

21 May 2020

The Hon. Dr Gary Johns  
Commissioner  
Australian Charities and Not-for-profits Commission  
GPO Box 5108  
Melbourne Vic 3001

Via email: gary.johns@acnc.gov.au

Dear Commissioner

**Re: COVID-19: Insolvent trading safe harbour and ACNC notification requirement**

I am writing in relation to the challenges that charities are facing due to the COVID-19 crisis and the need to ensure that charities benefit from the same regulatory relief afforded to for-profit businesses.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 45,000 including directors and senior leaders from business, government and the not-for-profit (**NFP**) and charities sectors. The AICD is regularly updating our substantial NFP membership on support and regulatory measures announced during the crisis, and drawing on the sector for insights on priority issues and challenges.

I acknowledge and applaud the ACNC's response to the COVID-19 pandemic. In particular, we welcome the practical steps that the ACNC has taken to ensure charities are not overburdened at this time, including the blanket extension to Annual Information Statement submissions and the extension of the insolvent trading relief to charities.

At this time of significant hardship for many, communities and individuals are utilising charities' support more than ever. Accordingly, government and regulators should ensure that regulatory settings do not run counter to charities' efforts to assist those vulnerable people impacted by COVID-19.

With that in mind, we are concerned by the ACNC's requirement that a charity which is trading while insolvent is still required to notify its members and the ACNC of that occurrence. We suggest that the obligation to notify members and the ACNC be removed for the reasons outlined below.

In particular, we consider that the continued application of this obligation runs counter to the policy objectives of the insolvent trading changes to the Corporations Act which are designed to encourage organisations to trade through the current crisis. Relevantly, companies that are trading while insolvent are not

required to advise their shareholders (or members in the case of companies limited by guarantee), nor indeed ASIC. There is no clear policy rationale for charities to be held to a different standard.

The implications of a charity notifying its members are significant, particularly given the extent to which charities depend on member support to ensure their continued viability. Once it became commonly known that a charity was trading while insolvent, its prospects of continuing its operations with the support of stakeholders (e.g. members, suppliers, clients, lenders, donors) support would be severely limited. Faced with making such notifications, it is expected that many charities would opt to commence winding up procedures. Indeed, in many cases it is likely to be unclear whether an organisation is trading while insolvent, given the uncertainty generated by COVID-19 will make it difficult to assess whether debts will be able to be paid as and when they fall due.

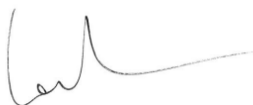
This is not to say that directors of charities should recklessly accrue debts in futile attempts to avert their organisations' insolvency. While we appreciate that the Corporations Act duties do not directly apply to directors of charities, the AICD has emphasised in updates to members that the insolvent trading relief does not extend to fundamental directors' duties (both statutory and common law), including the duty to act in good faith in the best interests of the company (which requires directors to consider the interests of its creditors where the company is approaching insolvency). We have also stressed that directors will need to exercise careful judgment in deciding whether their organisation should accrue additional liabilities at a time when the ongoing solvency of the organisation is questionable. This applies regardless of any obligation to notify members and the ACNC.

### **Next steps**

For the reasons outlined, we are of the view that the notification requirement is not necessary and stand ready to work with the ACNC to find a solution that satisfies the ACNC and does not hinder the ongoing viability of many charities.

If you would like to discuss any aspect of this letter further, please contact Christie McGrath – Senior Policy Adviser at [cmcgrath@aicd.com.au](mailto:cmcgrath@aicd.com.au) or on 0452 302 354 or me directly on [lpetschler@aicd.com.au](mailto:lpetschler@aicd.com.au).

Yours sincerely



**Louise Petschler GAICD**  
General Manager, Advocacy