



Australian Government



Australian
Charities and
Not-for-profits
Commission

24 October 2018

OUR REF: EXT2018/59

Matthew Sedgwick
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

BY EMAIL: regmod@treasury.gov.au

Submission to the Treasury Consultation on the Modernising Business Registers and Director Identification Numbers legislation

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide a submission to the consultation on the Modernising Business Registers and Director Identification Numbers draft legislation (**the Consultation**).
2. The ACNC has made submissions to previous Treasury consultations on the modernising business registers project, in September 2017 and August 2018. This submission builds on those submissions, and focuses on the impact of the exposure draft legislation (**Draft Legislation**) published with the Consultation.

Summary of the ACNC's submission

3. The ACNC generally supports the introduction of the Draft Legislation and the concept of a single platform to replace the Australian Business Register (**ABR**) and existing numerous business registers currently managed by the Australian Securities and Investments Commission (**ASIC**). The general framework provided by the Draft Legislation for the introduction of the platform and the appointment of a registrar (or registrars) appears to be appropriate.
4. However, the ACNC has some concern over the imposition of strict liability offences for directors of charities who do not have a DIN. The ACNC suggests that the penalty be significantly reduced for directors of charities, or amended to give directors of charities greater opportunity to comply with the requirements.
5. The ACNC appreciates that the Draft Legislation is intended only to provide a framework for the platform, to allow it to be flexible and adaptable to particular situations and future developments. However, we note that the operational aspects of the reform will be specified in legislative instruments. It will therefore be important for Treasury to continue to liaise with the ACNC following the enactment of the legislation, to ensure the relevant legislative instruments and business procedures take into account the operational needs of the ACNC and the unique characteristics of the charity sector.





6. As raised in previous discussions with Treasury, the ACNC specifically asks for the opportunity to provide input before key decisions are made relating to:
 - what information is made publicly available by the Registrar in future; and
 - the implementation of the Director Identification Number (**DIN**) scheme.

Penalties

7. The ACNC recommends that penalties for failure of a director to obtain a DIN within 28 days of becoming required to have a DIN be significantly reduced for persons who are only directors of charities. These offences are contained in the proposed section 308-20 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) (carries a maximum 25 penalty units), and section 1233 of the *Corporations Act 2001* (Cth) (**Corporations Act**) (maximum 60 penalty units).
8. The ACNC notes that 67% of charities are small (earning less than \$250,000 in revenue in a financial year), with 40% of charities being extra small (annual revenue less than \$50,000). While these figures are for all charities registered with the ACNC, and therefore not directly applicable to charities covered by the Draft Legislation, the point remains that the majority of charities are small.
9. Most directors of companies that are registered charities are not remunerated for their role on the charity's board, and commonly perform their role in limited time around work and other commitments. Charities are often reliant on donations for their funding, and are frequently run by volunteers who are seeking the betterment of society. One-off volunteer directors of charities are not likely to be involved in phoenixing, but are more likely to be unaware of the requirement to obtain a DIN. Charities already face challenges in finding appropriately skilled personnel to volunteer as directors or similar governance roles. The introduction of large penalties for failing to acquire a DIN within a specified timeframe may make it more difficult for charities to recruit directors and could adversely affect the governance of the sector.
10. The ACNC therefore suggests that the penalty for directors of registered charities for failing to acquire a DIN within the prescribed timeframe be significantly reduced. The ACNC would also encourage Treasury to adequately communicate with the charity sector to ensure all directors are aware of their new obligations.
11. Alternatively, extended timelines for compliance and a warning procedure could be introduced for persons who are directors of charities only (and not also directors of for profit companies), to reduce the risk of one-off volunteer directors of charities incurring significant penalties.

Ensuring ACNC can access information required to perform legislative functions

12. Under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**), the ACNC Commissioner is responsible for maintaining the ACNC Charity Register, which involves the following core functions:
 - determining, upon application, whether entities are entitled to registration as a charity;



- assessing whether registered charities continue to meet the legislative requirements to be entitled to registration as a charity; and
 - receiving, reviewing and publishing information provided by registered charities.
13. In undertaking these functions, examples of relevant information required by the ACNC includes:
- an entity's ABN, name(s) and legal structure;
 - an entity's registration details with other regulators; and
 - the names of the entity's responsible persons (i.e. the persons responsible for the governance of the entity of persons involved with an entity).
14. To obtain and verify information required to maintain the ACNC Charity Register, the ACNC currently regularly uses information available through both the ABR and registries managed by ASIC. The ACNC will also sometimes refer entities to publicly available parts of these registries while performing its role, such as the ASIC banned and disqualified register.
15. The Draft Legislation does not specify the information that will be recorded, or what will be publicly available from the Registrar on the single platform.
16. The ACNC accordingly requests that before any key operational decisions are made on issues relating to the content, access and public availability of the platform, these issues are discussed with the ACNC. This will help ensure that the project will not create practical difficulties for the ACNC or charities in future.

Director Identification Numbers and charities

17. The Draft Legislation sets out the basic framework for the introduction of DINs for directors of all relevant entities. Once implemented, DINs would need to be obtained by directors of charities of the following entity types:
- companies established under the Corporations Act;
 - Incorporated associations registered under section 601CA of the Corporations Act as a 'registered Australian body'; and
 - Indigenous companies registered under the CATSI Act.
18. Section 111L of the Corporations Act currently exempts registered charities from a number of the reporting obligations of body corporates to ASIC, including the requirement to notify ASIC of changes in directors or other officers.
19. Corporations Act entities (companies and registered Australian bodies) that are registered charities, are only required to report changes to their responsible persons to the ACNC. Accordingly, it is optional for them to report changes in directors to ASIC. As a result, ASIC's records for some of these organisations are out of date.
20. Consideration will need to be given to how the requirement for all directors to have a DIN will interact with the current reporting obligations of registered charities. To properly implement the requirement, it may be that the Registrar will need to be



made aware of any change to directors of a charity. Alternative arrangements may also require additional steps to be taken by the ACNC.

21. The ACNC is supportive of requirements for directors to have a DIN. To ensure a seamless introduction of DINs, the ACNC suggests that ACNC registration and related arrangements are considered when making key decisions about the practical implementation of the DIN provisions.
22. Of potential relevance, we also note that an independent panel's report on the ACNC Act was tabled in the Commonwealth Parliament by the Assistant Minister to the Treasurer on 22 August 2018. One of the recommendations made by the panel that certain provisions of the Corporations Act that are 'turned off' for charities by section 111L of the Corporations Act be turned back on. Such changes would need to be considered in this context.

Further Information

23. The ACNC can provide further information on any of the above, should this be useful to Treasury. Contact information is provided below.

Contact: Natashia Allitt, Policy Manager, Legal and Policy

████████████████████

Thomas Abourizk, Legal and Policy Officer, Legal and Policy

████████████████████

The Hon Dr Gary Johns
ACNC Commissioner