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30 August 2012

Ms Deborah O'Neill MP
Chair
Parliamentary Joint Committee on
Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Ms O'Neill

Australian Charities and Not-for-profits Commission Bill 2012

The Australian Institute of Company Directors (Company Directors) welcomes the opportunity to offer comment to the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) on the Australian Charities and Not-for-profits Commission Bill 2012 (the Bill) and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (the Consequential and Transitional Bill).

Company Directors is the second largest member-based director association worldwide, with over 32,000 individual members from a wide range of corporations: publicly-listed companies, private companies, not for profit organisations (NFPs), and government and semi-government bodies. As the principal professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in policy debates.

The NFP sector has been a particular area of focus for Company Directors. Our activities continue to include tailored educational services, events, published materials, research and facilitation of dialogue among members and others on NFP issues. Additionally, we have participated in NFP policy reform discussions and lodged various submissions, for which we have had input from our membership, including our Policy Committees and NFP Steering Committee.

In order to assist the Committee with its deliberations we enclose a copy of the two submissions we recently lodged with the House of Representatives Standing Committee on Economics. We note that 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. We also welcome the inclusion of additional procedural fairness requirements where the ACNC Commissioner exercises particular powers, and a provision to review the legislation after it has been in operation for five years.

Company Directors does, however, continue to have a number of concerns with some aspects of the Bill and the overall reform package, including (but not limited to):

1) that greater clarity and additional action is required to ensure red-tape reduction for charities is achieved and regulatory requirements are streamlined;
2) the proposed governance, reporting and external conduct standards need to be the subject of wide public consultation, debate and parliamentary oversight; and
3) the liability and obligations provisions could be further improved, as they remain onerous for individuals overseeing unincorporated associations and still pierce the corporate veil for directors of corporate trustees.

Due to the very short consultation time provided by the Committee, we are not in a position to provide more detailed comments at this stage. In this regard, we note that the revised version of the Bill is 155 pages, the relevant Explanatory Memorandum is 325 pages and the Consequential and Transitional Bill is 96 pages.

1. Greater clarity and additional action is required to ensure that red-tape reduction for charities is achieved and regulatory requirements are streamlined

A key measure of the legislation's effectiveness will be its ability to reduce red-tape, and streamline regulatory requirements for charities. As yet, it is not clear that the Bill will be able to achieve this, particularly in relation to charities currently subject to State-based reporting and governance requirements.

We have briefly reviewed the proposed consequential amendments to the Corporations Act 2001 (C'th) contained in the Consequential and Transitional Bill, which was introduced into Parliament on 23 August 2012. To our knowledge these proposed amendments have not previously been the subject of public consultation. We find the way in which it is intended that the requirements in the Corporations Act are to be "meshed" with the requirements in the Bill (including charities having to refer back and forward between the two) is complex, confusing and likely to increase rather than decrease the existing compliance burden on companies limited by guarantee. This has occurred as a result of a poor reform process.

We also note that no agreement has been reached with the States as to the interaction of the Bill with existing incorporated associations legislation in the States. As it currently stands, the Bill therefore adds an existing layer of regulation for charities currently required to comply with State legislation. This issue, previously set out in our submission dated 20 July 2012 (at section 4), has not yet been resolved and remains critical to the effectiveness of this reform package.

We are of the view that the Bill should not be passed until adequate time has been provided for the consequential amendments to be properly considered by stakeholders, and the Government and other parties have had an opportunity to obtain considered feedback.

2. The proposal to set governance and external conduct standards through regulation is inappropriate

The mandating of governance structures, processes or policies is fraught with difficulties. We have on numerous occasions outlined our concerns with a black letter law approach to corporate governance practices, including:

- it tends to be "one size fits all" and not take into account the diversity of organisational circumstances;
- it encourages a "conformance" mentality;
- it locks in particular governance practices and stifles development of alternative practices which could produce better outcomes;
- it is likely to lead to sub-optimal outcomes and may well have unintended consequences;
- it may result in material "re-tooling" costs for businesses; and
- it is counter to Australian and world best practice.

Australia's existing governance requirements as they relate to the structures, practices and policies of listed company boards are generally non-prescriptive and disclosure-based. We remain of the view that such an approach, with an emphasis on disclosure of governance practices and voluntary good practice guidelines, is more likely to result in optimal governance practices being put in place by charities, and should be adopted for the ACNC framework.

As David Gonski AC also noted at the public hearing on this Bill before the House of Representatives Standing Committee on Economics:

> *"Compare, for example, the ability of a very large or powerful charity to understand black-letter law with perhaps a bowling club or something in a small regional area. These are tiny organisations and we desperately want for the best people there to come on the boards and look after them. But if we prescribe too high, firstly, they will just breach because they do not have a choice. They may not even know what we have prescribed. Secondly, if we assist them by giving some sort of a feeler of what they should do, we are helping to educate at the same time."*[1]

While consideration of the governance, reporting and external conduct aspects of the Bill has been deferred, we note that provision has been made for the imposition of governance, reporting and external conduct standards through a regulation making power (see sections 45-10, 60-15 and 50-10).

We feel strongly, to the extent core governance, reporting and external conduct standards are to be mandated, that they should be included in the legislation rather than in regulations so that their introduction occurs through a process of parliamentary discussion, debate and voting. Our comments on this issue are set out in our submission dated 20 July 2012 (at section 9.2).

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 the director duties currently set out in sections 180 to

[1] Refer to the House Committees' public hearing transcript for 27 July 2012.

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.

3. The liability and obligations of individuals overseeing unincorporated associations remain onerous and could discourage people from serving their communities

3.1 *Liability for those with directorial type roles in unincorporated associations*

While the revised provisions affecting directors of companies limited by guarantee and incorporated associations are a significant improvement from the previous draft legislation, it is concerning to us that individuals overseeing unincorporated charities will still have the same obligations and will be liable for any and every amount payable by the unincorporated association under the Bill without exception and without access to defences.

The current drafting means that individuals involved in the management of unincorporated associations would be liable, even if they acted honestly, were not involved in a contravention and had no knowledge of a contravention. While we understand that the Government needs to impose obligations on natural persons given that unincorporated associations are not separate legal persons in themselves, we are concerned that this policy setting will provide a disincentive for people to volunteer to serve their local communities. We request that the Government re-consider whether it is possible to provide a carve-out from liability for those who volunteer in directorial type roles of unincorporated associations.

In an earlier submission, we made comments in respect of director liability that similarly apply to those individuals that take on directorial type roles in unincorporated charities:

> *"The imposition of such provisions would not lead to good social or economic outcomes and NFPs can least afford directors being overly focussed on personal liability issues. While we believe this problem should be addressed in both the for-profit and NFP sectors, we note there are particularly strong arguments and precedent[2] for exempting "volunteers" of community based projects and organisations – including volunteer directors - from personal liability provided, for instance, they act in good faith."*[3]

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[2] Various States have introduced legislation which protects volunteers who are carrying out community work from personal liability in certain situations, such as where they act in good faith. See, for example, the Volunteers (Protection from Liability) Act 2002 (Western Australia).

[3] Refer to Company Directors' submission dated 18 February 2011 to Federal Treasury in response to the Consultation Paper titled "Scoping study for a national not-for-profit regulator". This submission is included in the policy section of

Further comments on a volunteer carve-out are set out in our supplementary submission dated 1 August 2012 (at page 5).

3.2 *Corporate Trustees*

In our submission dated 20 July 2012 (at section 6) we raised concerns about directors of charities that are companies, having the same obligations as the company, in what was then the drafting of section 180-5. We noted that this would mean: "that every obligation of the company becomes the personal obligation of the director." We explained that this drafting failed "to recognise that the company and its controllers are distinct and separate legal entities and goes further than any other piece of Australian legislation by imposing *all* of the obligations of the company under the Bill on the directors."

We are pleased that section 180-5 has been amended to reflect the separate legal identities of the company and its directors, however, we note that the same problem has not been rectified in section 180-20(1)(b) as it relates to corporate trustees. Section 180-20 provides:

> "(1) Subject to subsection (2) an *obligation* that is imposed under this Act on a trust is imposed on each of the following entities, but may be discharged by any such entity:
>
> (a) each entity (whether an individual or a company that is a body corporate) that was a trustee of the trust at the time the obligation arose;
>
> (b) if the trustee, or one or more of the trustees, mentioned in paragraph (a) is a company that is a body corporate – each individual who was a director of such a company at the time the obligation arose." [emphasis added]

We are of the view that section 180-20(1)(b) should be deleted. This drafting still fails to recognise that a company and its directors are separate legal persons even when the company is acting in the capacity of a trustee. Given that the *company* is the trustee, any obligations given to the trustee should be the obligations of the company as a separate legal person, not the directors. We are concerned that this drafting pierces the corporate veil for directors who sit on companies that act in a trustee capacity, presents practical difficulties and provides a further disincentive for taking on such directorships. We are of the view that the subsection should be deleted.

We trust our comments are of assistance. Company Directors would be happy to elaborate on any of the points made in this submission should this be required.

Yours sincerely

John H C Colvin
CEO & Managing Director

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our website at http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions.