

24 November 2009

Mr Robert Fitzgerald AM
Presiding Commissioner
Contribution of the Not for Profit Sector
Productivity Commission
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Dear Mr Fitzgerald,

**Productivity Commission Draft Research Report:
Contribution of the Not-for-Profit Sector**

We are pleased to provide comments on a number of the recommendations contained in the Productivity Commission's draft research report into the Contribution of the Not-for-Profit Sector.

The Australian Institute of Company Directors (AICD) is the second largest member-based director association worldwide, with approximately 25,000 individual members from a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, charities, and 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 to current director issues in the policy debate.

Many of AICD's members serve as directors on the boards of not-for-profit organisations (NFPs). AICD is also structured as a public company limited by guarantee under the Corporations Act 2001 (C'th) and as such, is directly affected by the not-for-profit regulatory environment.

A. Summary

AICD has limited its comments to six of the draft recommendations. In summary, our comments in respect of the draft research report are as follows:

- AICD supports measuring the contribution of the not-for-profit sector to the Australian economy and recommends that the contribution made by directors of NFPs be specifically measured;
- AICD cautions against the use of a common measurement framework if it is designed to "evaluate" the success of individual NFPs or to compare diverse organisations within the sector in order to make funding decisions;
- AICD supports the reduction of the compliance burden for NFPs;
- AICD recommends that a single regulatory regime cover all NFPs;
- The Productivity Commission should consult widely to determine the most appropriate form of national regulator and where it should be sited;

- AICD recommends that the business judgment rule be extended;
- AICD supports the national harmonisation of fundraising regulation if it reduces the compliance burden for not-for-profit organisations;
- AICD supports the Standard Business Reporting initiative being extended to NFPs but notes that this will not resolve issues relating to the content, relevance and readability of financial statements;
- AICD strongly supports the proposal that Australian governments promote training for not-for-profit management and boards.

A discussion of each of these issues is set out in more detail below.

B. Recommendation 5.2

Australian governments should endorse a common framework for measuring the contribution of the not-for-profit sector. Having regard to the diversity of the sector's activities and structures, measurement using this framework should embody the principles of proportionality, transparency, robustness, flexibility, and applicability.

To the extent possible, evaluations should be used to help identify the contributions, especially in respect of the impacts on individuals and the community, and inform the development of data collections.

AICD response:

The contribution of the NFP sector to the Australian economy should be measured

AICD is of the view that the contribution made by the not-for-profit sector to the Australian economy should be measured. NFPs play a significant role in our economy and this contribution is only likely to be recognised if it is supported by meaningful data. In many cases, NFPs perform vital functions that would otherwise not be offered to the community by for-profit businesses or government.

We note that the framework proposed in the draft report refers to the measurement of a range of "inputs." The report states that "inputs" include resources used by the sector including the labour of volunteers. Despite this, the draft report does not make any reference to measuring the contribution made by *directors* of NFPs. Given that directors of NFPs are ultimately responsible for the strategic direction, outcomes and value created by their organisations, this valuable contribution should be measured.

Recently, AICD conducted a survey of its members in NSW and Victoria regarding their contribution to the NFP sector. A formal report setting out the results of the survey is to be released in February 2010. Over 1,170 members responded to the survey. AICD's preliminary results identified the following:

- three out of five directors who responded to the survey are involved in not-for-profit boards;
- three out of four directors do all of their not-for-profit work on a voluntary basis; and
- the average non-executive director works 6 to 20 hours per month for not-for-profit organisations (approximately 2 to 6 working weeks per year).

These preliminary results identify that company directors are making a significant economic contribution through their voluntary involvement in not-for-profit boards.

Using a common measurement framework to evaluate the performance of diverse NFPs across the sector could have unintended consequences

Whilst AICD supports measuring the contribution NFPs make to the Australian economy, AICD would be concerned if a common measurement framework was used by Australian governments to evaluate, rank or compare individual NFPs against others in the sector, particularly where funding decisions are concerned. The not-for-profit sector is comprised of extremely diverse entities with different legal structures, organisational sizes, purposes and types of products and services offered. AICD cautions that the adoption of a common measurement framework, if it is used to evaluate and compare the success of individual entities, could operate to the detriment of some organisations even though they are serving very useful and successful functions in the wider community. Formulaic approaches in this regard should be looked at with a great deal of caution.

AICD is of the view that directors of NFPs should set a clear strategy for their organisation and measure the implementation of that strategy against key performance indicators that are relevant to the organisation's desired outcomes. These indicators and outcomes will be different for each NFP in the sector. For this reason, AICD cautions that using an external measurement framework to "evaluate" the performance of not-for-profit entities, may result in meaningless and invalid comparisons.

In summary, a clear distinction should be made between measuring the *contribution* of the not-for-profit sector to the economy and *evaluating the performance* of individual and diverse not-for-profit organisations against a common measurement framework and set of outcomes.

C. Recommendation 5.3

To minimise compliance costs and maximise the value of data collected, Australian governments should agree to implement a reform agenda for reporting and evaluation requirements for not-for-profit organisations involved in the delivery of government funded services. This should:

- *commit to basing reporting and evaluation requirements in service delivery contracts on a common measurement framework (appropriately adapted to the specific circumstances of service delivery)*
- *require expenditure (input) measures to be based on the Standard Chart of Accounts*
- *ensure that information generated through performance evaluations are returned to service providers to enable appropriate learning to take place and for organisations to benchmark their performance*
- *embody, where practicable, the principle of 'report once, use often'.*

AICD Response:

The reporting and compliance burden for not-for-profits should be reduced

AICD is supportive of reforms that have the effect of reducing the compliance and reporting burden for NFPs. The complexity of the governance and reporting regime for NFPs results in the misallocation of all forms of scarce NFP resources such as donations and grants as well as

the time of management and volunteers. In this regard the principle, 'report once, use often' is sensible, provided that it is part of a well considered, practical and useful reporting system.

AICD is of the view that recipients of grants are subject to significant burdens in meeting obligations imposed by different government departments when reporting on the acquittal of grants received. As such, AICD would support reforms that would reduce this burden and allow NFPs to use a standard method for reporting to government grantors at a state and federal level whether by a Standard Chart of Accounts or otherwise.

If a Standard Chart of Accounts were to be adopted, careful consideration would need to be given to ensuring that conflicts do not arise between the information required by the Standard Chart of Accounts and the financial reporting obligations imposed on NFPs by law and accounting standards. As the draft research report notes, the financial reporting obligations of NFPs currently differ across the sector depending upon the legal structure by which they are formed. AICD anticipates that even with the introduction of a Standard Chart of Accounts, the issues faced by NFP entities in applying Australian accounting standards (which have been developed to report financial information to investors in capital markets) will not be alleviated. On this basis, a separate accounting standard for NFPs is likely to be warranted. Further information on this issue was set out in AICD's submission to the Senate Economics Committee Inquiry into the Disclosure regimes for Charities and Not-for-profit Organisations dated 19 September 2008.¹

D. Draft Recommendation 6.1

The Australian Government should establish a Commonwealth incorporated associations legal structure for not-for-profits. The new legal structure would assist not-for-profits, in particular those operating across state and territory boundaries, that do not wish to be companies limited by guarantee but wish to be incorporated at the Commonwealth level.

Australian governments should ensure that incorporation legislation is amended to allow not-for-profits to migrate from one form of legal entity to another and to migrate between jurisdictions.

State and territory governments should continue to reduce unnecessary compliance requirements for incorporated associations.

The Commission seeks comments on:

- *whether there is a need for a new legal form for small unincorporated associations, similar to the Australian Business Name registration, providing limited legal rights*
- *whether state/territory based incorporation of associations should be restricted to not-for-profits with income less than \$150 000 per annum*
- *how governments can free up the ability of organisations to migrate between legal forms and jurisdictions, while guarding against any undesirable consequences from forum shopping.*

AICD Response:

A single regulatory regime should cover all NFPs

The Productivity Commission recommends that an additional legal structure for NFPs - Commonwealth incorporated associations be adopted. There are already a number of legal

¹<http://www.companydirectors.com.au/Policy/Submissions/2008/200809+Senate+Economics+Committee+Inquiry+into+Disclosure+Regimes+for+charities+and+not-for-profit.htm>

structures available for NFPs such as state based incorporated associations and companies limited by guarantee. We acknowledge that one of the reasons why NFPs may choose to conduct their undertaking as companies limited by guarantee is so that they can operate in all States and Territories.

Models of existing regulation and legal forms are fragmented and overly complex. The proposed Commonwealth incorporated associations structure might alleviate the additional Corporations Act governance and reporting burden that fall on entities operating as a companies limited by guarantee. However, the resourcing implications for NFPs flowing from regulation and regulatory choices generally are significant. They have less financial and operational resources and limited pools of expertise at their disposal relative to for profit companies.

For these reasons, we need a single regulatory regime covering all NFPs, not just a new legal structure added to the choices already available. Simplification might involve the referral of state powers over NFPs to the Commonwealth allowing it to solely regulate NFP activity. AICD advocated for this position in our September 2008 paper to the Senate Economics Committee Inquiry into the Disclosure Regimes for Charities and Not-for-profit Organisations.² The regime should be based on size thresholds so that the governance and reporting requirements reflect the relative complexity and size of NFPs. The regime must be able to be applied to both smaller NFPs with volunteer staff and directors who are not necessarily experienced, as well as to larger NFPs who have full time staff and may remunerate their directors.

We do not support the proposal to limit State/Territory based incorporation of associations to NFPs with income less than \$150,000. Our simplification proposal would eradicate migration between types of incorporation by NFPs (for example, from association to company limited by guarantee), as it would “forum shopping” for the most favourable jurisdiction.

The business judgment rule should be extended

Whilst NFPs have the objective of social impact, NFP directors can be subject to the same duties and personal liability exposure as directors of for profit companies. This may act as a deterrent to individuals who wish to volunteer their time and expertise to assist NFPs. The personal liability of directors for corporate fault and its negative impact on board recruitment, decision making and retention were identified in the 2008 AICD/Federal Treasury top200 listed company director survey. The results of the survey are summarised in the February 2009 edition of the *Company Director* a copy of which is attached as Appendix A to this submission.

With these issues in mind, AICD strongly supports the expansion of the business judgement rule (s180(2) *Corporations Act*) to NFPs so as not to dissuade well qualified people from taking up directorships in the sector. We made a similar point in relation to for-profits in our 2007 submission to the Treasury discussion paper on corporate sanctions.³

Currently the business judgement rule only operates in respect of a director’s duty of care and diligence under s180(1) *Corporations Act* and equivalent duties under the common law. AICD has proposed that the defence should be available where directors had acted in a bona fide manner, informed themselves about the subject matter to the extent they believe reasonably appropriate and reasonably believe it is in the best interests of the company.

²<http://www.companydirectors.com.au/Policy/Submissions/2008/200809+Senate+Economics+Committee+Inquiry+intro+Disco>
[sure+Regimes+for+charities+and+not-for-profit.htm](http://www.companydirectors.com.au/Policy/Submissions/2007/200709+Regimes+for+charities+and+not-for-profit.htm)

³ AICD submission available at <http://www.companydirectors.com.au/Policy/Submissions/2007/>

E. Draft Recommendation 6.2

To promote confidence in the not-for-profit sector and reduce regulatory burden, Australian governments, initially through the COAG Business Regulation and Competition Working Group, should:

- *agree to and implement harmonised fundraising regulation and mutual recognition across Australia*
- *support the development of a fundraising register for cross jurisdictional fundraising organisations, to be administered by the proposed national Registrar*
- *endorse the adoption by all governments of the Standard Chart of Accounts for reporting by not-for-profits in receipt of government grants or service contracts*
- *ensure that the Standard Business Reporting initiative be expanded to include reporting requirements by not-for-profits.*

AICD Response:

Harmonisation of fundraising regulation should occur if it reduces the compliance burden for not-for-profit organisations

AICD believes that a 'light touch' needs to be applied to the regulation of NFPs. Excessive regulation and different or conflicting regulation in each jurisdiction creates a compliance burden that dissuades volunteers and donors from contributing their time, expertise and resources to the sector. AICD supports the national harmonisation of fundraising regulation, if it has the capacity to significantly reduce the compliance burden for NFPs and where it substantially improves the environment within which not-for-profit organisations operate.

The Standard Business Reporting initiative could be extended to not-for-profit entities

In regard to the extension of the Standard Business Reporting initiative to not-for-profit entities, AICD supports the extension if it provides cost and time savings for NFPs. Despite this, AICD notes that the SBR project is only a mechanism for collecting or disseminating financial information. The project does not address the more complex issues facing NFPs which relate to the content, relevance and readability of those financial statements and reports.

AICD's comments in respect of the national adoption of a Standard Chart of Accounts, set out in our response to draft recommendation 5.3, are applicable in respect of recommendation 6.2.

F. Draft Recommendation 6.4

The Australian Government should establish a one-stop shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations with the following key functions to promote confidence in the not-for-profit sector:

- *register and regulate Commonwealth incorporated associations, companies limited by guarantee and Indigenous corporations*
- *register and endorse not-for-profits for commonwealth tax concession status*
- *registration of cross-jurisdictional fundraising by not-for-profit organisations*
- *a single reporting portal for public record corporate and financial information*

- proportionate to the size and scope of functions of not-for-profit organisations
- provision of appropriate governance education
- complaints handling.

The Commission seeks comments on:

- *whether the proposed national Registrar be a separate agency under the Financial Management and Accountability Act 1997, or whether it should be an additional function and separate division of the Australian Securities and Investments Commission*
- *the appropriate reporting thresholds and requirements under the Registrar's proposed functions,*
- *whether the Office of the Registrar for Indigenous corporations should be transferred to the new regulatory organisation.*

AICD Response:

The Productivity Commission should consult widely to determine the most appropriate form of national regulator and where it should be sited

The community at large has expectations of a high level of accountability on the part of those handling funds donated by members or, granted by government. AICD considers that the single regulatory regime we referred to in response to recommendation 6.1 covering all NFPs should be operated by a single regulator. We note that there are already separate regulators for charities in New Zealand & the United Kingdom. This is the position AICD advocated in the September 2008 submission to the Senate Economics Committee Inquiry into the Disclosure Regimes for Charities and Not-for-profit Organisations.³

The Productivity Commission seeks comments on whether the proposed national Registrar should be a separate agency under the Financial and Management Accountability Act 1997, or whether it should be an additional function or separate division of ASIC. AICD does not have a firm view in this regard. We urge the Productivity Commission to consult widely in order to determine the most appropriate form of national regulator and where it should be sited. Regardless, adequate funding for the regulator is imperative to undertake its proposed diverse roles including registration, reporting, complaints handling and education.

Whatever governance and reporting thresholds and requirements are adopted by the regulator, they should be consistent across all legislation. As previously suggested, they should be based on size thresholds so that they reflect the relative complexity and size of NFPs.

G. Draft Recommendation 10.4

Australian governments should provide support to develop and promote training for not-for-profit management and boards in governance and related areas. They should explore the options for improving access to and quality of such training in these areas with peak bodies and appropriate training providers.

³<http://www.companydirectors.com.au/Policy/Submissions/2008/200809+Senate+Economics+Committee+Inquiry+into+Disclosure+Regimes+for+charities+and+not-for-profit.htm>

AICD Response:

The Government should support training for not-for-profit management and boards

AICD strongly supports this recommendation. NFP directors can be subject to the law in the way that for profit directors are – this is especially the case where the NFP is a company limited by guarantee under the Corporations Act. Although some NFP directors are experienced directors, others are not and may not be aware of the serious nature of their role, duties and responsibilities on the board. Education plays a vital role in ensuring that NFP directors are well equipped for their important role in the governance, rather than the management, of the organisation.

AICD has long advocated against directors being personally liable for corporate misconduct. There are over 660 State and Territory laws that create such personal liability. This is anomalous relative to the way that other citizens are treated under the law and does not lead to good social or economic outcomes. The 2008 AICD/Federal Treasury survey referred to previously, demonstrated that the risk of personal liability led to less than optimal board decision making. NFPs can least afford for directors to be overly focussed on personal liability issues. AICD will continue to advocate on behalf of all directors to remove personal liability for corporate misconduct.

AICD is an organisation focused on helping directors to understand their roles and responsibilities and enriching the practice of organisational governance and directorship. AICD strongly endorses director education and offers a range of director and board development courses which are relevant to, or are specifically designed for, directors of NFPs. AICD's commitment to the education of not-for-profit directors was also highlighted in 2009 when AICD partnered with the Australian Scholarships Foundation to offer scholarships to directors of not-for-profit organisations.

AICD is particularly well placed to support the educational needs of not-for-profit directors in Australia. In 2008/2009 AICD conducted 419 courses which were attended by over 7,522 directors and aspiring directors. Many of the participants in AICD courses are not-for-profit directors. The key courses offered by AICD which are relevant to directors of NFPs are briefly summarized below⁴.

Foundations of Directorship

This introductory suite of six courses (formerly known as Directors Essentials) has been offered by AICD since 2003 and is designed for executives, sole directors and new directors who require a basic understanding of their duties and responsibilities as a director. The suite covers governance and board meeting processes, and provides a director-oriented introduction to finance, strategy, risk and governance in varying organisational structures. The full suite comprises 21 hours of face to face sessions and optional assessment is available for those seeking to gain the AICD Foundations of Directorship Certificate.

⁴ Further information about AICD's director and board development courses is contained in the AICD director and board development handbook available at: <http://www.companymdirectors.com.au/Education/>

Company Directors Course

The Company Directors Course (CDC) is a comprehensive directorship program leading to a qualification recognised by the director community both in Australia and overseas. First delivered in 1975, the CDC is the most established director program in the world. In 2008/2009 2,383 participants attend the CDC. Seventeen universities across Australia grant advanced standing of one subject of a Masters degree for successful completion of the CDC.

The NFP Board

AICD's Not-for-Profit Board course deals with governance issues relating to the not-for-profit environment. This practical course examines the duties and responsibilities of directors and council members; the role of the regulators in the not-for-profit sector; the potential personal liability of directors and council members; the major elements of key financial statements used to assess organisational performance and the links between them; and the director's duties with regard to the finances of the organisation. Since its launch in early 2008, 600 directors have attended the course.

In-Boardroom for NFPs

AICD also offers development programs to NFP boards across Australia. AICD's In-Boardroom services provide a framework where the board will learn as a whole and where issues can be discussed and debated. AICD works in confidence with boards, assists in determining the board's priorities, selects the most appropriate program to meet the organisation's needs and focuses delivery and discussions to meet customised outcomes. Since 2006, AICD has delivered over 200 *In-Boardroom* sessions for not-for-profit boards.

E-Learning

AICD's suite of e-learning courses provides a flexible means of accessing a series of short practical courses covering directors duties and responsibilities, governance, finance, board meetings and board reporting.

In addition to its formal director and board development courses AICD also enhances the professional development of directors by conducting a range of events and briefings. In 2008/2009 AICD held 322 events attended by 31,544 participants. These events included two conferences, 88 directors' briefings around Australia and *Directing Tomorrow Today*. The comprehensive three hour seminar on current issues affecting director responsibilities entitled *Directing Tomorrow Today* was held in Queensland, Tasmania, Victoria, South Australia, New South Wales, Western Australia and the Australian Capital Territory and was attended by over 2200 AICD members.

AICD also provides directors with access to information on issues that are important to their professional development and to the boards on which they serve. Through a number of different formats AICD keeps directors abreast of directorship, governance and regulatory issues. In summary, AICD provides information through:

- a monthly journal (*Company Director*)
- email (*The Boardroom Report, Director Update and Director Alerts*);

- AICD's website (*Frequently Asked Questions, Online Guides*); and
- State newsletters.

In AICD's experience, not-for-profit directors derive a strong benefit from attending director and board development courses, professional development events, briefings and in having access to comprehensive corporate governance resources and information. Although NFPs have scarce resources, director education is an important investment that will facilitate the sound decision making required by NFP boards.

We hope our comments on the draft recommendations will be of assistance to you as you finalise your report. If you are interested in any of our views please do not hesitate to contact me.

Yours sincerely



John He Colvin
Chief Executive Officer

Appendix A

Summary of the 2008 ASX 200 - Federal Treasury Survey of Company Directors

"AICD Welcomes findings on director liability"

Company Director

February 2009

AICD welcomes findings on director liability

Board recruitment, retention and decisions. **Gabrielle Upton** reviews these important findings of a Treasury survey.



Gabrielle Upton FAICD is Legal Counsel at AICD and a member of the Legal Committee of the Corporate and Markets Advisory Committee, the Federal Government's advisory committee on corporations and securities law

In 2008, AICD invited 600 members who were directors of ASX-200 listed companies to complete an online Federal Treasury *Survey of Company Directors*. AICD welcomed the news of the public release of the survey results by the Minister for Superannuation and Corporate Law, Nick Sherry, on 18 December 2008.

The Government's commitment to reviewing director liability recognises that directors make an important contribution to economic growth through the board's oversight and monitoring role of companies. Its commitment is particularly commendable given the downturn in the economy and recent community concerns about, and media scrutiny of, the actions of some directors. We commend the complete survey results to you which can be found on the Treasury website at: www.treasury.gov.au

THE ISSUE

There are more than 600 state and territory laws in Australia imposing personal liability on individual directors and officers for corporate misconduct. Such provisions are objectionable and unfairly discriminate against directors when compared with the way in which other people are treated under the law. AICD believes individuals should not be penalised for corporate misconduct except where it can be shown they were accessories. This was also the view taken by the Corporate and Markets Advisory Committee (CAMAC) 2006 *Report on Personal Liability for Corporate Fault*.

The survey results are important because, for the first time, they provide strong quantitative evidence supporting AICD's view that director liability, and personal liability in particular, has a negative affect on board recruitment, retention and decision-making.

AICD is focused on achieving legislative reform so that directors' roles, responsibilities and defences are clear, consistent and reasonable. We are not seeking to lower the standards required of directors. Positive regulatory change can be achieved without the increased protection of those guilty of misconduct. We believe that greater certainty through legislative reform will enable the majority of directors who carry out their duties diligently to better focus on strategic decision-making, which enhances company performance.

SURVEY RESPONDENTS

Thank you to our members who completed the survey. Your assistance will strengthen AICD's advocacy and benefit

our broader membership, including directors of small and medium companies and not-for-profit organisations.

The survey respondents were an experienced group of directors. Indeed, 84 per cent of them were non-executive directors and more than 70 per cent sat on four or more boards. Over 75 per cent had been a company director for more than 10 years while 69 per cent had experience as chairmen and 74 per cent as members of an audit committee.

SURVEY RESULTS

Effect on board decision-making

The negative effect of personal liability on board decision-making was clear from the survey results. They showed that 78 per cent of respondents considered that there was a medium to high risk of being held personally liable for decisions they or their boards had made in good faith.

Similarly, 78 per cent believed that the risk of personal liability had caused them, or the board on which they sat, to occasionally or frequently take an overly cautious approach to business decision-making. In addition, 64 per cent suggested that such an approach had inhibited an optimal business decision to a medium to high degree.

Directors strongly highlighted derivative liability laws, such as those for occupational health and safety and environmental protection, as reasons for their overly cautious approach to decision-making. The duty to prevent insolvent trading and continuous disclosure laws were next up in tempering decision-making.

In making their assessment, respondents commented on the imbalance in the risk/reward trade-off for directors, increased regulation and that board decisions made in real time are often judged in litigation with the benefit of hindsight.

In this regard, one respondent noted: "Directors should not face the risk of being sued due to their predictions not always being fulfilled."

Other respondents made remarks in a similar vein:

- "There is no doubt that more and more board and executive time and effort is being taken up by

processes and procedures designed only to avoid risk. Risk management at a board level has become more about avoidance of personal liability than about good business decisions".

- "High integrity and achieving the best outcome for

stakeholders within the laws is no longer enough. To avoid risk requires excessive corporate governance to the point of paralysis and astrophysical capabilities”.

The survey revealed that concerns about personal liability had inhibited optimal business decisions by requiring more expert reports, delays in decision-making and the premature disclosure of information to the market. The major costs to the company, shareholders and other stakeholders were expert fees and the loss of investment and entrepreneurial opportunities, as well as competitive position.

Broad-based defence

Respondents noted that there were no reasonable defences for directors for derivative liability laws (67 per cent) and continuous disclosure laws (52 per cent). In contrast, 64 per cent of respondents believed there were reasonable defences for directors for the duty of good faith and 61 per cent for the duty of care and diligence.

Respondents commented that “the business judgment rule should be widened to cover continuous disclosure, mergers and acquisitions and fundraising” and that “there needs to be a consistent defence upon which directors who have acted appropriately can rely”. One observed: “Even though safe harbours ostensibly exist, this does not prevent directors being embroiled in lengthy, expensive and personally damaging litigation, especially class actions.”

The survey supports AICD’s call for a broad-based defence across Federal, state and territory laws for directors making commercial decisions in good faith, having informed themselves about the subject matter of the decision and having acted in the best interests of the company.

AICD’s position in this regard is articulated in our submission to the Federal Treasury’s *Review of Sanctions in Corporate Law*, which can be found in the Policy section of our website at: www.companydirectors.com.au

Impact on retention and recruitment

The survey also highlighted the negative impact of personal liability on board retention and recruitment:

- 71 per cent of respondents had declined the offer of a company directorship because of the risk of personal liability;
- 62 per cent believed their boards had lost a potential or suitable board member because of that person’s

concern about the risk of personal liability;

- 87 per cent knew of other people who had declined an offer of company directorship because of the risk of personal liability; and
- 75 per cent knew of other people who had resigned from a company directorship because of the risk of personal liability.

In responding, directors commented that “the intellectual stimulus and desire to contribute are being outweighed by the risks” and “the problem is that at the time when shareholders need independent directors the most, the incentive is for independent directors to leave or not to join”.

NEXT STEPS

The survey will now be used by the Council of Australian Government’s (COAG) in its work on harmonising director liability laws. COAG has asked the Ministerial Council for Corporations (MINCO) to report back to it on proposed reforms by mid 2009.

MINCO, however, will only examine criminal liability.

This is a good start and AICD will continue to lobby for a similar review of civil liability for directors.

COAG’s reference to MINCO provides guidance in the form of three principles that parallel those in CAMAC’s *Report on Personal Liability for Corporate Fault*. These include that when companies contravene statutory requirements, liability should be imposed first on the company itself, that personal criminal liability should be limited to where the officer is an accessory and only automatically deemed in exceptional circumstances. AICD strongly supports these principles.

HOW YOU CAN ASSIST

AICD will be seeking opportunities through the COAG process to continue lobbying for clear, consistent and reasonable directors duties and defences.

As the risks of personal liability and the burden of compliance with inconsistent state laws apply to all directors, we will also be consulting our broader membership on similar issues raised in the survey in the near future. We encourage you to participate in these activities, as they will provide input into important and timely law reform for directors.

If you have specific suggestions in the meantime, please email me at: gupton@companydirectors.com.au 