



Senate Economics Legislation Committee

Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014

19 January 2015



Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Dr Dermody

Inquiry into the Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (Cth) (*the Bill*)

Thank you for the opportunity to provide a submission on the Bill. The Australian Charities and Not-for-Profits Commission (**ACNC**) is the national regulator of charities and currently regulates approximately 7,500 charities that are registered with ASIC. Most of these charities are companies limited by guarantee (**CLGs**). One of the legislative objects of the ACNC is to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector, and we have prepared this submission in furtherance of this object.

We have confined this submission to the parts of the Bill relating to the current requirement that a public company (including a CLG) appoint an auditor, as these provisions affect certain registered charities. We understand that the intent of the Bill is to remove this requirement where a CLG is not required to prepare audited financial reports, thereby reducing unnecessary regulatory burden. However, we are concerned that the Bill, as it is currently drafted, will not have this intended effect of reducing red tape for a significant number of CLGs that are charities registered with the ACNC (**Charitable CLGs**).

This is because the Bill does not take into account the interaction between the *Corporations Act 2001* (Cth) (**the Corporations Act**) and the *Australian Charities and Not-for-Profits Act 2012* (Cth) (**ACNC Act**). Consequently, despite the proposed amendments, many Charitable CLGs will still be required to appoint an auditor under the Corporations Act, even though they are under no obligation to prepare audited financial reports. The technical detail about this is explained in Appendix 1.

We note that the Government has stated that it intends to abolish the ACNC. If this occurs, and regulatory arrangements for Charitable CLGs return to ASIC, the issues outlined in Appendix 1 may no longer exist. However, given that the timing of any abolition is not clear, we recommend that the Bill be amended to take account of the current arrangements for Charitable CLGs. If at a later time, the ACNC is abolished, there will need to be legislation which deals with the changes made to the Corporations Act in any event, and this legislation could therefore easily deal with the changes recommended in Appendix 1.

This approach would ensure that Charitable CLGs are not, for any period, subject to more red tape and unnecessary regulatory burden than their non-charitable counterparts. Such an approach would be in line with the Government's deregulation agenda.

We would be very happy to provide any further detail required by the Committee.

Sincerely

Susan Pascoe AM
Commissioner, Australian Charities and Not-for-profits Commission

Appendix 1

Changes to the Corporations Act for Charitable Companies

The *Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Act 2012* (Cth) added a new section (section 111L) to the Corporations Act. This section states that a number of listed provisions in the Corporations Act do not apply to a body corporate that is registered under the ACNC Act (with limited exceptions). The effect of this section is to 'switch off' a number of obligations under the Corporations Act for Charitable CLGs, including the financial reporting requirements. At the same time, broadly similar obligations now apply to Charitable CLGs under the ACNC Act.

It is important to note that although Charitable CLGs are no longer subject to the financial reporting and audit requirements in the Corporations Act, they are still subject to the auditor appointment provisions. In other words, although any requirement to prepare audited financial reports is now dealt with in the ACNC Act for Charitable CLGs, the requirement to appoint an auditor is set out in the Corporations Act.

In terms of financial reporting obligations, prior to the ACNC legislation:

- 'Small companies limited by guarantee' (as defined in the Corporations Act) were not required to conduct an audit or review.
- CLGs that did not fall within this definition, but had annual revenue of less than \$1 million were only required to have their accounts reviewed.

These two categories are broadly similar to the categories under the ACNC Act of 'small' and 'medium' registered entities and the reporting obligations are similar to those that were required under the Corporations Act.

Importantly, the definition of 'small registered entity' under the ACNC Act is broader than the definition of 'small company limited by guarantee' under the Corporations Act. Therefore, more CLGs have reduced financial reporting obligations now that they are regulated under the ACNC Act, as compared to when they were regulated under the Corporations Act. As described below, this difference creates a gap in the class of companies that can benefit from the auditor appointment exemption proposed by the Bill.

Application of the proposed changes to Charitable CLGs

The Bill proposes to insert subsection 327A(1A) into the Corporations Act to exempt the following companies from having to appoint an auditor within one month of registering as a company:

1. CLGs whose directors reasonably believe that subsection 301(3) will apply to the company's financial report (Medium CLGs); or
2. small companies limited by guarantee (Small CLGs).

Similarly, the Bill proposes to insert subsection 327B(1) which exempts a company from having to appoint an auditor at an AGM if:

1. subsection 301(3) applies to the company's financial reports (Medium CLGs); or
2. it is a small company limited by guarantee (Small CLGs).

Medium CLGs - Revenue of less than \$1 million

Subsection 301(3) applies to certain types of CLGs that have a revenue or consolidated revenue of less than \$1 million (for convenience, referred to here as 'Medium CLGs'). Under that subsection, Medium

CLGs can choose to have financial reports reviewed rather than audited. The effect of the proposed amendments is that a Medium CLG does not have to appoint an auditor.

However, if that CLG is also a registered charity, it will have to appoint an auditor under the Corporations Act, even with the proposed changes.

This is because section 301(3) appears in Part 2M.3 of the Corporations Act which no longer applies to charitable CLGs. Therefore subsection 301(3) could not be said to apply to the Charitable CLG's financial report, as that provision does not apply to Charitable CLGs. As such, these Charitable CLGs could not fall within the first class of companies subject to the exemption (ie, Medium CLGs).

These companies would still have to appoint an auditor under the Corporations Act, even though they are only required to have a reviewed financial report under the ACNC Act.

Small CLGs

Under the Corporations Act, Small CLGs as defined in that Act, do not need to have their accounts audited unless specifically requested to do so. The proposed changes would mean that Small CLGs would not be required to appoint an auditor.

As with the definition of 'small registered entity' under the ACNC Act, Small CLGs must have an annual revenue of less than \$250,000. However, there are differences between the two definitions. Most relevantly, a Small CLG, unlike a 'small registered entity' cannot be a deductible gift recipient (**DGR**).

This means that a Charitable CLG that has an annual revenue of less than \$250,000, but is a DGR will not be required to produce either audited or reviewed financial reports under the ACNC Act. At the same time, this company would not fall within the definition of 'Small CLG' (since it is a DGR) and would therefore not be exempt from the auditor appointment provisions under the proposed changes.

Again, this illustrates a situation where the proposed changes do not meet the policy objective of removing the burden of appointing an auditor in a situation where an auditor will not be required.

Proposal

In order to fully achieve the policy intent of the proposed changes for Charitable CLGs we recommend that an additional exemption be provided in sections 327A(1A) and 327B(1A) to account for CLGs that are (or will become) registered charities, and would or do fall within the definition of 'small' or 'medium' registered entity under the ACNC Act.

For example, the proposed section 327B(1A) could be amended to include two additional categories:
(c) the company is a 'small registered entity' under the ACNC Act; or
(d) the company is a 'medium registered entity' under the ACNC Act.

This would ensure that Charitable CLGs benefit from the same red tape reduction as non-charitable CLGs.