SUBMISSION 5

SUBMISSION BY THE

Housing Industry Association

To

House of Representatives Standing Committee on Economics

Inquiry into the Exposure Draft Australian Charities and Not-for-profits Commission Bill

20 July 2012

Contact Details
Glenn I Simpson
General Counsel
Housing Industry Association Ltd ACN 004 631 752
Address: 79 Constitution Avenue, CAMPBELL ACT 2612
Ph: 04 1975 1180
Fax: 07 5587 7400
Email: g.simpson@hia.com.au

1. Introduction.

1.1. HIA is the premier industry organisation in the home building sector of the Australian economy, and represents some 34,000 members throughout Australia. It employs a professional staff of some 350 persons and forms its policies through an internal democratic system of committees made up of its members serving in a voluntary capacity. HIA Members are the builders and contractors with whom consumers deal when contracting for domestic building projects.

1.2. HIA is a Not for Profit association incorporated as a company limited by guarantee. Under its Constitution HIA is an organisation whose purpose is the development of the industrial resources of Australia under para 50-40 8.2 of the ITAA. HIA also sponsors the HIA Charitable Foundation, a DGR.

2. General Comments.

2.1. HIA has serious concerns about much of the Government's current approach to reform of the NFP sector, and considers that regulation of charities should be on a completely separate basis from the regulation of other NFPs. HIA also considers that NFPs which are companies should continue to be regulated by ASIC.

2.2. The Government has said that –

> "Initially, only charities (including public benevolent institutions) will be regulated by the ACNC. However, the legislation establishes a regulatory framework that can be extended to all NFP entities in the future.[1]

2.3. HIA suggests that this Bill should not establish such an open-ended framework and should be expressly restricted to charities only, with regulation of other NFPs to be considered on their separate merits only after Commonwealth regulation of charities has been successfully implemented. ACNC should be renamed ACC and corresponding changes made to the Bill accordingly.

2.4. Many of the problems with the Government's proposed approach flows from an apparent misunderstanding of the diverse nature of the NFP sector. Treating all NFPs in the same way as charities is inappropriate, as most NFPs are of a fundamentally different nature to charities. While both charities and NFPs are expected to act in the public interest, or in the interest of a section of the public, charities go further and receive and spend public donations, while NFPs do not. It is this accountability for public money that is the prime justification for detailed public regulation, and this factor does not apply to NFPs that are not charities.

2.5. To clarify this difference, HIA suggests that a more appropriate term for non-charity NFPs would be 'Not for Dividend' organisations, which makes clear that such organisations may well be appropriately run on a commercial basis to generate surpluses in order to fund their public interest activities, but do not distribute those surpluses by way of dividends to shareholders.

2.6. Statements in the Preamble to the Exposure Draft Bill are made to justify regulation which in HIA's view do not stand up to scrutiny when applied across the whole NFP sector. For example, in its Preamble, the Exposure Draft Bill says –

> "Not-for-profit entities promote a broad range of community, altruistic and philanthropic purposes. The not-for-profit sector delivers vital services and benefits to communities throughout Australia. The not-for-profit sector is funded by donations from members of

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[1] Hon David Bradbury MP Media release 6 July 2012

the public and by tax concessions, grants and other support from Australian governments".

2.7. Similar sentiments exist in s.15-10. However, that is a very top down, government's eye view of the sector, which sees the sector as providing services on behalf or supplementing those of government. But overwhelmingly this is not the case. Not all NFPs are philanthropic in focus, community based, in receipt of public donations or public funding, and staffed by volunteers – only a very small minority fall into this category. The vast majority are small and member-driven organisations such as clubs and societies with limited capacity to meet red tape requirements and with little or no involvement in delivering 'vital services' to the public at large.

2.8. The Government, in attempting to grapple with the diversity of the NFP sector, seeks to justify imposing increased transparency and accountability regulation on all NFPs on the basis of the need to maintain 'public trust and confidence'. The Preamble to the Exposure Draft Bill says -

> "It is important that a national regulatory system that promotes good governance, accountability and transparency for not-for-profit entities be introduced to maintain, protect and enhance public trust and confidence in the not-for-profit sector.

2.9. Governments do not need new legislation or the ACNC to control NFPs' accountability for and management of any government grants they may receive - the current system of contract law is perfectly adequate. And while the public has a legitimate interest in the fate of its charitable donations, in HIA's view this is wrongly generalised into a public 'right' to intrude into all NFP activities.

2.10. This alleged right disregards the fact that many NFPs such as clubs and societies were set up and continue to exist for the benefit of their members, rather than the public at large. Where no public donations or public money is involved, public trust and confidence is irrelevant and 'good governance' should be a matter for the members of the organisation itself to decide, not the ACNC.

2.11. HIA notes that no-one is compelled to join or remain a member of a club, and there is no public interest in subjecting them to a costly legislated external regime of 'transparency and accountability'. Fraud, mismanagement in office amounting to a crime or misdemeanour, and public safety, are well covered by existing criminal law, and if no public money is involved, then mismanagement not involving a breach of the existing law is purely a matter for the club's members.

2.12. The exemption of a 'Basic religious charity' from the governance standards and financial reporting requirements of the Bill is puzzling. If public trust and confidence in the uses to which charities put donations needs to be protected and enhanced, why are large well run charities required to meet legislative governance and reporting standards while small opaque church-run ones are not? If small opaque church-run charities are to be expressly exempt under the Act, why not small non-religious charities, and small clubs and societies? To argue that the latter could be exempted later by Regulation when the Act is extended to NFPs is unsatisfactory, as this places them in a much less secure position than Basic religious charities, whose status derives from the Act.

3. Duplication of Regulation

3.1. Whilst according to the Government's Regulatory Impact Statement, the Government's reform package will reduce compliance costs and red tape faced by the sector, some of the proposed provisions will increase regulatory costs and

compliance without any public or private benefit. This is an area where there is already existing State regulation, and there is no assurance that the States will relinquish their existing regulatory role, particularly in relation to fund raising.

3.2. Reliance on Commonwealth constitutional power under s.51(xx) in relation to corporations means that unincorporated charities and NFPs will remain outside the ambit of the ACNC. In addition it is unclear whether Commonwealth legislation could oust State laws applying to the public generally – for example those relating to holding a licence to run a raffle.

3.3. The Guide to the Act (s.10-5) talks about a simplified and streamlined regulatory framework for not-for-profit entities, but without complementary State action, which no State has yet agreed to, this Bill will result in a prolonged and indefinite period of dual regulation. The costs imposed across the whole charitable sector will in the aggregate be very significant.

3.4. HIA considers that it is conceptually difficult to reduce red tape by adding red tape, which is what adding new Commonwealth regulation on top of existing State regulation will do. Only if States vacate the field is there any hope of reducing the administrative burden on Charities and NFPs.

3.5. HIA considers that if the Commonwealth is serious about red tape reduction it should not seek to impose ACNC regulation in any State unless and until that particular State agrees to refer their constitutional powers in this area to the Commonwealth, thus allowing a comprehensive single regulatory scheme.

4. Responsibilities of Registered Entities

4.1. The provisions of the Bill relating to Governance Standards and External Conduct Standards are simply unacceptable. The Bill as it is currently drafted entitles the Government to set governance standards and external conduct standards by delegated legislation, which can varied without notice at any time, and without any safeguards beyond the Senate's power to disallow a legislative instrument. This is arbitrary, undemocratic and amounts to legislation by stealth.

4.2. Some of the proposed 'good governance' provisions canvassed by the Government's own discussion papers, such as requirements for NFP directors to hold formal academic qualifications, or imposing new conflict of interest requirements over and above those imposed by law, are worrying enough, but the Bill enables the Government to impose by Regulation whatever new standards it chooses, without limit and without appeal.

4.3. If particular minimum governance standards are to be imposed on charities and NFPs, they should be explicitly done so by Act of Parliament. The *Corporations Law* exemplifies this. Both the required and replaceable rules for companies are set out in detail in the Act itself. To allow such things to be prescribed in the Regulations is inappropriate and derogates from the legislative role of the Parliament.

4.4. It is also important that such governance standards imposed by Regulation should not be in conflict with the responsibilities of NFPs under other legislation. NFPs that are corporations are already adequately regulated by the *Corporations Law* and ASIC, and (like Basic religious charities) should be exempted.

5. Expansive powers of the Commission

5.1. HIA notes that the Bill gives the Commissioner expansive information gathering and

monitoring powers for the purposes of determining whether:

- a registered entity has complied with a provision subject to monitoring in the ACNC Bill; or
- information given by a registered entity, either on voluntary basis or to fulfil an obligation under the ACNC Bill, is correct and accurate.

5.2. The Commissioner will hold powers to gather information or request documents, search premises and inspect items on premises, and secure documents or electronic equipment found on premises.

5.3. The Commissioner will also hold powers to take information (and presumably ask questions) under oath or affirmation. An individual will not be excused from answering any questions or producing any document in order to comply with a request from an ACNC officer on the grounds that complying may incriminate the individual or expose the individual to a penalty. And the Commissioner is able to delegate these powers and functions in accordance with this Bill

5.4. Whilst HIA understands these provisions are similar to the respective powers provided to ASIC and the ACCC under the *Corporations Act 2001* and *Competition and Consumer Act 2009*, HIA notes the contrast with powers under the recently enacted *Fair Work (Building Industry) Act 2012.* Under that Act the Government went to significant lengths to provide circumscribed power for the new construction industry regulator to issue examination notices, requiring not only that such powers must be exercised by the Director of Fair Work Building alone but also that examination notices can only be issued following application to the Administrative Appeals Tribunal.

5.5. In establishing a new independent regulator with such expansive powers in relation to charities and not for profit organisations, mainly staffed by philanthropic volunteers, whilst curtailing similar powers for the regulator responsible for policing industrial militancy in the building industry, the Government's approach to these issues appears quite inconsistent.

5.6. HIA further notes that under the *Fair Work (Registered Organisations) Act 2009*, which regulates trade unions and other registered industrial associations, that whilst sanctions apply to persons failing to give information or knowingly or recklessly giving false or misleading information to the Manager of Fair Work Australia conducting investigation in accordance Section 335, there is no power for the Manager to require such information to be given under oath. Yet this Bill allows the Commissioner (or a Delegate) to require information to be provided under oath, with the threat of perjury charges being laid if, for example, the treasurer of the local Parents and Citizens association gives incorrect information in relation to their audited accounts.

5.7. Overall, HIA considers that the Bill is significantly flawed, and should be withdrawn and re-drafted to give effect to the principles outlined above.

Housing Industry Association Limited

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