Beehive Industries of WA (Inc) Submission in response to the Development of Governance Standards Consultation Paper

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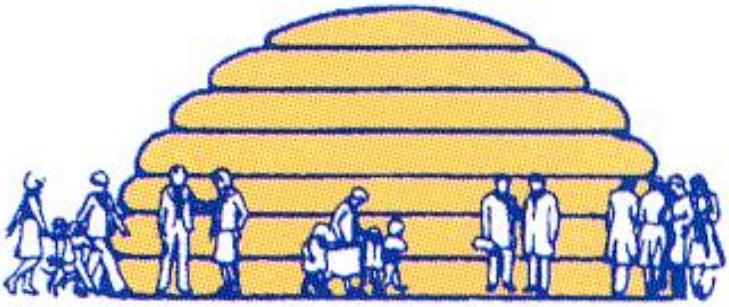

Beehive Industries

of Western Australia (Inc)

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BEEHIVE INDUSTRIES OF WA (INC)

Beehive Industries was established to serve people who need to participate in a working environment but, for many reasons, are not able to join the mainstream commercial workforce. Beehive maintains an Activity Workshop for people to complete the work supplied. Beehive Industries is supported by businesses and government agencies which use our skills, experience and special talents to extend their own business and add value to their services.

Since 1996, we have not received financial subsidy from State or Federal budgets because the support needed by our beneficiaries has not fallen within the parameters of traditional government programmes. We are not seen to provide health care because we are not a residential or day care facility and we are neither a leisure centre nor a centre delivering training programmes. In short, Beehive Industries has fallen through the gaps for funding because the service we provide is to a population who themselves fall through the gaps for services provided by funded authorities. A close watch is being kept for the possibility of support as Governments move from funding programmes towards collaborative delivery of services to those living with disadvantage and social exclusion.

Beehive people do not need either residential or day care, nor are they looking for training. Some are elderly and wish to remain active while others need confidence to apply for subsidised assistance, including education, housing or employment. The shared need is to be useful in a working environment.

Beehive Industries was established in 1973 as a social enterprise with a vision of social inclusion. Circumstances of establishment and operation indicated that the organization is best served as an incorporated association in terms of The Associations Incorporation Act 1987 in Western Australia.

CONSULTATION PAPER

The NFP Reform Council has consulted with organizations within the Not for Profit sector to develop a draft set of minimum governance standards for certain charities now under the regulatory framework of the Australian Charities and Not-for-profits Commission (ACNC).

It is noted that compliance with these standards, when in place, is necessary for charities to retain registration. It is also noted that Appendix Two of the Consultation Paper sets out existing governance obligations, except where they are provisions of State and Territory legislation. Uncertainty is thus created for those charities established under State and Territory law. It is stated that compliance with current enabling legislation will indicate compliance with the ACNC Act and its regulations, but this cannot be so if the proposed governance standards differ from provisions of State and Territory law. It is clear that there can be no incongruities.

SUBMISSION

Beehive Industries has examined the Consultation Paper, the Draft Governance Standards and its Appendices. It is stated in page 7 that "the governance standards

will be set out in regulations to the ACNC Act" and, in page 8, that "the proposed governance standards propose to consolidate and deliver an element of consistency to the broader governance arrangements for charities". We submit that these proposed governance standards, while each quite clear in substance, are in fact creating a great deal of confusion and contradiction in their proposed application.

Contrary to the statement at section 2.3.3 that "current governance arrangements for charities in Australia are complex, ad hoc, and can lack transparency in some cases", the current arrangements are quite clear under the terms of each of the several governing laws. It would seem that variety and quantity has been interpreted as complexity but there is far more intricacy in this consolidation of governance standards presented in the Consultation Paper of December 2012.

The very first complication arises in trying to determine whether the governance standards regulations are intended to apply to those charities incorporated under State or Territory Associations Incorporation legislation. The stated need for charities to comply to retain the now necessary ACNC registration suggests that the regulations will apply. But the apparent direction of each proposed standard to those entities incorporated as companies, limited by guarantee or otherwise, and the clear exclusion from the information provided in Appendix Two, suggests that State and Territory incorporated associations are not being considered relevant to these draft governance standards. Clarification is needed.

The matter of responsibility and obligation under the proposed standards appears to be another issue with interesting complications. It seems that the intention is set for the registered entities (charities) to become the entity of responsibilities, unless (under standards 5 and 6) it is the responsibility of the responsible entity (Board member) to comply, in which case the registered entity will still become responsible for a breach if the responsible entity claims ignorance but neither the responsible nor the registered entity will be responsible if the registered entity is deemed to have taken reasonable steps to enable all entities to comply. And the word "reasonable" has such a subjective application.

Notwithstanding the clarity of the above situation, the question still to be answered is whether the registered entity or the responsible entity or both will be listed on the dreaded register of recalcitrant entities while the matter is under investigation. It is suggested that the matter may need a little longer than the 28 days allowed for a written notice of cause.

DRAFT GOVERNANCE STANDARDS

1: Purposes and NFP Character of a Charity

Draft standard one does establish the appropriate principle and the wording is appropriate.

2: Accountability to Members

While it is felt that draft standard two does establish the appropriate principle and the wording is appropriate, there are some concerns arising from the explanatory notes.

It is understood that the main explanatory example provided relates to the *Corporations Act 2001* or the *Australian Charities and Not-for-profits Commission*

(Consequential and Transitional) Act 2012, and that the proposed standard would simplify matters. It is still startling that an entity could be required to call a general meeting on the request of members with at least five per cent of member votes. For an organization with a very short member register, this could result in one member having the power to call a general meeting.

It is also understood that an organization's own governing rules or Constitution may require a much higher percentage of voting power to prompt a general meeting. The concern is the fact that this example was used and whether or not there is a pending implication.

3: Compliance with Australian Laws

The need for draft governance standard three is seriously in question. The purpose of every Australian Law is that Australia complies. Non-compliance has consequences.

There is no apparent need for one piece of Australian Law, *Australian Charities and Not-for-profits Commission Act 2012,* and its regulations to require compliance with Australian Law in general. If any entity commits an offence indictable under an Australian law, that law must deal with the offence.

The *Australian Charities and Not-for-profits Commission Act 2012* provides for the Commissioner to take action if there is reason to believe that an offence has occurred. The stated purpose of this standard is understood but could be seen to have the sole function of assigning enforcement powers to the Commissioner. The effect could be that an entity is listed on a register as being under investigation without there being substantiation of an accusation under law.

The continuing explanatory notes discuss some hypothetical situations that the draft standard does not address.

The standard does not adequately establish the appropriate principle and the wording of draft standard three is not appropriate.

4: Responsible Management of Financial Affairs

There is a sincere question of the need for draft governance standard four. The draft standard seems to say, simply, "be responsible" and then, in explanation, acknowledge the broad subjectivity of the notion of responsibility.

The principle of the standard is flawed in that no standard can ensure required action of any entity. It may be more appropriate to replace the word "ensure" with "require".

The wording of the standard is equally inadequate and it is suggested that draft governance standard four be extended to read "A registered entity must take reasonable steps to manage its financial affairs in a responsible manner appropriate to relevant statutory requirements".

5: Suitability of Responsible Entities

Draft governance standard five contains many convolutions and raises many questions.

The stated object of the draft standard is simplistic and does not define any

application of confidence in the suitability of responsible entities. It could be said that the entire ACNC Act and this set of draft standards have the object of maintaining, protecting and enhancing public trust and confidence in the governance and operation of registered entities.

The object of this draft standard is really to maintain, protect and enhance public trust and confidence in the suitability of people entrusted with the governance and operation of registered entities.

The notion of "reasonable steps" is often used and, in this draft standard, some examples of reasonable steps are given. There leaves a question of how the ACNC will deem steps to be not reasonable when, as stated earlier, the idea of reasonable steps is quite subjective.

Circular references between subsection (3) and subsection (5) create another set of intricacies and apparent contradictions. At the very least, they create difficulties for those charged with ensuring suitability of their responsible entities. In summary, there are certain criteria for suitability which should help registered entities to make informed decisions. These same criteria are the basis of possible disqualification by the Commissioner. Thus far, all is quite clear.

Then subsection (5) allows for the Commissioner to deem that an entity may actually be suitable, regardless of the applicable criteria indicating unsuitability.

This is followed by the provision for an entity to object to a decision of the Commissioner by appealing to the Commissioner to allow the objection (part 7-2 of the Act). This circularity must suggest a compromising situation.

A register of disqualified entities which includes decisions subject to review is inequitable when the register is open for public inspection. There is an assumption of guilt which has not been verified.

The availability of the register for public inspection is not contested but there should be a high degree of certainty of unsuitability before names and details are added to the register.

6: Duties of Responsible Entities

While draft governance standard six is substantially clear and appropriate, there are some considerations to note relevant to the draft protections under this standard.

The wording is again clear and appropriate if all responsible entities are willing to submit themselves to group regulation. Most will say they are willing to do so but there are many independent thinkers who will reasonably believe it quite inappropriate to inform themselves by asking questions and quite appropriate to rely on assumptions. These same free souls will always believe that their decisions are in the best interests of the registered entity. It must be acknowledged that circumstances and regulations will provide means of dealing with such entities.

3.6.1 Duties for Responsible Entities

It is understood and agreed that responsible entities "need to act in good faith in the best interests of the registered charity" and it is desirable that responsible entities disclose material conflicts of interest. It is extremely difficult for registered charities to "ensure that their responsible entities" make these disclosures, with or without a conflict of interest policy.

The registered charity cannot know if there is a conflict of interest, or any other matter subject to disclosure, unless the responsible entity discloses the matter.

In the same way, it is difficult for registered charities to "ensure that their responsible entities do not carry on the operations of the charity while it is insolvent". Notwithstanding the duty of a registered charity to cease operations if it is insolvent, it is difficult to ensure that that every responsible entity takes no action as a free-thinking individual. So, the registered charity cannot be made responsible for the activities of individuals when the registered charity has no control of individual activities.

It is recognized that this situation is difficult to resolve but it remains that responsible entities must take some responsibility and registered charities must have some protection from liability for actions they have no power to prevent.

3.6.2 Protections for responsible entities

While protections for responsible entities and registered charities are essential, there are some anomalies within the discussion on page 27 of the Consultation Paper.

It is noted that "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" and that "a registered charity will be deemed as having taken reasonable steps and therefore compliant with draft standard six".

What is not addressed is the situation where a responsible entity claims ignorance of facts and so to have acted in a manner considered reasonable. While this would appear to have the effect of indemnifying the registered charity, it must be that the registered charity would be in breach of informing the responsible entity.

Further to that possibility, if it could be shown that the responsible entity had received all relevant information, was not ignorant and had not acted reasonably, the registered charity would be in breach for actions of an irresponsible entity.

It would appear that protection defence relies on the responsible entity being unaware of governance issues and claiming no fault. While the draft regulations then allow that the registered charity is not in breach because of the responsible entity's now "reasonable" action, there still remains the issue of the registered charity being in breach of the duty to provide information and the decision that information was indeed provided so the registered charity could reasonably conclude that duty had been fulfilled.