CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

29 August 2012

Dr Richard Grant
A/g Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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CANBERRA ACT 2600

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Dear Dr Grant

Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012 and an associated bill

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance.

CSA has unrivalled depth and expertise as an independent influencer and commentator on governance and risk management thinking and behaviour in Australia. Our Members are all involved in governance, corporate administration, legal practice and compliance, with their primary responsibility being the development and implementation of governance frameworks in public listed and public unlisted companies, private companies, and not-for-profit (NFP) organisations. Many of our members serve as officers of NFP organisations, or work for or are involved with companies limited by guarantee. CSA itself is a company limited by guarantee, formed to serve the interests of its Members, who are governance professionals.

General comments

CSA supports the Australian Charities and Not-for-profits Commission Bill 2012 (the bill) and an associated bill (Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012) that have been introduced to parliament, particularly in light of the bill's redrafting which has taken into account the recommendations of the House of Representatives Standing Committee of Economics in its recent report.[1] The amendments made in response to

[1] House of Representatives Standing Committee on Economics, *Report on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bills 2012*, August 2012, Canberra. On Thursday, 5 July 2012, the Assistant Treasurer and Minister Assisting for Deregulation, the Hon David Bradbury MP, referred exposure drafts of the Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 for inquiry and report to the House of Representative Standing Committee on Economics and requested that the committee report by Tuesday, 14 August 2012.

those recommendations have responded to the concerns with the exposure drafts of the legislation expressed by stakeholders and we comment on them in more detail later.

CSA strongly supports the establishment of the independent statutory office, the Australian Charities and Not-for-Profits Commission (ACNC). We have long supported the adoption of a new, dedicated regulator and a reduced compliance burden for the NFP sector and the amended bill is a very positive step in achieving the most appropriate reforms for the sector. [2]

We have also been a strong proponent of an approach to reform that separates the legislation establishing the ACNC from the regulations that will establish the duties, governance arrangements and operation of the entities which the ACNC will regulate. We commend the government for the implementation of this two-staged reform process[3] and believe that the bill is an important step in ensuring that the regulatory reform will operate to remedy the current inconsistent, inefficient, fragmented and uncoordinated regulatory framework spread across many agencies and more than one level of government to which charities and other NFP organisations are subject.

As we have noted in our earlier submissions, for the private sector there is one Act that establishes the framework for the Australian Securities and Investments Commission (ASIC) and a separate Corporations Act that deals with the duties, governance arrangements and operation of companies that ASIC regulates. A great deal of effort was expended on the sequencing of the legislation, and it has served the private sector well. The current bill ensures that the NFP sector is afforded the same sequencing of legislation, which is appropriate to the needs of the sector.

How the exposure drafts have responded to stakeholder concerns

We note that the bill has been amended to take account of the recommendations made by the House of Representatives Standing Committee on Economics in its report on the exposure drafts of the legislation that noted that:

> Broadly, the committee covered three major policy areas in the inquiry. The first is the capacity of the Commission to reduce red tape.... The second policy area was the

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[2] CSA notes that five major reviews have been conducted into the regulation and taxation of the NFP sector since 2000, being the report of the inquiry into the Definition of Charities and Related Organisations (2001); the Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations (2008); the Australia's Future Tax System report (2009); the Productivity Commission report on Contribution of the Not-for-Profit sector (2010); and the Senate Economic Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010. These reviews concluded that the sector's regulatory framework has added to its complexity and costs and they recommended that a single, national regulator for the sector should be established. The sector itself supports a national regulator and has been clear in each inquiry that it does *not* support retaining the regulatory function within the Australian Taxation Office (ATO) because of a perceived conflict of interest in that the ATO would be acting as both a revenue raiser and regulator. The sector has clearly expressed its desire for a new, dedicated regulator in each inquiry.

[3] The government announced on 17 May 2012 that it would stage the NFP sector reform process to:

- commence the operations of the ACNC from 1 October 2012, and
- delay the commencement of the governance standards, including the external conduct standards, and the financial reporting framework to commence on 1 July 2013, with the first financial reports for medium and large registered entities now beginning to fall due after 31 December 2014.1

The bill honours this commitment by introducing legislation that establishes the new regulator, the ACNC, separately from any regulations that will be introduced relating to governance standards, external conduct standards and the reporting framework.

> liability of directors, trustees and management committees for the conduct of their organisations.... The third main policy area revolved around procedural fairness.

In CSA's submission to the House of Representatives Standing Committee on Economics when the exposure drafts were first released, CSA expressed concern with:

Duplication of reporting
CSA noted that, without a referral of powers, as occurred with the Corporations Act, to ensure that charities in the first instance (and the entire NFP sector in time) have to respond to only one set of compliance obligations that operate nationally, these organisations would be subject to duplication of reporting. However, we recognised that such a referral of powers could take some time to effect, and recommended that consideration be given as to how best to ameliorate the burden of duplication of reporting. We suggested, for example, that one approach may be to put in place transitional arrangements whereby any charity currently reporting under state legislation is exempt from reporting under Commonwealth legislation until such time as the state legislation is repealed or a referral of powers is implemented.

While we understand that the Commonwealth is seeking to 'turn off' any duplication, such as reports to ASIC or other Commonwealth agencies and also discussing whether states and territories might wish to do the same with their associations legislation to the extent that these organisations are covered by the bill, this is a long-term project, with no guarantee of immediate minimisation of reporting obligations. The House of Representatives Standing Committee on Economics therefore recommended that the ACNC be able to accept reports and materials from other agencies for a limited time, and to annex existing and sector-developed standards to the bill.

We are, therefore, very pleased to note that the bill has been amended to take account of the recommendation of the House of Representatives Standing Committee on Economics that:

> ...the Commissioner have discretion to accept reports or material prepared for other agencies and levels of government as reports for the purpose of the reporting framework under the Bills. This arrangement should be time limited and be reviewed as the lodge-once use-often process is developed.

We believe that these transitional arrangements will ensure minimal duplication of reporting, while the ACNC works with other regulators and cooperates with other government agencies to promote the reduction of unnecessary regulatory obligations on the NFP sector.

CSA is still strongly of the view that a referral of powers would, ultimately, remove all uncertainty, confusion and duplication in any regulatory reform affecting the NFP sector, and would be a credit to all governments if they provide for this sector in the same way as they have provided for the for-profit sector.

CSA will continue to advocate for such a referral of powers.

Governance and external conduct standards and reporting framework have yet to be exposed for consultation
CSA noted that, without further knowledge of how the governance and external conduct standards and reporting framework will be crafted in regulations, it was difficult to comment on how the requirement in the exposure drafts for charities to comply with the governance standards and reporting framework will apply, or how charities will ensure that they comply with the requisite conditions of their registration.

The House of Representatives Standing Committee on Economics examined these issues, and concluded that it will be of benefit for the sector for the legislation to pass and the new

Commissioner to be formally appointed so that they can work with the sector in finalising these requirements.

CSA has long been in favour of the ACNC participating in further consultation with the sector to finalise the governance arrangements and ensure they are principles-based and not prescriptive. While we believe that it would have been useful for the draft regulations to be released concurrently with the bill, we accept that the bill provides for sufficient flexibility for the development of the governance and external conduct standards and reporting framework to be developed in consultation with the sector without imposing onerous compliance obligations on the sector.

The House of Representatives Standing Committee on Economics had recommended that:

> ...the Government consider incorporating existing or sector-developed governance standards into the Bill through regulation, in addition to a default set of governance standards.

CSA in its appearance before the Committee drew attention to the ASX Corporate Governance Council's principles and recommendations, which have become the default guidelines on governance, noting that they are adaptable as they operate on an 'if not, why not' basis.

CSA is strongly of the view that an approach that develops principles which are pooled together by the NFP sector itself, not government, into a code or similar, will result in a regulatory framework that fulfils the objectives of reducing the compliance burden for the NFP sector and providing for a light-touch regulatory framework.

CSA notes that the Explanatory Memorandum for the bill states that:

> The Government will consult on the content of financial reports and the governance and external conduct standards, including with key stakeholders and advisory bodies such as the NFP Sector Reform Council and the public more broadly.

CSA looks forward to participating in this consultation. We are happy to support the bill in its current form even though the draft regulations have not yet been released.

The liability of directors, trustees and management committees for the conduct of their organisations

The bill deals with obligations, liabilities and offences under the Act, and provides that 'If an entity (the primary entity) is subject to an obligation or liability, or commits an offence, certain entities that are responsible for managing the primary entity may also be subject to the obligation or liability, or commit the offences, in specific situations'. That is, the bill imposes personal liability on directors of bodies corporate in certain circumstances.

As noted in the Committee's report:

> Directors have two defences available to them:
> - The offence will not apply to a director of a body corporate if, because of illness or for some other good reason, it would have been unreasonable to expect the director to take part, and the director did not take part, in the management of the body corporate at any time when the offence was committed.
> - The offence will also not apply to the directors of a body corporate, if the director took all reasonable steps to ensure that the body corporate did not commit the offence, or there were no such steps the director could have taken.

> The evidential burden for proving these defences lies with the director; however, the evidential burden for proving the offence remains with the Commissioner.

In our appearance before the Committee at its public hearings, CSA noted its concern with the application and effect of these provisions, as did other parties. The Committee noted in its report that '...the legislation and explanatory materials [are] unclear and ... at times they did not appear to match the policy intent'.

CSA is pleased to see that the bill has, in part, taken into account the recommendation of the Committee that:

> ... Treasury redraft Division 180—Obligations, liabilities and offences, of the Australian Charities and Not-for-profits Commission Bill 2012, with a view to clarifying its intent and operation.

We note that the bill now clarifies that the directors of the body corporate will *not* be made personally liable for any offences contained in the bill and, furthermore, directors will only be personally liable for the liabilities of the body corporate in certain limited cases, for example, if there is a deliberate act involving dishonesty on their part.

Procedural fairness

In our appearance before the House of Representative Standing Committee on Economics, CSA expressed concern with a lack of procedural fairness in the bill, particularly in relation to refusal of registration, suspension or removal of a responsible entity and periods of suspension.[4] We noted that there are well-established principles in the corporations and the consumer credit legislation for procedural fairness that could be incorporated in the bill.

We were pleased to see that the Committee made, in its report:

> ... a number of recommendations to ensure that organisations are notified and have the opportunity to respond prior to enforcement action.

The bill has made provision for a greater degree of procedural fairness.

Recommendations

CSA notes that the bills reflect the recommendations from the House of Representatives Standing Committee on Economics, as the government accepted all recommendations made by this Committee.

CSA further notes that these recommendations arise from consultation with stakeholders, and therefore reflect attention to the areas of the bill that gave rise to stakeholder concern.

CSA is pleased to see that the bill has been amended to ensure that stakeholder concerns have been addressed.

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[4] Transcript, Committee Hansard, House of Representatives Standing Committee on Economics, Australian Charities and Not-for-profits Commission Bill 2012 and an associated bill, Friday 27 July 2012, Canberra

CSA recommends the passage of the bills in their current form and the establishment of the ACNC on 1 October 2012.

We would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely

Tim Sheehy
CHIEF EXECUTIVE