

## House of Representatives Standing Committee on Economics Inquiry into the ACNC Bill 2012 *Supplementary Comments – 1 August 2012*

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### 1. Introduction

This document sets out some supplementary comments from the Australian Institute of Company Directors (Company Directors) on the Australian Charities and Not-for-profits Commission Bill 2012 (the Bill). These comments should be read in conjunction with our submission dated 20 July 2012 to the House of Representatives Standing Committee on Economics (the Committee).

Company Directors remains of the view that there are significant problems with the Bill, including:

- the intention to leave the development and passage of fundamental requirements for charities such as reporting requirements, governance standards and external conduct standards to a regulation-making power. (This is particularly problematic, given that compliance with aspects of these standards may determine whether the charity can remain registered or a director can continue to act);
- the heavy-handed nature of responsibilities, particularly as they relate to volunteers;
- the complexity of provisions;
- the tight and inappropriate shoe-horning of different organisational forms into the one framework; and
- the absence of details around how the Bill is intended to interact with existing legislation governing charities (e.g. Corporations Act, Incorporated Associations Acts, Trustee Acts).

**We feel strongly that further consultation on the Bill and related amendments is required.** We believe this consultation should include consideration of how the Bill might best be structured. We are of the view that one option which should be canvassed is whether it is better to adopt a “chapter” based approach in the Bill in relation to each main category of organisational form adopted by charities (e.g. companies limited by guarantee, incorporated associations, unincorporated associations, charitable trusts, others). An example in this regard is provided by the Charities Act 2011 (UK). We would envisage that the front of the Bill contain the powers of the ACNC and the requirements which will be common to each organisational type. This would be followed by “chapters” in the Bill which set out the requirements that will need to differ for each category of organisational form, as a result of their legal structures. For example, the chapters relevant to each entity would, amongst other things, include the matters currently contained in Division 180 of the Bill, with appropriate modifications.

We are of the view that a number of key aspects of the Bill should be modelled on the Corporations Act rather than the Taxation Administration Act or prudential regulation. We set out below, by way of illustration, some comments as to how the Bill should apply to public companies limited by guarantee. In addition we draw the Committee’s attention to key aspects of how public companies limited by guarantee are currently regulated and thereby highlight a number of problems with the Bill as it applies to these companies.

## 2. Obligations

- For charities that are companies there must be a clear distinction between the obligations of the company and the responsibilities of the directors.
- Section 180-5(1) of the Bill should be re-drafted so as to not pierce the corporate veil.
- As a starting point the obligations in the Bill should be the obligations of the *company*, not the director (except in very limited and well-defined circumstances).

*Table 1 sets out some of the differences between the way obligations are generally imposed on public companies limited by guarantee and the position adopted in the Bill.*

**Table 1**

| Comments on Public Companies Limited by Guarantee                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Examples of problems with the Bill                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
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| <ul style="list-style-type: none"> <li>• Once incorporated the company is a legal person and has all the powers of a body corporate and a natural person (section 124 Corporations Act 2001 (C'th)).</li> <li>• The company is overseen by directors. However, the directors, in law, are separate legal persons from the company.</li> <li>• The legal requirements (or obligations) that govern the activities of the company are set out in the Corporations Act. A clear distinction is made between what the company must do and what the directors must do.</li> <li>• The directors as separate legal persons owe duties to the company. Directors have statutory duties and duties at common law. The statutory duties include: <ul style="list-style-type: none"> <li>- A duty to act with care and diligence (s 180 of the Corporations Act)</li> <li>- A duty to act in good faith in the best interests of the company and for a proper purpose (s 181 of the Corporations Act)</li> <li>- A duty not to use their position to gain an advantage for themselves (s 182 of the Corporations Act)</li> <li>- A duty not to use information obtained in the course of their directorships to gain an advantage for themselves (s 183 of the Corporations Act).</li> </ul> </li> <li>• Directors of companies limited by guarantee may rely on the information, or professional or expert advice given by employees, professional advisers, officers and committees, if certain criteria are met (s 189 of the Corporations Act).</li> <li>• Sections 198D and 190 of the Corporations Act</li> </ul> | <ul style="list-style-type: none"> <li>• Section 180-5(1) of the Bill gives the directors the <i>same obligations</i> as the company. Section 180-5(1) therefore has the effect of piercing the corporate veil. In other words, the section fails to appreciate the legal effect of incorporation, in that upon incorporation the company becomes its own legal person separate from its directors.</li> <li>• Section 180-5(1) makes no distinction between the obligations or legal requirements of the company (as a legal person) and the obligations of the directors (as separate legal persons). As such there is no distinction between what the company must do and what a director must do.</li> <li>• It is unclear how the Bill will interact with the legal requirements for public companies limited by guarantee already set out in the Corporations Act. In particular, it is unclear whether the Bill intends to include directors' duties (in lieu of the duties currently set out in the Corporations Act) or whether the duties under the Corporations Act will continue to apply.</li> <li>• No express provisions relating to reliance or delegation are included in the Bill. By: <ul style="list-style-type: none"> <li>- failing to include reliance and delegation provisions;</li> <li>- failing to clarify whether the Corporations Act still applies; and</li> <li>- giving the directors the same obligations as the company,</li> </ul> it does not appear that directors will be able to rely on the advice of others or to delegate to others in the same way that they are able to </li> </ul> |

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| allow directors to delegate their powers. | under the Corporations Act. This places onerous obligations on the directors of charities. |
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### 3. Liability & Offences

- The liability provisions in the Bill should be drafted so that they are clear, straightforward and easily understood.
- The content of any obligation or duty which creates a liability or attracts an offence should be included in the legislation and not left to the Regulations (e.g. if it is proposed to include any directors duties in the regime, similar to those in sections 180 to 184 of the Corporations Act, these duties should be included in the Bill and not left to the Regulations). The use of regulation-making powers will mean that fundamental aspects of the regime are not the subject of parliamentary scrutiny or debate.
- The Bill should make clear:
  - a) the circumstances where the company could become liable for a contravention of the Bill; and
  - b) the very limited circumstances where the directors could become liable for a contravention of their responsibilities under the Bill.
- The Bill should make clear whether a particular breach attracts civil liability or criminal liability.
- Before the liability and offence provisions in the Bill can be re-drafted and finalised:
  - a) all of the obligations (including any director's duties, external conduct standards, governance standards and reporting requirements); and
  - b) the intended interaction of the Bill with the Corporations Act,
 must be set out and opened for public consultation.
- The Bill should impose less onerous liabilities upon directors that act in a volunteer capacity (see section 5 below).

*Table 2 sets out how civil and criminal liabilities are generally imposed on directors of public companies limited by guarantee and the position taken in the Bill.*

**Table 2**

| Comments on Public Companies Limited by Guarantee                                                                                                                                                                                                                                                                                                                                                                                                                     | Examples of problems with the Bill                                                                                                                                                                                                                                                                                                                                                     |
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| <p><i>Civil Liability</i></p> <ul style="list-style-type: none"> <li>• Directors who breach <i>their</i> duties (not the company's obligations) under Corporations Act may be subject to civil liability. Once a breach has been proven on a civil standard of proof, the Court will make a declaration of contravention and may make: an order for the payment of a civil penalty order, a compensation order, or a disqualification order (as examples).</li> </ul> | <p><i>Civil Liability</i></p> <ul style="list-style-type: none"> <li>• It appears, although it is not clear, that s 180-5 (2) of the Bill imposes civil liability on directors for <i>acts of the company</i> in circumstances where, for example, they have acted, dishonestly, with gross negligence or recklessly.</li> <li>• The Bill mixes the concepts of "liability"</li> </ul> |

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| <ul style="list-style-type: none"> <li>• “The civil penalty provisions of the Corporations Law were the outcome of recommendations by reformers who thought that directors and others who contravene the corporations legislation should not be branded as criminals unless they have acted dishonestly.” (See <i>ASIC v Rich</i> [2009] 75 ACSR 1 at 105).</li> <li>• The distinction between civil and criminal contraventions is important because it determines the standard of proof that must met by ASIC in order to prove a contravention.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <p>and “an amount payable under the Act.”</p> <ul style="list-style-type: none"> <li>• It is unclear how the liability provisions in the Bill are intended to interact with the Corporations Act.</li> <li>• One circumstance where an amount is payable by directors is if there is a “deliberate act or omission”. This wording would include all honest and appropriate acts or omissions undertaken by the directors.</li> <li>• The liability provisions (by trying to fit a range of charitable structures under their umbrella) are unnecessarily complex and require consideration of the “covered entity” definitions to determine who they apply to. Liability provisions should be drafted in a manner that is clear and straightforward.</li> </ul>                                                                                                                                                                                                                                                           |
| <p><i>Criminal Liability</i></p> <ul style="list-style-type: none"> <li>• Directors may be criminally liable for breaching duties of good faith, use of position and use of information where, for example they are reckless or intentionally dishonest. (For greater detail see s 184 of the Corporations Act).</li> <li>• Outside of the Corporations Act, some legislation (including state and territory legislation) makes directors personally criminally liable for acts of the company in particular circumstances. The issue of personal criminal liability for corporate fault is currently a reform priority under the <i>COAG National Partnership to Deliver a Seamless National Economy</i>.</li> <li>• To assist the COAG reform process the Australian Institute of Company Directors provided a model for reforming provisions imposing personal criminal liability on directors for corporate fault. This model is available on our website.<sup>1</sup> We are of the view that directors should only be subject to criminal liability for corporate fault in limited circumstances. Those circumstances are determined when all of the Company Directors’ principles (set out in the model) have been met. If a provision imposing personal criminal liability on directors for corporate fault is found to be necessary, then the type of provision inserted should be an accessorial liability provision (aiding, abetting etc.) or the Company Directors’ model provision (set out in the model for reform).</li> </ul> | <p><i>Criminal Liability</i></p> <ul style="list-style-type: none"> <li>• It appears, although it is not clear, that section 180-20 imposes criminal liability upon directors for particular acts of the company (i.e. non-compliance with a direction given by the ACNC Commissioner).</li> <li>• Whilst it is appropriate that blanket liability has not been imposed on company directors for all acts of the company, any provision that imposes criminal liability on an individual for acts of the corporation needs to be clear.</li> <li>• The offence provisions (by trying to fit a range of charitable structures under their umbrella) have made the drafting overly complex, use terminology that is inconsistent with a person’s understanding of their directorial role, require significant cross-referencing to determine whether a person is a director of a “covered entity”, and include different standards of criminal liability depending upon the type of entity the person serves on.</li> </ul> |

<sup>1</sup> See our submissions to Federal Treasury dated 30 March 2012 and 28 June 2012 on the Personal Liability for Corporate Fault Reform Bill 2012 (C’t’h) available at <http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions>.

#### 4. Suspension & Removal

- A director of a charity should not, prima facie, be removed from office unless this occurs by way of court order.
- In some very limited circumstances, directors could be automatically disqualified from acting as a director of a corporate charity.

*Table 3 sets out the approach taken to the removal and suspension of directors for public companies limited by guarantee and the position taken in the Bill.*

**Table 3**

| <b>Comments on Public Companies Limited by Guarantee</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>Examples of problems with the Bill</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| <ul style="list-style-type: none"> <li>• Pursuant to the Corporations Act, the majority of powers to disqualify directors are given to Courts. Courts for example, may disqualify directors on application by ASIC for: <ul style="list-style-type: none"> <li>- a contravention of a civil penalty provision (s 206C of the Corporations Act)</li> <li>- corporate failures relating to insolvency and the non-payment of debts (s 206D of the Corporations Act);</li> <li>- repeated contraventions of the Act (s 206E of the Corporations Act); and</li> <li>- disqualification under a law of a foreign jurisdiction (s 206EAA of the Corporations Act).</li> </ul> </li> <li>• ASIC has limited powers to disqualify directors pursuant to section 206F of the Corporations Act.</li> <li>• A person will only be automatically disqualified from managing a corporation under the Corporations Act where the person: <ul style="list-style-type: none"> <li>- is convicted of particular offences; or</li> <li>- becomes an undischarged bankrupt or has executed a personal insolvency agreement.</li> </ul> </li> </ul> <p>(See in more detail section 206B of the Corporations Act).</p> | <ul style="list-style-type: none"> <li>• The Bill gives the Commissioner wide powers to suspend or remove directors of charities. While there are some limitations on the use of the Commissioner's powers, the main circumstances where the ACNC Commissioner can suspend or remove a director include where the Commissioner reasonably believes that the registered entity: <ul style="list-style-type: none"> <li>- has contravened or is likely to contravene a provision of the Bill;</li> <li>- has not complied or is likely not to comply with a governance standard; or</li> <li>- has not complied or is likely to not comply with an external conduct standard.</li> </ul> </li> <li>• Generally the suspension or removal of a director relies on the view of the ACNC Commissioner rather than a Court.</li> <li>• It is unclear how the Bill intends to interact with the disqualification provisions of the Corporations Act.</li> </ul> |

#### 5. Safe Harbour for Volunteer Directors

We believe that an important policy objective of the NFP reforms should be to encourage volunteerism. We have previously noted that a high proportion of directors in the NFP sector serve on a voluntary basis. As a starting point these directors should be supported in their efforts. With this in mind, we believe as a matter of principle that there should be an explicit carve-out or safe harbour from liability (across all relevant Acts imposing liability on a charity director) where a director of a charity serves on a voluntary basis.

We accept there would need to be some limitation on the extent of the carve-out, such as where the director has been involved in a criminal act. In this regard, we note exclusions from liability that exist in various Acts, including the Civil Liability Act 2002 (NSW) (see Part 9 of that Act). Again, however, we would emphasize that these issues should be the subject of full and proper public consultation.

**The comments above are illustrative only and not intended to be exhaustive. We are strongly of the view that the Bill requires substantial re-working. All of the issues above (and others) need to be carefully considered and be the subject of transparent and extensive consultation before any aspect of this Bill proceeds.**