

ACCESS INDUSTRIES

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24 January, 2012

Dear Sir/Madam,

NFP REFORM
SUBMISSION BY ACCESS INDUSTRIES FOR THE DISABLED LIMITED (ACN: 001 797 511)
EXPOSURE DRAFT OF AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS BILL 2012
CONTENT ID: 2263

The Board of Directors of Access Industries for the Disabled Limited welcomes the opportunity to review and offer comment on the exposure draft of the *Australian Charities and Not-For-Profits Commission Bill 2012*.

Access Industries is a registered not-for-profit Company, limited by Guarantee. The organisation was established in April 1949, initially as a self-help group, by several people with physical disabilities. In subsequent years the organisation grew and expanded, at various times establishing a variety of different service models including what were originally referred to as *sheltered workshops*, and a residential hostel at Dulwich Hill in Sydney. In doing so, the organisation extended its services to respond to the needs of a wider cross-section of people with disabilities including: people with intellectual disability, various sensory impairments, epilepsy, and acquired brain injury, amongst others.

Today, the organisation provides supported employment opportunities (including direct employment, employment-related training, and personal support) for about 250 people with disabilities through four *Australian Disability Enterprises (ADEs)* located in the Sydney Metropolitan Area (at Seven Hills and Erskine Park), at Hamilton (Newcastle) and at Lithgow. The organisation also provides support and assistance to around 300 people with disabilities who are employed in (or seek to gain employment in) the open labour market through our funded DES (i.e. Disability Employment Service), Equal Access, which is based at Campsie in the Sydney Metropolitan Area. Our ADEs receive Commonwealth Funding from the Department of Families, Housing, Community Services and Indigenous Affairs, whilst Equal Access receives funding from the Department of Education, Employment and Workplace Relations.

Access Industries has been acknowledged as a not-for-profit, charitable organisation by the Australian Tax Office, and receives a range of tax benefits as a result.

In carrying out our primary Mission to provide assistance for people with disabilities in employment related areas, Access Industries remains faithful to its original philosophy of being a service for people with disabilities, controlled by people with disabilities. In this context, our Memorandum & Articles of Association require that a simple majority of the Board of Directors must at all time involve Directors who have a disability, while not less than two-thirds of our Voting membership must be comprised of persons who have a disability.

Thus, any proposed changes to legislation which might have an impact on our organisation, or its ability to continue to provide services for people with disabilities, is of vital interest to us.

Comments on Exposure Draft: Australian Charities and Not-for-Profits Commission Bill 2012:

The Board of Directors acknowledges and supports the intent of the proposed Australian Charities and Not-For-Profits Commission (ACNC). The potential for the ACNC to improve the operational framework for charities and not-for-profit organisations is acknowledged and welcomed, as is the intention to strive for a significant reduction in the administrative red tape that accompanies the currently fragmented arrangements and very individualised and detailed reporting requirements imposed by various government departments and programs.

Having said this, there is one area of the exposure draft which does give us some in principle concerns in terms of natural justice and possible future administrative problems. This involves aspects of **Chapter 4 – Regulatory powers of the ACNC**, and in particular those sections at **Division 120** dealing with **Investigation Powers**.

Access Industries acknowledges and accepts that the ACNC needs to have the power to investigate possible breaches or alleged breaches of the Act, and to require an entity to “give to the Commissioner any information that the Commissioner requires for the purposes of the administration or application of (the) Act in relation the entity or any other entity.” (**120-10 Commissioner’s power.**)

Our concern is that, while **Section 120-100 General powers of investigation** appears to impose some reasonable constraints on what can be investigated legitimately (i.e. contraventions of the Act, contraventions of an Australian law that concerns the management or affairs of a registered entity or involves fraud or deception), we are concerned that **there does not appear to be a legislatively prescribed requirement** that the Commissioner ,(or his delegate) must inform the entity of the purpose of the investigation and/or its basis.

This appears to be a significant omission, which in principle appears to involve a denial of natural justice.

A corollary to this basic concern then arises in relation to **Division 120-415 Inspection powers of ACNC officers**. As presented in the Exposure Draft these currently appear to give ACNC officers completely unfettered powers in terms of carrying out investigations.

We would have thought that:

- a) Any investigation should be constrained by the ambit of the proposed legislation, and the powers afforded to the Commissioner under the Act.
- b) Natural justice would surely require that before an Investigating officer could, or indeed should, commence an investigation (i.e. seeking access to documentation and electronic records, taking copies of such records etc), that the entity should have a right to be informed of the purpose of the investigation, (i.e. the issue or allegation that has given rise to the investigation: though not necessarily the source of that allegation). We accept that under extreme circumstances this might compromise an investigation, and perhaps special provisions could be made for exceptions in the case of suspected criminal behavior, but as a general rule one would have thought that this should rarely apply.
- c) The entity should be provided with an initial right of reply to any allegations.

- d) The powers of inspection detailed at 120-415 should be constrained to the extent that they do not provide a de facto basis for what could constitute little more than a “fishing expedition” that has no basis in any issue of substance, or transcend the legitimate parameters of the ACNC’s legislated powers and responsibilities. They should also be qualified to limit the right to “search the premises and *any thing on the premises*” (including documents and electronic records) to items that are directly relevant to the lawful purpose of the investigation, and exclude documents and records that are not relevant to the investigation, or are covered by generally accepted exclusions (e.g. correspondence between the entity and its legal advisers, confidential information relating to clients of the entity which would in all likelihood be irrelevant to any investigation or – if there was the potential for them to be relevant – ought under existing privacy legislation be subject to agreement by the person concerned before they are released to any third party.)

We would assume that if an entity refused to grant an inspecting officer the right to access the premises, and the officer then sought (under Sub-Division 120-F of the draft legislation) a warrant from a magistrate, the magistrate would require sufficient information to enable him/her to issue a warrant, and would be duty-bound to specify the scope of the warrant. In terms of administrative efficiency, it would seem desirable to minimise the circumstances where a warrant would need to be sought from a magistrate. It is suggested that if the issues raised above are addressed, then both this objective, and the broader principles of natural justice, might be better achieved.

Again, we thank you for the opportunity to comment on the exposure draft.



Michael C Smith
Chief Executive Officer/ Company Secretary
On behalf of the Board of Directors