approach may be more cumbersome in the standard, it will be more user friendly for the reader.**

We set out the detail of how each alternative approach would appear in the standards below.

CSA strongly recommends the use of alternative approach 3 as the one most likely to reduce confusion.

Alternative approach 1

Include references to the glossary definition at the end of the title and object as follows (suggested additional material in red):

Governance standard 5: Suitability of responsible entities (refer to the definition in the glossary of the individuals and organisations who comprise responsible entities).

45.25 Standard 5 — suitability of responsible entities (refer to the definition in the glossary of the individuals and organisations who comprise 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 by the people or organisations defined in the glossary as responsible entities.

Governance standard 6: Duties of responsible entities (refer to the definition in the glossary of the individuals and organisations who comprise responsible entities).

45.30 Standard 6 — duties of responsible entities (refer to the definition in the glossary of the individuals and organisations who comprise responsible entities).

Advantage — It brings the reader's attention to the definition in the glossary.

Disadvantage — It remains confusing to differentiate between the obligations of individuals and the registered charity itself as set out in standards 5 and 6 and many readers will either misunderstand their obligations or feel compelled to seek legal advice.

Alternative approach 2

Include a Note to Standard 5 and Standard 6 as follows (suggested additional material in red):

Note 1 The term 'responsible entity' refers to people, whereas the term 'registered entity' refers to the charity. Responsible entities are individuals (or in some limited cases corporations) who are responsible for running a charity, who are members of the governing body (including directors and members of management committees) or trustees (including insolvency trustees and administrators).

Advantage — It brings the glossary definition into the standard, where those who need to understand the term are most likely to find it.

Disadvantage — The wording in standard 6 already includes reference to directors and trustees (see Standard (3). There is also already a confusion between the terms 'registered entity' and 'responsible entity' in both standards (see Standard (2) (b) (ii) in Standard 5), showing that the drafter had difficulty keeping track of the terms and their meanings. If the drafter is so confused, an unsophisticated reader will not be able to make sense of either standard with any degree of ease.

Alternative approach 3

Reverse the wording of Standards 5 and 6 to use everyday language with a reference to the legislative terminology, as follows (suggested additional material in red):

Draft governance standard 5: Suitability of responsible entities

45.25 Standard 5—suitability of an individual (and in some limited cases a corporation) who is a director, or a member of a management committee or a trustee (see the definition of 'responsible entities' in the glossary).

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 **directors, or members of a management committee or trustees** (responsible entities) meet the conditions mentioned in subsection (3); and
- b) after taking those steps:
 - i) be, and remain, satisfied that each **director, or member of a management committee or trustee** (responsible entity) meets the conditions; or
 - ii) if it is unable to be, or remain, satisfied that a **director, or member of a management committee or trustee** (responsible entity) meets the conditions, take reasonable steps to remove that **director, or member of a management committee or trustee** (responsible entity).

Note Other Australian laws may require **directors, or members of a management committee or trustees** (responsible entities) to be replaced, if removed, because a registered entity may need to have a minimum number of **directors, or members of a management committee or trustees** (responsible entities).

Examples of reasonable steps

Reasonable steps may include obtaining declarations from **directors, or members of a management committee or trustees** (responsible entities) and the searching of public registers.

- 3) Subject to subsection (5), the conditions for each **director, or member of a management committee or trustee** (responsible entity) are that they are 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 **director, or member of a management committee or trustee** (responsible entity) of a registered entity under subsection (4).

Note Other Australian laws may place other limitations on who may be the **director, or member of a management committee or trustee** (responsible entity) of a registered entity, or a particular type of registered entity.

- 4) The Commissioner may disqualify a **director, or member of a management committee or trustee** (responsible entity) from being eligible to be a **director, or member of a management committee or trustee** (responsible entity) for the purpose of this standard if:
- a) the **director, or member of a management committee or trustee** (responsible entity) has been previously suspended or removed as a **director, or member of a management committee or trustee** (responsible entity) of any registered entity, under Division 100 of the Act; and
 - b) the **director, or member of a management committee or trustee** (responsible entity) has been given notice of their 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 **director, or member of a management committee or trustee** (responsible entity) for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.

6) A **director, or member of a management committee or trustee** (responsible entity) that is dissatisfied with a decision of the Commissioner to disqualify the **director, or member of a management committee or trustee** (responsible 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 **directors, or members of management committees or trustees** (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 **director, or member of a management committee or trustee** (responsible entity) disqualified by the Commissioner from being a **director, or member of a management committee or trustee** (responsible entity) of a registered entity, under subsection 45.25 (4);
- b) the date that the **director, or member of a management committee or trustee** (responsible 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.

Draft governance standard 6: Duties of directors, or members of a management committee or trustees (responsible entities)

45.30 Standard 6—duties of **directors, or members of management committees or trustees** (responsible entities)

Object

1) The object of this governance standard is:

- a) to ensure that the **directors, or members of management committees or trustees** (responsible entities) of a registered entity conduct themselves in the manner that would be necessary if:
 - i) the relationship between them and the **registered** 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 **directors, or members of management committees or trustees** (responsible entities); and
 - ii) if non-compliance with the duties imposed on **directors, or members of management committees or trustees** (responsible entities) occurs—will act to identify and remedy non-compliance with the duties imposed on the **director, or member of the management committee or trustee** (responsible entity).

Standard

2) A registered entity must take reasonable steps to ensure that its **directors, or members of a management committee or trustees** (responsible entities) are subject to, and comply with, the following duties:

- a) to exercise the **director's, or member of a management committee's or trustee's** (responsible entity's) powers and discharge the **director's, or member of a management committee's or trustee's** (responsible entity's) duties with the degree of care and diligence that a reasonable individual would exercise if they were a **director, or member of a management committee or trustee** (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 **director's, or member of a management committee's or trustee's** (responsible entity's) position;
- d) not to misuse information obtained in the performance of the **director's, or member of a management committee's or trustee's** (responsible entity's) duties as a **director, member of a management committee or trustee** (responsible entity) of the registered entity;
- e) to disclose perceived or actual material conflicts of interest of the **director, or member of a management committee or trustee** (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 **directors, members of management committees and trustees** (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 **director, or member of a management committee or trustee** (responsible entity) to exercise their powers and discharge their 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 **director's, or member of a management committee's or trustee's** (responsible entity's) conduct is consistent with Subdivision 45-C, the **director, or member of a management committee or trustee** (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*.

Advantage — This approach uses the everyday language that those charged with governance responsibilities in registered entities will recognise. It clarifies that the term ‘responsible entity’ refers to individuals (and in some limited cases a corporation). Indeed, we note that the current drafting does not always use the term ‘responsible entity’ but sometimes uses only the term ‘entity’, which renders understanding even more problematic, and this rewrite solves that issue. It also avoids confusion between the meaning of a registered entity and a responsible entity. This is enhanced by using the term ‘responsible entity’ as set out in the legislation in parentheses after each instance of use of the everyday language. It uses the terminology set out in the legislation but clarifies its meaning and, as a result, does not require directors, or members of a management committee or trustees to seek legal advice to understand how the governance standard applies to them. It ensures compliance by being written in a manner best suited to its intended audience.

Disadvantage — The wording in standards 5 and 6 uses everyday language as well as the terminology used in the legislation, adding to the length of the standard.

Other drafting issues with draft standards 5 and 6

CSA recommends that a Note be added to standard 5 (2) to the effect that the removal of a responsible entity may not be within the powers of the registered entity (for example, only members can remove directors at a general meeting) and that reasonable steps could include holding an annual general meeting at which director elections take place or notifying the ACNC and asking it to remove the responsible entity.

CSA also recommends that the meaning of ‘insolvent’ should be provided in the standard (the definition is very short) as readers of the standard should not have to access the Corporations Act to understand what is meant by this term. At the very least, the definition should be provided in the glossary.

We also note that it is unclear as to the definition of related party in draft standard 6 and recommend that it clearly state that the definition is as provided in the Corporations Act (again, the definition should be provided in the standard or in the glossary).

Finally, CSA supports the ACNC having the power to disqualify responsible entities and maintain a disqualified responsible entities register. ASIC maintains a register of disqualified directors, which provides transparency as to who has been disqualified from holding the role. CSA is of the view that similar transparency should be granted to those who interact with the NFP sector and wish to understand who is suitable to be a responsible entity.

Draft protections to standard 6

45.120 Protection 4

We note that absence as a defence could be subject to abuse if hard decisions are required to be taken and directors opt out of participating in decision-making, citing illness. We note that attendance of directors at board meeting can be a major issue for NFP entities generally, and we are concerned that providing illness as a defence could exacerbate this. Moreover, there is the potential for those registered entities that are companies limited by guarantee to lower standards in relation to director attendance at directors’ meetings, as this protection could make it harder for the registered entity to manage under-performing directors off the board. CSA believes that additional drafting is required to ensure that this protection is not subject to abuse.

CSA recommends that a note is required to clarify that a responsible entity can attend a meeting by technological means if they are ill, and that, if the responsible entity is so ill to not be able to

participate in the management of the registered entity at more than one meeting, the responsible entity should apply for leave of absence or resign.

CSA suggests that the Note could read as follows:

Note Normally absence is not a protection or reason for protection and where directors, or members of management committees or trustees (responsible entities) cannot attend meetings, the registered entity should arrange for other means of participation in the management of the registered entity, such as teleconferencing or video conferencing. If the illness of a director, or member of a management committee or trustee is ongoing and participation is not possible, the director, or member of the management committee or trustee (responsible entity) should seek leave of absence or resign.

If such a Note is not included, CSA recommends that such matters must be dealt with in the ACNC guidance note. The ACNC guidance note should also explain that attendance expectations should be set out in a letter of appointment for a responsible entity.

CSA notes that a company limited by guarantee will normally take out directors' and officers' insurance (D&O insurance). CSA would be concerned if volunteer responsible entities of other types of registered entities found themselves subject to less protection than the responsible entities of companies limited by guarantee. CSA also recommends that the ACNC guidance note point to the need for D&O insurance to ensure that all responsible entities, including volunteers, are equally protected. Finally, the term D&O insurance applies to directors and officers as defined in the Corporations Act and may need reconsideration in regard to its application to responsible entities.