Answer to Question taken on Notice by the Australian Institute of Company Directors, received Thursday 6 September 2012

6 September 2012

Senator Claire Moore
Chair
Senate Community Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Senator Moore

Questions on Notice - Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 and the Tax Laws Amendment (Special Conditions for Not-for-Profit Concessions) Bill 2012

Further to the questions on notice received from the Senate Community Affairs Legislation Committee (the Committee) on 4 September 2012, the Australian Institute of Company Directors (Company Directors) is pleased to provide the following responses.

1. Could you review the suggestion, and the wording, on page 6 of the Uniting Care submission regarding independence. They propose an amendment to the bill:

> ***Subdivision 205-C – Other concepts***
> ***Insert 205-45 Independence of the NFP Sector***
> ***Independence of the sector means that NFP entities are autonomous entities subject to the direction and control of their Boards or Governance body(ies). The independence of an NFP entity, particularly in relation to advocacy cannot be set aside, limited or controlled by condition of direct or indirect Government funding.***
>
> **What is your view of this proposal?**

It is not clear to us that such a requirement is necessary or will have the desired effect. We note that directors of an incorporated charity owe their duties to that organisation, and as such should be making decisions in the best interests of that organisation – including weighing up the acceptance of any conditions associated with grants.

2. The AICD states that it now comfortable with the envisioned responsibilities of directors. Does the AICD have any concerns that NFP directors/management committee members, who are obliged to sign "gag clauses" to receive government funding, may

thereby be breaching the Objects in their Constitution? If you have this concern, can you suggest how it may be addressed?

In our submission to the Committee dated 30 August 2012, Company Directors said:

> "We note that the following the tabling of the report by the latter Committee the Federal Government made a number of amendments to the Bill, including in the area of the director obligations and liability for companies limited by guarantee and incorporated associations. We welcome these changes."

With respect to the Committee, we did not state that we "are comfortable with the envisioned *responsibilities* of directors" in the ACNC Bill. While the current drafting of Division 180, as it relates to the *obligations* and *liabilities* of directors is an improvement, we noted that there are still outstanding issues in respect of Division 180 of the Bill. These include:

- the fact that the drafting of section 180-20(1)(b) still pierces the corporate veil for directors of companies that act as corporate trustees; and
- the onerous nature of the obligations and liabilities as they relate to those who act in directorial type roles of unincorporated associations.

As Division 180 addresses the liabilities of directors for corporate fault, these are arguably not "responsibilities" of directors per se. We set out in our submissions our concerns about the suggestion that the *duties* of directors of not-for-profit entities appeared to be earmarked for inclusion in the Regulations.

Our submission dated 30 August further stated:

> "We deduce from reading the proposed consequential amendments to the Corporations Act relating to companies limited by guarantee that register as charities and the Explanatory Memorandum, that director duties currently set out in sections 180 to 183 of that Act will be replaced with another set of duties to be included in the NFP Reform Package. We are left to conclude that this is intended to occur via the governance standards contained in the yet-to-be-seen regulations attaching to the Bill. If our inferences are correct, we are extremely concerned that such a core requirement is being relegated to the Regulations. If new directors' duties are to be inserted into the Regulations they will not be subject to the usual scrutiny, consultation, debate and process that would accompany a requirement in the main Bill. We are not alone in saying this is an extremely problematic approach, which undervalues the importance of the issues involved and has the effect in our view of undermining the role of Parliament. It is also unclear how the obligations and liabilities provisions currently set out in Division 180 of the Bill are intended to relate to the undisclosed duties contemplated in the Regulations."

Given these concerns, it is important to us that the Committee not conclude that we are entirely comfortable with the "responsibilities" of directors set out (or yet to be disclosed) in the package. Our specific comments related to the improvements in Division 180 only.

On the issue of "gag orders", we note that Company Directors has public policy concerns with the use of these in connection with NFP grants - in particular, with a charity not being able to advocate publicly on matters impacting on or relating to its mission. We believe policy outcomes are likely to suffer. Again, however, we note that directors of an incorporated charity owe their duties to that organisation and will need to make an assessment of how any actions relate to their Objects and the relative benefit to the organisation of a grant and any associated gag order.

Yours sincerely

Phil Butler
Manager, NFP, Public Sector & ACT

Phil Butler
Manager, NFP, Public Sector & ACT
Australian Capital Territory

Please note my new contact numbers below.

AUSTRALIAN INSTITUTE of COMPANY DIRECTORS
Level 3
54 Marcus Clarke Street
Canberra ACT 2601 Australia
www.companydirectors.com.au
ABN 11 008 484 197

T: +61 2 6132 3200
F: +61 2 6132 3222