



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

25 January 2012

Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: nfpreform@treasury.gov.au

Dear Treasury

***Exposure Draft – Australian Charities and Not-for-profits
Commission Bill***

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body in Australia delivering authoritative accredited education and the most practical training and information in the field, CSA is focused on improving organisational performance and transparency.

Our members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act). Many of our members serve as officers of not-for-profit (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.

CSA welcomes the opportunity to comment on the Exposure Draft – Australian Charities and Not-for-profits Commission Bill (the exposure draft) and draws upon the experience of our Members in formulating our submission.

General comments

Given the importance of the NFP sector to Australia and the inefficiencies of the current dual regulatory NFP regime, with state and territory-based associations' legislation co-existing with the national regulation of companies, the establishment of a centralised Australian Charities and Not-for-profit Commission (ACNC) provides an opportunity to streamline the operation of the whole of the NFP sector.

CSA, therefore, sees the development of the exposure draft as representing a key stage of progress in the NFP reform process. CSA is mindful that the central regulation and management of NFP organisations must be well supported by a coherent legislative framework.

CSA notes that the exposure draft consultation interacts with other consultations in the package of NFP reforms released on 8 and 9 December 2011. The relevant consultation documents are:

- consultation paper for review of not-for profit governance arrangements
- exposure draft legislation to establish the ACNC, and
- consultation paper on the implementation design of the ACNC.

CHARTERED SECRETARIES AUSTRALIA LIMITED ABN 49 008 615 950

LEVEL 10, 5 HUNTER STREET, SYDNEY NSW 2000, GPO BOX 1594, SYDNEY NSW 2001 TEL +61 2 9223 5744 FAX +61 2 9232 7174 EMAIL info@CSAust.com

www.CSAust.com

We also note that consultations are proposed in the near future on a review of the company limited by guarantee structure and its continuing appropriateness for NFP entities.

At present it is unclear how these separate consultations interact. Various of the issues dealt with in these separate consultations overlap. For example, the exposure draft mixes legislation that is specific to the formation of the national regulator with legislation that relates to the duties and operation of the bodies that the ACNC will regulate. CSA is of the view that the latter issues are the subject matter of the separate consultation on governance arrangements. CSA is most concerned that there is such a lack of clarity about the relationship between the three current consultation documents and any overlap or inconsistencies contained within them. This makes it very difficult for stakeholders to comment in an informed manner.

In relation to this consultation, the result is a confusing bill which will make regulatory reform that achieves the policy objectives of a reduced compliance burden for the NFP sector extremely difficult, if not impossible to achieve.

Simplifying the legislation

CSA's main concern with the exposure draft is that its ambit is too wide, covering both prescriptive aspect of how entities will be regulated, as well as establishing the ACNC as the regulator of the NFP sector. The NFP sector is diverse and requires a more detailed consideration of how each legal form currently serving the sector will be brought into the regulatory framework without imposing additional compliance burdens. For example, companies limited by guarantee are already subject to regulation by the Australian Securities and Investments Commission (ASIC), with a range of reporting responsibilities to ensure accountability and transparency, and their responsible individuals have duties as set out in the Corporations Act. Yet the current drafting of the Australian Charities and Not-for-profits Commission Bill would potentially see its provisions apply to companies limited by guarantee, thereby subjecting them simultaneously to two different regulatory frameworks.

For the private sector, there is one Act that establishes the framework for 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. **CSA recommends** that a similar approach be taken to the legislative framework for the NFP sector.

There can be no doubt that all the issues canvassed in the exposure draft are immensely important to the NFP reform process and must be comprehensively dealt with before the ACNC can assume a complete regulatory role. CSA believes this is best achieved through separating the provisions relating to the establishment, powers and operations of the new regulator from those duties and obligations of the entities it will regulate.

CSA believes that the confusion which the exposure draft creates can be resolved by simplifying the bill. For example, the bill could retain the objects, functions and application of the ACNC (currently Chapter 1 of the exposure draft); detail the establishment and function of the ACNC (currently chapter 5 of the exposure draft); consider the advisory board (currently Chapter 6 of the exposure draft); and set out the regulatory powers of the ACNC (currently chapter 4 of the exposure draft). This would provide a clear outline of the ACNC framework. Chapters 7 and 8 of the current exposure draft could similarly be retained.

Clarifying that the bill is solely related to the establishment of the new regulator would ensure that the ACNC could be operational by 1 July 2012, as planned, without the very real risk of introducing a regulatory framework that imposes even further onerous compliance burdens on the NFP sector. Once established, on 1 July 2012, the ACNC can then function as an adviser and stakeholder in the ongoing consultation on and implementation of further legislation relating to the different types of entities within the NFP sector that it will regulate.

This would also ensure an orderly roll-out of the new regulatory framework, providing a structured transition period for each type of entity operating in the NFP sector. For example, following receipt of stakeholder comment on the governance arrangements, legislation could be introduced dealing with how charities will be regulated. That legislation could clarify that it applies to charities by stating that it excludes all entities that are not charities.

CSA believes that this will offer several advantages for the NFP sector, including the opportunity for further discussions between the Federal Government and states about any referral of powers. Charities might commence registration on 1 July 2012, as planned, but the detail of how they will be regulated can be dealt with over a longer period of time. The ACNC is provided with the opportunity to partake in the broader community consultation process with respect not only to the regulation of charities, but also the incorporation of other NFP entities into the overarching regulatory framework. For example, CSA refers to the proposed consultation in relation to companies limited by guarantee and believes that the ACNC should play an integral role in this consultation and in the development of legislation and regulation for these types of companies.

CSA strongly recommends that the Australian Charities and Not-for-profit Commission Bill be restructured to reflect its primary aim of establishing a new statutory regulator. The bill should focus entirely on the establishment of the ACNC, its constitutional and ancillary powers and how it operates and the aspects of the bill relating to the duties and operations of those entities it regulates should be dealt with in separate legislation.

Time frame for consultation

CSA Members are concerned about the period of consultation for the exposure draft, being less than one month and over the Christmas holiday period. The time frame for the submission of feedback on a major piece of legislation that will affect the NFP sector for many years to come remains unacceptably short and poses particular difficulties for the NFP sector.

Many NFP organisations are staffed or managed by volunteers, who will be seeking to address the issues canvassed in the exposure draft as part of their extra-curricular responsibilities. The one-month consultation period over Christmas does not provide sufficient time for volunteers to meet, discuss the bill and formulate considered responses. Given that this is not the only consultation of relevance to the NFP sector that is currently under way, the tight time frame for response is even more worrying.

These time frames do not accord with the recommendations of the Banks Report¹ and, in particular, the principle which requires effective consultations with stakeholders, or the government's own guidelines on consultation as found in Appendix C of the Department of Finance and Deregulation's *Best Practice Regulation Handbook* (June 2010), which recommends a consultation period of between six and 12 weeks, depending on the significance of the proposal, citing the United Kingdom Government's Code of Practice on Consultation which stipulates a minimum of 12 weeks for written consultation at least once during the policy development process. They also counter the very intent of the NFP reform process, of which one of the major aims is to reduce the onerous compliance burden on the NFP sector. The NFP sector has traditionally been under-resourced and subject to complex compliance provisions, yet these time frames for consultation place an exceptionally high burden on NFP organisations.

As noted above, CSA is of the view that the Australian Charities and Not-for-profit Commission Bill should focus entirely on the establishment of the ACNC, its regulatory powers and how it operates, with legislation relating to the duties and operation of the bodies which the ACNC will regulate dealt with separately. This will allow the ACNC to be established by 1 July 2012, while consultation continues on other relevant issues, and the ACNC itself can be a stakeholder in those consultations. CSA is firmly of the view that this will provide sufficient time to implement a

¹ Treasurer of Australia, *Report of the Taskforce on Reducing Regulatory Burdens on Business – Final Government Response*, Media Release, 15 August 2006.

new regulatory framework without imposing new compliance costs on an already overburdened sector.

If the legislation is introduced in its current form, it will impose reporting and auditing obligations on charities that will see them required to report under the new law by 1 July 2013. For accounting purposes, that sees their financial year start on 1 July 2012. In practice, this means that such organisations would have only four months in which to make the multiple changes required to meet the new legislative and reporting requirements, which is more than an onerous obligation — most charities will simply be unable to make this deadline or have the resources to do so. The exposure draft imposes auditing obligations on many organisations that have not previously been subject to auditing requirements, thereby increasing the compliance load and adding considerably to their costs. Again, this would counter the very intent of the NFP reform process, of which one of the major aims is to reduce the onerous compliance burden on the NFP sector.

CSA notes that the consequences attached to this legislation are more far-reaching than those attached to the legislation introducing amendments to how financial advisers are regulated, yet more time has been granted to stakeholders to comment on the latter. CSA is very concerned that, yet again, the NFP sector is being treated as a 'second-class' citizen, with fundamental changes being introduced without sufficient time to properly assess their impact.

Diversity within the NFP industry

The fact sheets released by the government state that the draft legislation is intended to apply solely to charities. The exposure draft and explanatory memorandum both appear to address the establishment of the ACNC as being solely for the regulation of benevolent charities. Under the heading *Summary of new law* on page 14 of the explanatory memorandum, it is explained that the registration of a NFP entity would allow access to support that the Australian Government has 'earmarked for their specific charitable purpose'. Yet the table in section 5-10 of the exposure draft provides an entitlement to registration for entities which have purposes as diverse as the 'promotion of Australian industry, encouragement of community entertainment, scientific purposes, or the advancement of employees or employers interests'.

There are some 600,000 NFP organisations (excluding body corporates) within the Australian NFP landscape. The Productivity Commission reports that the majority, some 440,000, are small unincorporated organisations (such as neighbourhood tennis, babysitting, or card clubs).² However, within the NFP sector also reside associations (CSA is one such association), hospitals, community services, universities, sports clubs, religious groups, day care centres, recreation clubs, environmental groups, job-training centres, family counselling agencies, and many more.

The table in section 5-10 of the exposure draft, which CSA notes is derived from Division 50 of the *Income Tax Assessment Act 1997*, provides a useful guide of the purposes for which NFP organisations exist. However, CSA also notes that the list is not exhaustive of the types of entities which exist within the NFP sector (for example, it does not cover companies limited by guarantee). The explanatory memorandum refers to a range of entities and the exposure draft does not make the distinction between charities and other NFP organisations clear. This indicates that the exposure draft could inadvertently capture other NFP entities apart from charities, despite the fact sheets advising that it is intended to apply only to charities.

CSA has previously recommended that the national regulator should be designed to regulate all NFP organisations regardless of size, whether they receive government funding, or whether they access tax concessions, and CSA continues to support this position. It would be a grave

² Australian Government, Productivity Commission 'Contribution of the Not-for-Profit Sector' Research Report
Downloaded on 29 November 2011 from http://www.pc.gov.au/data/assets/pdf_file/0003/94548/not-for-profit-report.pdf

misrepresentation of the sector and its contribution to the Australian community and economy to make any reforms to the regulatory framework based on the particularities of charities alone.

While CSA is encouraged that the bill is designed to make 'provisions for additions to its regulatory responsibilities over time', we are also concerned that narrow legislative provisions will make this process difficult, cumbersome and time consuming. While CSA appreciates that charities will be the primary focus during the initial stages of implementation for the ACNC, CSA supports legislation that solely establishes the role, powers and operation of the ACNC, with later legislation setting out the duties and obligations of those entities it regulates. Charities could be dealt with first, and other forms of NFP organisations dealt with in separate legislation over a period of time. Overall, CSA recommends a light-touch regulatory approach, which would see high-level requirements set out in the legislation, supported by fact sheets, guidance and standards issued by the ACNC in its capacity as the national regulator.

CSA recommends that the ACNC should be responsible for the regulation of the entire NFP sector, rather than just charities. CSA encourages the government to clarify that the ACNC will, in time, be the regulator for the entire NFP sector and not just charities. At present no such clarity exists.

Specific changes to the exposure draft

CSA notes some specific areas which require further clarification.

Qualifications of responsible individuals

The draft legislation requires the Australian Charities and Not-for-profits Register (ACN Register) to hold information which details the 'qualifications of the responsible individual in relation to the registered entity'.

CSA strongly opposes responsible individuals being required to hold particular qualifications or have particular experience or skills.

CSA notes that even the directors of public listed companies in Australia are not required to hold particular qualifications or have particular experience or skills, and it would be highly prejudicial to the NFP sector should responsible individuals in NFP entities be subject to more onerous obligations than officers of companies.

Members of the particular NFP organisation are best equipped to judge whether candidates are suited to the role of responsible individual, given the nature of the organisation and the skills of others involved in its governance. Publicising the various differences in qualifications fails to recognise the diversity of the objectives of NFPs and the benefit to society of encouraging people of good character and dedication to a cause to take on responsibilities. Rather, it would place barriers on participation.

CSA notes that ASIC currently provides extensive information to officeholders of companies concerning their responsibilities and obligations, including directing them to training and education programs to assist them to fulfil their duties. CSA is of the view that the ACNC can similarly provide links to training and education programs for responsible individuals in NFP entities.

Moreover, CSA notes that the draft legislation pre-empts the outcomes of the simultaneous consultation on governance arrangements, which seeks feedback from stakeholders as to whether responsible individuals should have particular qualifications. According to the draft legislation, this question has already been settled.

CSA recommends that the requirement for the qualifications of responsible individuals of an entity registered with ACNC be removed.

Enforcement

CSA notes that there is substantial material on enforcement in the draft legislation. CSA accepts that the ACNC is a regulatory body and requires powers to enforce the law, but given the strong commitment from the government that the ACNC should also undertake an educational role, CSA is strongly of the view that the ACNC also needs the discretion to respond to breaches of the law according to the size and circumstances of the particular NFP entity.

The ACNC should have the discretion to issue instructions or provide relief in approved circumstances, or to facilitate compliance while also providing ongoing education to the NFP sector. If the ACNC is granted this power, it will have the discretion to allow for the diversity in the sector and take account of what would be reasonable for the responsible individuals and the entity itself of a particular size and dominant purpose.

CSA recommends that the ACNC be provided with a discretionary power to modify regulations.

Reporting

The exposure draft requires all registered charities to prepare general purpose accounts and to disclose the quantum of remuneration of responsible individuals.

This conflicts with the separate consultation on governance arrangements, where stakeholder feedback is being sought on tiered financial reporting and disclosure of remuneration. The draft legislation pre-empts the outcomes of that separate consultation.

Moreover, the exposure draft introduces an onerous compliance burden by requiring all registered charities to prepare general purpose accounts. Many prepare special purpose accounts at present, and have neither the revenue nor the resources to prepare general purpose accounts. If a registered charity meets the criteria for special purpose accounts, they should be able to choose that mode of reporting. Such charities should not have to seek the consent of the Commissioner of Taxation.

In requiring general purpose accounts, the exposure draft also imposes auditing obligations on many organisations that have not previously been subject to auditing requirements, thereby increasing the compliance load and adding considerably to the costs of compliance. This counters the very intent of the reform process, which is to reduce the compliance burden on NFP organisations.

CSA recommends that the legislation not require all registered charities to prepare general purpose accounts.

Audit

The draft legislation provides an audit requirement for medium and large organisations to the ACNC. However, there is no provision for a small or micro charity to be subject to an audit or review if the ACNC considers it appropriate. The draft legislation does not explicitly provide to the ACNC adequate powers in relation to audits. In particular it uses a crude measure of size to determine whether an audit or review is required when the diversity in the nature of the organisations which will be regulated necessitates a much more refined approach. Further, circumstances may come to the notice of the regulator that suggests that, in spite of an organisation being exempt from the audit requirements, an audit is desirable. The regulator needs to be granted the power to determine the audit regulations which should apply to different classes of organisations and to modify those regulations in relation to specific organisations when they determine that such variation is warranted by circumstances. This means that even a small single-purpose charity may be subject to audit on instruction of the ACNC in the event that something triggers a feeling of disquiet about the organisation.

CSA recommends that the ACNC have the power to determine the audit regulations which should apply to different classes of organisations and to modify those regulations in relation to specific organisations when they determine that such variation is warranted by circumstances. It

is appropriate that the ACNC be able to determine if an audit is required. It should also be granted the power to change licensing requirements as appropriate.

Any further review, either internal or external, should be dependent on the size and nature of the NFP organisation. The tiered arrangements that companies limited by guarantee are subject to under the Corporations Act provides a precedent for such tiered financial review and reporting arrangements.

CSA notes that, where funding is provided by the public, it may be seen that a greater level of review and/or audit is required, to instil confidence. However, CSA also notes that audits are costly and it is not appropriate to impose an audit on all NFP entities which raise funds from the public.

CSA also notes that the exposure draft requires the auditor to report on the compliance of an entity with the legislation. Given that the exposure draft currently includes prescriptive material on a range of issues, including governance and remuneration, neither of which are audit responsibilities, this introduces a new level of complexity into the regulatory framework. It not only prescribes governance and remuneration arrangements, which are the subject of a separate consultation and which should be dealt with through a principles-based approach, but also attaches new and onerous responsibilities to the role of auditor. Their responsibilities, as set out in the exposure draft, would be far more than those as set out in the Corporations Act. CSA does not support such an extension of responsibility.

CSA recommends that the legislation be amended to remove the obligation for an auditor to report on the compliance of an entity.

Conclusion

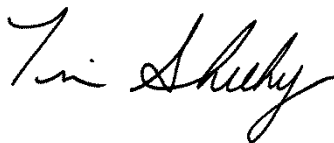
CSA's main recommendation is that the Australian Charities and Not-for-profit Commission Bill be restructured to reflect its primary aim of establishing a new statutory regulator. The bill should focus entirely on the establishment of the ACNC, its constitutional and ancillary powers and how it operates and the aspects of the bill relating to the duties and operations of those entities it regulates should be dealt with in separate legislation.

Clarifying that the bill is solely related to the establishment of the new regulator would ensure that the ACNC could be operational by 1 July 2012, as planned, without the very real risk of introducing a regulatory framework that imposes even further onerous compliance burdens on the NFP sector. Once established, on 1 July 2012, the ACNC can then function as an adviser and stakeholder in the ongoing consultation on and implementation of further legislation relating to the different types of entities within the NFP sector that it will regulate.

This will also provide clarity as to how the various consultations on the reform of the NFP regulatory framework interact.

CSA would be more than happy to discuss these issues with you further.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE