

6 March 2019

Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via Email: economics.sen@aph.gov.au

Dear Sir/Madam

Commonwealth Registers Bill 2019 and 4 related bills [Provisions]

Thank you for the opportunity to provide a submission in relation to the Commonwealth Registers Bill 2019 and 4 related bills [Provisions] (**Bills**).

The Australian Institute of Company Directors (**AICD**) has a membership of more than 43,000 including directors and senior leaders from business, government and the not-for-profit (**NFP**) sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

The AICD supports the introduction of legislation that provides for the development of a new flexible and technology-neutral modern business registry regime. We further support the introduction of the legislation to introduce Director Identification Numbers (**DINs**) as part of this process and support the government's aim to deter illegal phoenix activity.

We acknowledge extensive consultation by Treasury over the last year on these reforms and will continue to support consultation on implementation.

The AICD's comments relate primarily to the DIN framework.

1. Executive Summary

The AICD supports the introduction of DINs. We consider that effective implementation of DINs will improve the registration of directors and support measures to combat fraudulent illegal phoenix activity.

Our interest is in promoting an effective and efficient DIN model with appropriate resourcing and systems investments to achieve these policy objectives. We are also concerned that the proposals do not create unworkable or impractical obstacles to use of the corporate structure, particularly noting their wide application.

In our view, there are a number of aspects of the Bills that warrant further consideration.

These include:

- The implications of having requirements for the collection and disclosure of director information shift from the *Corporations Act 2001 (the Act)* to be dealt with later by the Registrar through disallowable instruments. The process for settling these requirements should be subject to extensive consultation with consideration of relevant privacy, security and public benefit issues;
- The proposal for defendants to carry the evidentiary burden for proving defences to offences for breaches of the requirement to apply for a DIN prior to appointment and the obligation not to apply for additional DINS, in view of the substantial civil and criminal penalties that may apply and the strict liability nature of the offences;
- The proposal for a DIN to be applied for prior to appointment is considered impractical. The transition allowance of 28 days should be made a permanent feature of the DIN framework, rather than be limited to a 12 month transition period; and
- The proposed automatic cancellation of a prospective director's DIN after a 12-month period of not being appointed as a director. Time period should be at least two years, both for practical reasons and in light of the penalties proposed.

As a broader concern, in our view it is vital that the Government's systems (including forms and online systems) work effectively to require the holding of, or application for, a DIN as part of procedures for establishing or amending corporate structures. This is particularly important to prevent inadvertent administrative errors exposing small and single proprietor entity officers to the framework's high civil and criminal penalties, where this is unwarranted or avoidable.

The AICD is also very concerned with the confidentiality and security of information held on Registrar systems. High standards of security and accountability for breaches of security are required to provide officers with confidence in supplying highly personal identity verification information online. We encourage the Committee to support effective consideration of these issues in the implementation of the new framework by the Registrar.

The AICD also considers that the introduction of effective DINs and identity verification processes will allow less personal information to be publicly disclosed on registers. Public availability of this information exposes officers to undue privacy, cyber-security and personal safety risk, including identity fraud. The importance of effective consultation and consideration of risks, as well as consideration for availability of personal information to relevant stakeholders on application where justified, is critical, as we discuss below.

We note that for directorship tracking information to be complete, the DIN should apply to all responsible persons/directors of not only charities (which are already regulated by the Commonwealth), but all entities that are incorporated (including through state/territory legislation). This is an area that will be an important consideration for the future.

2. Deferring disclosure framework to Registrar

The Bills provide a framework for the introduction of the DIN, with the detail behind the DIN incorporated into data standards and a disclosure framework that will be determined by the Registrar once the Registrar is appointed. The data standards and a disclosure framework will be disallowable instruments.

Whilst the reason for this structure is to enable flexibility, we have concerns with this approach as the information required to obtain a DIN and the information disclosed publicly about an individual director are critical features of a DIN and require extensive consultation before being put in place. To increase certainty in this area, we would have preferred such consultation to be undertaken as part of introducing the current Bills, rather than through the disallowable instruments process.

As disallowable instruments, the *Legislative Instruments Act 2003* provides that the Minister must be satisfied as to 'appropriate consultation'. We consider such consultation is critically

important, particularly with those most impacted, having due regard to the *Privacy Act 1988* when deciding what personal information of directors and officers is made public, and the circumstances in which applications could be made for personal information not broadly disclosed (if any).

3. Evidential burden

The AICD does not support the defendant carrying an evidential burden in relation to:

- The defences that exist regarding the obligation for the director to apply for a DIN prior to their appointment (i.e., that the director has applied for a DIN prior to their appointment, within a period specified in the regulations after appointment or within a period allowed by the registrar or that the director was appointed without their knowledge); and
- The defences that exist regarding the obligation not to apply for additional DINs (i.e., that the registrar directed the person to make the application or when they are applying for a DIN only in relation to the Act or the *Corporations (Aboriginals and Torres Strait Islander) Act 2006*).

The Explanatory Memorandum states that the evidential burden is reversed because the 'subject matter of the defence is peculiarly within the knowledge of the defendant' and is 'significantly more difficult and costly for the prosecution to disprove that for the defendant to establish' (in accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*).

The AICD does not agree that this principle clearly applies in relation to these defences.

Further we do not agree that the evidential burden is necessarily "low" such that it overrides the right to be presumed innocent, particularly in light of the substantial penalties that could be imposed on individuals for breaches, and the strict liability nature of the offences.

For example, in circumstances where the director makes representations to ASIC that they applied for a DIN prior to appointment, or that the Registrar directed them to make an application for a DIN, it will be a straightforward matter for the regulator to address these matters with the Registrar.

This is a more appropriate and efficient approach than imposing an evidential burden on the director which he or she would then be required to establish in court.

In circumstances where a person alleges that they were appointed without their knowledge, ASIC will be in a far better position than that person (who may have no knowledge whatsoever of the relevant circumstances) to investigate those circumstances through its compulsory information gathering powers under the ASIC Act, including the power to require the production of documents or to require disclosure of information.

We accept that a person may falsely allege that they were appointed without their knowledge, and it is appropriate that this conduct be subject to significant penalties. In the context of criminal proceedings and given the risk of unfair punishment, however, it is more appropriate that the prosecution be put to proof, rather than an innocent person being obliged to discharge an evidential burden when they may not be in a position to effectively do so – particularly noting that the question of whether the evidential burden has been discharged is a question of law for the trial judge.

The AICD's view is that the legislature should not lightly depart from the fundamental tenet of criminal law that the prosecution bears the onus of proving all elements of an alleged offence, particular where proof is neither difficult nor onerous.

4. Application for the DIN

We consider the need to have applied for a DIN prior to appointment to be impractical for new directors, especially given the penalties that can apply in breach of this obligation.

We note that a transition requirement has been included in the Bills to allow for 28 days after the appointment as a director to apply for a DIN for the first twelve months only. We consider that this 12-month transition period is not sufficient to allow for the massive communication and education effort that will be required to inform potential and new directors across companies of all types and sectors of their obligations in this regard.

The explanatory memorandum explains that this transitional period is designed to provide time for new directors to become familiar with the new requirement and for any information or awareness campaigns in relation to it to take effect. In regards to new directors, particularly for companies limited by guarantee and those small proprietary companies, we anticipate awareness of these obligations will be an ongoing challenge, and therefore the transitional period should be a permanent feature of the DIN framework.

5. Automatic cancellation of the DIN

As a result of the requirement in the Bills to obtain a DIN prior to appointment, there will likely be many more individuals applying for a DIN as a prospective director.

The appointment of a director can often be a long process, and in some cases need to be accompanied by a police check and/or working with children check. Therefore, to cancel a DIN automatically after 12 months seems an unreasonably short period of time. The EM states that this requirement is to ensure the new law is focused on those that are directors or likely to become directors. We agree with the intent of the Bill, but note that continually reapplying for DINs is impractical and frustrating for both individuals and the government.

We understand from Treasury that there needs to be a timeframe for Constitutional reasons, therefore we consider a period of 2 years of inactivity a more reasonable requirement to apply to prospective directors. We also consider that the Registrar should develop a notification process to individuals prior to their DIN being cancelled.

6. Privacy considerations

Privacy considerations are outside the scope of the Bills, as it is intended this will be dealt with in both the data standards and the disclosure framework. The current requirements for personal details of directors and alternate directors in section 205B (3) of the Act requiring name, former name, date and place of birth and residential address have been repealed in the Bills. In its place is a reference to the (not yet drafted) data standards.

The DIN, a robust form of individual identity verification, will reduce the need for other publicly accessible verification mechanisms (such as the residential address, place and date of birth which are available on the current register). The current public availability of such personal information in Australia (which is out of step with other jurisdictions such as the UK and New Zealand) has raised serious concerns of members with respect to privacy, cyber-security and personal safety.

As we have advised Treasury in previous submissions, in today's digital world, personal identity information is a key exploitation target of cyber and identity criminals. Further, an external expert we have engaged in this area has indicated that public holdings of identity information are known to have attracted serious and organised crime committed to exploiting this information for criminal misuse.

In our view, it is critical that these issues are addressed in the overall implementation and regulatory environment for DINs and we look forward to further consultation as a priority.

7. Next steps

In order to support compliance with the obligations on directors, noting that it is a significant change, it is essential that the government and Registrar commit to comprehensive director and community communication and education program. Given the estimated 2.7 million company directors on the ASIC register alone, we anticipate that communication efforts will involve an extensive media campaign. In addition to substantial government resources this should involve relevant member organisations that can reach potential and existing directors and officers (including the AICD and Governance Institute of Australia and more broadly industry bodies with wide reach in different sectors of the economy, including small business) and intermediaries. It will be necessary to write repeatedly to directors given, for many individuals, this will not be their primary occupation.

If you would like to discuss any aspect of this submission, please contact Kerry Hicks, Senior Policy Adviser, on 028248 6635 or at khicks@aicd.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

LOUISE PETSCHLER
General Manager, Advocacy