November 2013

Growing Governance Information

Our Across the Board email newsletter is the latest step in supporting school boards and leadership teams with governance information.

The newsletter adds to Across the Board – Governance Guidelines for Independent Schools on our website, and the popular printed Independent Schools Victoria Governance Handbook that has evolved from the first editions published in 2008.

In addition, Board Members of Independent Schools Victoria join senior management to provide individual in-school briefings. We hold tailored weekend and mid-week governance sessions, sometimes with representatives of regulatory organisations.

The Compliance Framework, also on our website, lists and updates legislation affecting schools, provides general governance information and outlines risk management procedures.

The aim of this newsletter is to discuss the context and governance implications of current government policies and other issues that could affect Member Schools. Where necessary we will go into greater detail that can be held for reference.

Good governance is a major focus because:

- a school board must ensure that it satisfies its statutory and governance obligations
- successful governance minimises problems and improves management performance and accountability
- an effective board culture instils the values of transparency and trust in the Independent school ethos.

We are looking forward to hearing what you would like us to research and write for you in future editions. Please email Brian Peck with your suggestions.

Michelle Green
Chief Executive

Next Edition – Risk Management and School Boards

Risk management is inherent in everything we do. Individuals and organisations manage risk every day. It is about identifying potential variations from what we plan or desire and managing these to maximise opportunity, minimise loss and improve decision making. This in turn contributes to improvement in performance of the organisation.

Risk management is a systematic process that can guide decisions to improve the effectiveness and efficiency of performance. It is an integral element of good business practice rather than a stand-alone process.
It enables organisations to be prepared for what might happen rather than managing retrospectively. In addition it also ensures new opportunities and innovation are more effectively planned and implemented.

There is a need to consciously manage risk systematically because sensible risk management contributes to good governance by providing reasonable assurance to boards and school management that the school’s goals and objectives will be achieved within a tolerable degree of residual risk.

Risk management:

- provides some protection for board members in the event of adverse outcomes
- enables members to demonstrate that they have exercised a proper level of diligence
- is likely to limit the severity of the adverse outcomes.

The effectiveness of risk management strategies depends on good communication within an organisation, including between the board and school management.

The benefits of risk management include:

- increased likelihood of achieving objectives
- enhanced stakeholder trust and confidence
- better operational effectiveness
- effective resource planning
- confident financial management
- regulatory compliance
- fewer surprises.

Risk management and oversight of the school’s approach should be a board function. A board needs to be satisfied that:

- management has a framework in place for managing risk
- the school has decided on an appropriate amount of risk it is willing to accept
- all levels of management are aware of the acceptable risk levels
- staff appreciate that management of risk is not just about compliance.

An Audit Committee could be established to coordinate the board’s approach to risk oversight and ensuring regular reporting.

The next edition of this e-newsletter will discuss the benefits of risk management planning and outline an approach to developing a risk management plan.

**What issues do you want discussed?**

Suggestions for future topics for discussion are most welcome. The second edition of the *Across the Board* email newsletter will be published next February. Please send your suggestions for articles to Brian Peck.
Welcome to the November 2013 Across the Board newsletter

Your Guide to the Charities and Not-for-Profits Commission

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The Australian Charities and Not-for-profits Commission (ACNC) was established under federal legislation as an independent national regulator from December 2012. This article outlines the functions of the ACNC and its regulatory framework that applies to all charities – including Independent schools.

The governance of not-for-profit organisations (NFPs) has been debated over the past decade with recommendations seeking to tighten regulations.

The Henry Review (Australia’s Future Tax System – 2009) recommended the establishment of a national charities commission to monitor, regulate and provide advice to NFPs. This was supported by the Productivity Commission’s Report (Contribution of the Not-for-Profit Sector – 2010).

The Coalition Government’s policy is to abolish the ACNC and replace it with a Centre for Excellence that will have an advisory, rather than a regulatory role. However, the current Senate is unlikely to accept major changes to the existing legislation and it is not known what attitude new Senators will have when they take up their seats in July 2014.

In the meantime, Member Schools must comply with ACNC regulations.

Coalition Government Position on the ACNC

Nowhere has the mischief that requires this new monolithic regulatory structure, or that justifies the sweeping powers of the ACNC, been identified.

– Kevin Andrews.
Addressing the National Press Club as the Shadow Minister for Families, Housing and Human Services, Mr Kevin Andrews, who is now Minister for Social Services, said on 23 August 2013:

*In keeping with our commitment to reduce red tape on the not-for-profit sector, a Coalition government will abolish the ACNC and replace it with a Centre for Excellence, one that will have its ownership transferred to the sector itself.*

*The focus on the new centre will shift from endless compliance and regulation to a body that encourages innovation, education and best practice and it will also be able to advise the government and undertake research.*

In an earlier announcement of Coalition policy, Mr Andrews said that the proposed new centre would:

- provide education and support services to registered charities
- provide information to assist with the process of registration for new charities and not-for-profit agencies
- act as a one-stop shop for information on charitable organisations and agencies operating within Australia
- advocate for the rights of charities and not-for-profit agencies
- represent the interests of charities and not-for-profit agencies to government
- help facilitate the interaction between government and the charitable and not-for-profit sector
- undertake research and cross-sector evaluations on issues of concern to the sector
- help foster innovation within the sector.

In a speech in to the Centre for Independent Studies, Mr Andrews indicated a Federal Coalition Government would return the ACNC’s regulatory powers to the Australian Taxation Office and Australian Securities and Investment Commission.


Pro Bono Australia News Future of the ACNC Under a Federal Coalition, The Hon Kevin Andrews, Address to Centre for Independent Studies, 30 April 2013

**Federal Opposition's Response**

The ACNC is a one-stop shop, aiming to be a single clearinghouse for all interactions charities have with government. The ACNC is an essential reform to strengthen the sector’s transparency and governance and remove with unnecessary red tape.

- Andrew Leigh, Shadow Assistant Treasurer

In a media release on 21 November 2013, Mr Leigh said that the Abbott Government is forcing charities to spend less time getting on with the job and more time on paperwork.
The Government needs to explain to our tireless charity workers why they should spend more time complying with government regulations, and less time helping vulnerable people in Australia and overseas.

Mr Leigh said that 58,000 charities were registered with the ACNC.

For too long charities that work across multiple states and territories have had to register and report to those jurisdictions as well as work through complex funding contracts and processes that the ACNC helps simplify.

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**ACNC’s Aims and ACNC's Role**

Under its establishing legislation the aims of the ACNC include:

- maintain, protect and enhance public trust and confidence in the not-for-profit sector
- support and sustain a robust, vibrant, independent and innovative sector
- promote the reduction of unnecessary regulatory obligations.

The functions of the ACNC include:

- establishing and maintaining a register of not-for-profit organisations
- implementing a ‘report-once, use often’ framework for charities and establishing a public information portal
- educating and supporting not-for-profits on complying with ACNC legal and reporting obligations
- monitoring and investigating the activities of NFPs if there are legitimate concerns
- stimulating and promoting research into matters related to the NFP sector
- providing information to government and the public
- promoting public trust and confidence in the NFP sector.

Registration with the ACNC is necessary for an organisation to access Commonwealth tax concessions, exemptions, benefits and concessions provided under other legislation.

The Australian Taxation Office (ATO) remains responsible for determining eligibility to receive tax concessions. The ATO will accept the ACNC’s determination on charity status.

The ACNC does not currently have powers to regulate fundraising or gaming activities, which continue to be regulated by state and territory authorities. However, there have been some discussions regarding national registration of fundraising (excluding gaming).
ACNC’S Regulatory Approach

The ACNC’s publication, Australian Charities and Not-for-profits Commission: Regulatory Approach describes how the ACNC will regulate charities.

Its approach includes providing information and education, identifying risks and opportunities and taking action when registered charities do not meet their obligations under the ACNC Act.

If necessary, it will conduct an investigation to determine whether there was an intention to do the wrong thing and whether any of those responsible for the charity, (such as committee members, directors, trustees) knew about or participated in the conduct.

The three main situations where the ACNC could take action are when a charity:

- does not meet its obligations under the ACNC Act to report or keep proper records
- fails to meet minimum standards of governance where those responsible are not taking reasonable care or not managing conflicts of interest
- is no longer a charity, e.g. where it is being used to make profit for private individuals.

The ACNC does not deal with all complaints relating to charities; for instance, issues relating to the effectiveness of a charity in meeting its objectives or employment disputes.

The Commissioner has extensive regulatory powers, including:

- gathering information to monitor registered entities’ compliance and to assess their ongoing entitlement to registration
- inspecting and retaining documents
- issuing administrative (non-criminal) penalties for late reporting or notification or for false or misleading statements
- suspending or removing a registered entity – this decision is reviewable
- making an appointment to enable a registered entity to continue to function following suspension.

Registered entities are required to notify the Commissioner about significant contraventions or non-compliance that result in the entity ceasing to be entitled to registration.

Red Tape Reduction?

A Reporting and Red Tape Reduction Directorate has been established within ACNC to meet one of its statutory objects, which is to promote the reduction of unnecessary regulatory obligations, by:

- developing an ACNC reporting framework
- developing and implementing a ‘one-stop shop’ so that charities can use the ACNC to access Commonwealth tax concessions and potentially state and territory concessions
- aligning where possible the regulatory requirements that charities have to the ACNC and other Commonwealth regulators
- establishing charity-type reporting working parties in partnership with government departments and agencies and not-for-profit sector representatives to identify opportunities to streamline and reduce unnecessary reporting
- clarifying arrangements for reporting to some other Commonwealth regulators
- contributing to the work of the Council of Australian Governments Not-for-Profit Reform Working Group which is reviewing fundraising, governance and reporting requirements for the not-for-profit sector.

The previous federal government announced measures aimed at reducing overlapping information requests from departments and agencies.

The ACNC will accept the financial questionnaire provided to the Department of Education as meeting the requirement to lodge financial reports under the ACNC legislation. This will apply for the first three reporting periods after the commencement date for the ACNC.

The ACNC will also approve the calendar year as a substituted period if a school notifies the ACNC that legislation requires reporting on that basis.

If a school building fund was endorsed as a charity by the ATO before 3 December 2012, it will automatically be registered with the ACNC.

The objective of the ACNC is to reduce red tape and it has agreements with Commonwealth and State government regulatory authorities. However, some charities consider that the ACNC is adding another level of bureaucracy to existing arrangements and passing on additional compliance costs. The number of not-for-profit sector workers reporting a negative view of ACNC tripled in 2012, as more details of its precise nature became clear, according to the Centre for Independent Studies.

However, non-government schools must continue to meet obligations to other government agencies. Duplication of compliance requirements across levels of government and regulatory bodies remains a concern within the Independent sector despite the ACNC’s assurances that the one-stop shop will reduce red tape.

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**Defining Charities**

The Charities Act 2013 (cth) provides a statutory definition of charity that will take effect from 1 January 2014 and specifies that to be a charity, an entity must be not-for-profit and have charitable purposes that must be for the public benefit.

The ACNC fact sheet ([Who can register with the ACNC?](#)) attempts to clarify what is meant by public benefit. It includes non-government schools as examples of entities meeting charitable purposes.

The definition recognises that a charity may have incidental or ancillary purposes which are not charitable but which further the charitable purpose.

The Act indicates that public benefit requires the purpose of an entity to be directed to a benefit that is available to the members of the general public or a sufficient section of the general public.
The Independent education sector has argued that education provided by Independent schools not only benefits the individual but the cumulative education of all individuals benefits society as a whole. This fundamental principle underpins government policies relating to compulsory school attendance, school retention and school partnerships with the wider community.

The core business of Independent schools is to advance education via the educational programs and support services that they provide to students, including those from different socioeconomic backgrounds.

Independent schools contribute to the wider public benefit through extracurricular programs for students, for example, engaging with isolated Indigenous communities and community service organisations to support the disadvantaged in the wider community.

Independent School Victoria and Independent Schools Council of Australia raised concerns about the definition of public benefit and charitable entities during the Bill's consultation period, in particular the prospect of a narrower application of public benefit. We recommended that the Australian Government acknowledge that non-government schools be recognised as a class of charitable entities rather than requiring each school to justify its charitable status.

The ACNC claims that the Act sets out more clearly the common law meaning of charity and clarifies some areas of uncertainty but there remains ambiguity about the application of these terms.

Under section 7(b) of the Charities Act 2013 (cth) the purpose of ‘advancing education’ is deemed to satisfy the public benefit requirement, (in the absence of evidence to the contrary). It remains theoretically possible that someone could challenge the charitable status of Independent schools, along the lines of the arguments raised in Britain, but the availability of the presumption and the different school systems across the two countries would make this difficult.

Obligations of Registered Charities

To remain registered charities, organisations must:

- continue to be not-for-profit, pursuing a charitable purpose
- keep records
- report to ACNC on an annual basis
- comply with ACNC approved governance standards
- comply with external conduct standards if sending funds to or engaging in activities overseas.

Annual reporting requirements include financial and non-financial information. The ongoing obligations of each charity will depend on the size of the entity. The ACNC Act defines size according to annual revenue:
- Small charity – annual revenue less than $250,000 – needs to submit an Annual Information Statement (AIS). The 2013 AIS will not include financial questions. Future statements will include basic financial information as outlined on the ACNC website.
- Medium charity – annual revenue of $250,000 or more but less than $1 million – needs to submit an AIS for 2103, and for 2104 and beyond must submit an AIS and a financial report that is reviewed or audited.
- Large charity – annual revenue is $1 million or more – needs to submit AIS for 2013 and for 2014, and beyond they must also submit a financial report that is audited.

The 2013 AIS is the only reporting obligation registered charities have for the 2013 period. It only includes non-financial information. The AIS can be submitted online. It must be submitted within six months of the end of the organisation’s financial reporting period.

All the information provided in the AIS will be published on the ACNC register. A registered charity can request the ACNC not publish information if the information is commercially sensitive or could endanger public safety.

The Coalition has indicated that it will repeal the Charities Act 2013 (cth) and return to the common law definition.

### Responsible Person

The ACNC uses the term ‘responsible person’ (rather than ‘responsible entity’ which is used in the legislation) to describe those responsible for directing a charity, members of the governing body, which includes directors or committee members or trustees.

If the charity is an incorporated association, the responsible persons are each of the members of the committee of management. If the charity is a company limited by guarantee or other company under the Corporations Act 2001 (cth), its responsible persons are each of the directors of the company.

If the charity is the subject of insolvency arrangements, then a trustee in bankruptcy, a receiver, an administrator or liquidator could also be a responsible person.

The ACNC is required to list the names and positions of the responsible persons on the public ACNC register and to be notified if there are any changes. All board members should be listed as responsible persons, including office bearers.

The CEO, public officer or company secretary are not included as responsible persons unless they are a member of the organisation's governing authority.

The ACNC can remove a person from a board and place them on a list of disqualified persons, which illustrates the extensive regulatory powers of the ACNC’s functions.
Governance Standards

Registered charities must meet a set of governance standards (unless they are a basic religious charity). There are five standards:

**Purposes and not-for profit nature of a registered entity**

Charities must be not-for-profit and work towards their charitable purpose. They must be able to demonstrate this and provide information about their purpose to the public.

**Accountable to members**

Charities that have members must take reasonable steps to be accountable to their members and provide their members with adequate opportunity to raise concerns about how the charity is governed.

**Compliance with Australian laws**

Charities must not commit a serious offence (such as fraud) under any Australian laws that may result in a penalty of 60 penalty units (currently $10,000) or more.

**Suitability of responsible persons**

Charities must check that their responsible persons are not disqualified from managing a corporation under the Corporations Act 2001 (cth) or disqualified from being a responsible person of a registered charity by the ACNC Commissioner. Charities must take reasonable steps to remove any responsible person who does not meet these requirements.

**Duties of responsible persons**

Charities must take reasonable steps to make sure that responsible persons understand and carry out the duties set out below.

This standard has significant implications for school board members as responsible persons who are required to:

- exercise the care and diligence that a reasonable individual would exercise if they were a director of the registered charity
- act in good faith and in the interests of the charity, to further the purposes of the registered charity
- not misuse the director’s position
- not misuse information obtained in the performance of the director’s duties
- disclose perceived or actual material conflicts of interest of the director
- ensure the financial affairs of the charity are managed in a responsible manner
- not allow the registered charity to operate while insolvent.

All charities (except basic religious charities) must meet the governance standards from 1 July 2013. Details are on the [ACNC website](http://www.acnc.gov.au) along with tools and resources to assist charities to achieve good governance practices.

The five standards have been described as principle-based and are the minimum governance requirements. Charities can choose how to comply, as long as they can
demonstrate that their approach is appropriate considering their size, purpose, reach (local, national or international), membership numbers and profile, sources of funding, existing governance systems and the people they support.

ACNC Guide for Charity Board Members

The ACNC’s Governance For Good includes 10 tips for board members:

1. Know the charitable purpose of your charity and make sure you and your charity are working towards it – if you are unsure, ask yourself whether your actions promote your charity’s charitable purpose.

2. Be clear about your role and make sure that the roles and responsibilities of everyone at your charity are well understood – volunteers, members, board members, clients or employees.

3. Understand your charity’s financial position and be familiar with its financial statements – everyone on your board shares a responsibility to make sure your charity’s finances are well-managed.

4. Keep your responsibilities and legal duties as a board member in mind when making decisions as a board member, particularly difficult ones.

5. Have a copy of your rules – read, understand and follow them, and if you are ever unsure, ask your other board members or get professional advice.

6. Although board members act as a group, do not just follow the crowd. You should always do what you think is best for your charity, even if sometimes it means taking a different view to other board members.

7. Understand your charity’s obligations to government agencies (such as the ACNC and other regulators) and make sure your charity is meeting them.

8. Listen to the other board members and work as part of a team. Your board shares a collective responsibility for the organisation and you should see board members as colleagues.

9. Be confident to declare and manage conflicts of interest responsibly. Most members of a board will encounter conflicts of interest and you should feel confident to handle them responsibly.

10. Always act in the best interests of your charity – as a board member you have a responsibility to put the interests of your charity above your own personal interests.

ACNC and ASIC

Charities registered by ACNC may include organisations registered with the Australian Securities and Investment Commission (ASIC):

- public companies limited by guarantee
- proprietary companies limited by shares – such as a business wholly owned by a charity that has a similar charitable purpose
- registered Australian bodies such as an incorporated association registered under a State Act and registered with ASIC which carries on business outside the state or territory in which it is registered.
Some reporting obligations to ASIC will be transferred to the ACNC:

- A public company no longer needs to lodge changes to its constitution with ASIC or tell ASIC about the adoption or repeal of a constitution, and is no longer required to send a copy of its constitution to members who request a copy.
- A company and registered body is no longer required to notify ASIC of a change of address, including its registered office address, principal place of business address or contact address. The ACNC will advise ASIC of such changes.
- A company and registered body is no longer required to notify ASIC of the appointment, resignation or retirement of directors, secretaries and alternate directors or submit personal details of directors and secretaries.
- A company that is registered with the ACNC does not need to lodge with ASIC financial reports for years commencing on or after 1 July 2013. Instead medium to large charities registered with the ACNC will be required to provide annual financial reports to the ACNC.

References

In addition to footnotes, other references that were used in the preparation of this article include:

| ACNC website | www.acnc.gov.au |
| ACNC | Australian Charities and Not-for-profits Commission Statement: Regulatory Approach |
| ACNC | Governance for Good-the ACNC’s guide for charity board members |
| | Australian Charities and Not-for-profits Commission Act 2012 |
| | Australian Charities and Not-for-profits Commission Regulations 2013 |
| | Australian Charities and Not-for profits Commission Amendment Regulation 2013 |
| ASIC | ASIC and the Australian Charities and Not-for-profits Commission sign MOU, Media statement, 18 June 2013 |
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| Pro Bono Australia News | ACNC Adding to Sector Red Tape-Uniting Care, media statement, 27 August 2013 |
| The Hon Kevin Andrews | Future of the ACNC Under a Federal Coalition, The Hon Kevin Andrews, Address to Centre for Independent Studies, 30 April 2013 |