

**COVER PAGE**

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**Response to Options Paper:**

Please see attached letter.

20 August 2014

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## **Options Paper – Australia’s Charities and Not-for-profits**

The Australian Institute of Company Directors (Company Directors) welcomes the opportunity to comment on the Options for Replacement Arrangements following the abolition of the Australian Charities and Not-for-profits Commission (ACNC).

Company Directors is one of the two largest member-based director associations worldwide, with over 35,000 individual members from a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations (NFPs), 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 on current director issues in policy debates. Our goal is to improve the quality of governance for the betterment of the economy and society, and our leadership approach in the NFP sector supports this goal.

The NFP sector continues to be a priority focus area for Company Directors. Our activities 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 numerous submissions, which we have developed in consultation with our membership. We estimate that over 50 per cent of our members hold at least one directorship of an NFP, with many holding multiple roles. Thus we represent the views of over 50,000 NFP directorships.

An example of our commitment to the sector was the development of the “NFP Governance Principles and Guidance” in June 2013 which remains our most downloaded resource from our website. The extensive consultation on this guide reflected the diversity of the NFP sector and the need to ensure that, as a society, we support and nurture the organisations and individuals who are making such a difference to the lives of every Australian.

### **Summary**

When governments pursue a regulatory reform agenda, at the core of this should be the pursuit of improved outcomes for those concerned.

In this instance, it is clear that not only do the proposed options fail to deliver a better outcome but, in some instances, they will potentially increase the regulatory burden for charities.

Since the commencement of the NFP Reform in 2010/2011 and through a range of submissions, Company Directors has consistently repeated its view that the charity sector (and the broader NFP sector) would benefit from:

1. An independent national regulator.
2. A reduction of red-tape.
3. A harmonisation of Federal, State and Territory regulations.

4. A “one-stop-shop” for reporting to government(s).

While we recognise that the Government has stated its intention to abolish the ACNC, we do not see how its abolition, nor any of the options outlined in this paper, will assist in achieving the outcomes above.

We recognise that while the ACNC had also not yet achieved those outcomes, we believe that it was at least on a path to achieving them.

We also recognise a “weariness” across the sector about dealing with another range of reforms. There is a great deal of confusion with the current proposals for reform of charity regulation and this could be greatly reduced if each of the elements were completed simultaneously, as opposed to separate exercises.

In particular, the separate consultations regarding this Options Paper on the abolition of the ACNC and proposed Centre of Excellence (COE) is causing significant confusion. Given how closely these consultations interact, it is difficult to provide substantive feedback on one without knowing the outcome of the other. Examples of this confusion are provided later in this submission.

Although detail set out in the Options Paper is severely lacking, our specific comments on the proposals follow.

### **Proposed New Reporting Arrangements**

In our view, the proposed self-reporting standards neither reduce the regulatory burden for charities nor enhance public accountability in the sector.

Many smaller charities do not have the resources or expertise to create their own website for the purpose of reporting. Organisations may also be required to seek costly external advice on what level of reporting is appropriate.

One benefit of the existing Annual Information Statement (AIS) required by the ACNC, is that smaller charities simply lodge this form once a year and their information is placed on a public register, thus, removing the need for them to maintain their own website.

In addition, the AIS provides for a standardised level of reporting across the sector. Under the proposed self-reporting model, this standard will be removed and could lead to greater confusion for the public trying to source information on charities. It was this standardisation of publically accessible information that has, in part, led to enhanced transparency of the sector.

A specific area of increased burden will occur for non-reporting charities which, following clarification by the ACNC, do not have to apply IFRS/AASB recognition and measurement rules. A return to an ASIC regime will see these requirements reinstated unless ASIC is prepared to offer relief to charities.

Most importantly, the proposal does nothing to reduce the duplication in reporting that organisations face due to differing requirements across federal and state governments, agencies and departments.

The Government should clarify who is being tasked with removing this duplication, as this is unclear in the current proposals.

### **Determining Charitable Status**

In relation to the Government’s commitment to ensure independence in the decision-making process for the determination of charitable status, we believe a ‘hybrid’ of the two administrative options is preferable.

Greater independence of the decision-making process will enhance confidence; however this needs to be done within cost-efficiency parameters. In our view, option one, while noble, would seem a very costly exercise.

It should be noted that when consulting with our members on the Options Paper, many have made mention of the critical role the ACNC currently plays in supporting and guiding organisations applying for charitable status.

The Government should consider how this support and guidance could continue in any alternative model.

### **Proportionate Compliance Framework**

In our view, returning directors' duties, governance standards and obligations on charities back to either the *Corporations Act, 2001* or reverting to state-based Incorporated Associations Acts, does not represent a better outcome for directors and their organisations.

The directors' duties and responsibilities arrived at under the ACNC legislation were the result of considerable consultation with the sector and offered appropriate protections for directors who, for the most part, perform their role voluntarily and often without much executive support.

If directors' duties return to arrangements under the *Corporations Act 2001*, strong consideration needs to be given to how NFP directors (acting honestly and with an appropriate degree of care and diligence) can be protected from the risk of personal liability, so as to not discourage their contribution.

One way to do this is by inserting an overarching Honest and Reasonable Director Defence<sup>i</sup> into the *Corporations Act*. This will provide the kind of safe harbour that directors need, and will allow them and their boards to focus on the strategic best interests of the charity without potential personal liability being at the forefront of their minds.

### **Transitional Arrangements**

The Government should reconsider the timelines for this reform and ensure all of the relevant consultations, such as the proposed COE, are occurring simultaneously. Unless this occurs the level of uncertainty will only increase and the Government's outcomes will not be achieved to the great detriment of not only the sector but the Australian economy and society as a whole.

By way of example, at the Sydney consultation for this Options Paper on 23 July 2014 many participants raised aspects of the ACNC they would like to remain under an alternative regime, such as a public register of charities. The response from members representing the Department of Social Service at this consultation was that if there was a strong desire to keep this register, it could be a function of the proposed COE.

Subsequently at the proposed COE consultation in Sydney on 13 August 2014, it was widely argued that this was not a role for the COE as they would not have the data necessary to maintain it because charities will no longer be required to complete an AIS.

It is examples like these that highlight the dangers and flaws of conducting regulatory reform in such a disjointed way and reflect very poorly on the Government and lead to a loss of confidence by the sector.

More detailed consultation is required on many of the questions raised by the abolition of the ACNC, as well as a more holistic approach to a variety of issues that are being discussed in the various consultations that have recently taken place, are currently underway or foreshadowed to occur in the near future.

More consideration should also be given to transitional provisions, especially where the proposed requirements (e.g. financial reporting) are more onerous than those that apply under the current regime, and/or where expected red tape reductions from other regulatory agencies are yet to occur.

### **A way forward**

We understand the Government has made a commitment to abolish the ACNC. While we do not agree with this approach, we would strongly encourage the Government to maintain elements of the ACNC that were delivering improved outcomes for the sector. The Government could look at regulation of charities in other jurisdictions (e.g. Canada and the UK) to see examples of 'light-touch' regulators that either 'nest' within a government agency or are totally independent of another agency.

It is important that the considerable amount of consultation and work that has gone into the current regulatory model is not undone or wasted.

We believe the Government could achieve its commitment to abolish the ACNC, and still improve outcomes for the sector, if features of the current regime are maintained. Specifically:

- Directors duties and governance standards in the *ACNC Act 2012* that offer protections for volunteer directors are retained.
- A central reporting mechanism to government is established.
- A charities register that provides valuable information for a range of stakeholders is developed. It should be recognised that data collected on the charities register is a valuable source for research and policy development in the NFP sector.
- A firm commitment is made and upheld to create an agency/organisation tasked with harmonising, across jurisdictions all laws impacting the NFP and charity sector.

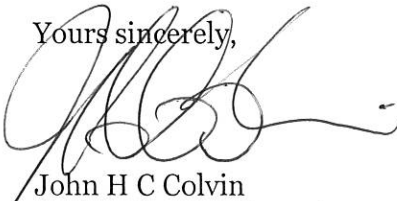
### **Conclusion**

Company Directors is committed to its long-term goal of working to improve the quality of governance in NFP organisations. Similarly, we are committed to working with governments at all levels to ensure that the regulatory and reporting framework is appropriate for this highly diverse and vitally important sector.

We believe the Government needs to urgently and fundamentally reconsider its current approach of disjointed and confidence sapping consultation to achieve a better outcome for the sector.

We hope that our comments will be of assistance to the Committee. Please do not hesitate to contact myself or Matt Pritchard, Communications Advisor, on (02) 8248 6627 if you would like to discuss this submission further.

Yours sincerely,



John H C Colvin  
CEO and Managing Director

<sup>i</sup> The Honest and Reasonable Director Defence – a proposal for Reform, Australian institute of Company Directors, August 2015 available at [www.companydirectors.com.au](http://www.companydirectors.com.au)