



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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Secretariat
Review of Regulatory Impact Assessment
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By email: RIAreview@finance.gov.au

Dear Secretariat

Regulatory Impact Assessment Review

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 have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. As governance professionals, CSA Members are directly affected by amendments to legislation, and/or policy in a diverse range of industries and sectors through various reviews, inquiries and consultations. They are responsible for implementing the changes to processes and frameworks to ensure compliance with legislative amendment as well as advising their boards to ensure their oversight responsibilities are fulfilled.

CSA welcomes, therefore, the government's commitment to providing a rigorous system for assessing the regulatory impact of proposals which are likely to impose an obligation on business or the not-for-profit (NFP) sector. It is important that better regulation of the private and NFP sectors is achieved through sound analysis, informed decision making, and transparent procedure.

However, CSA has strong concerns that, while the *Australian Government's Best Practice Regulation Handbook* (the Handbook) provides excellent guidance on the appropriate measures required for regulatory reform; in practice, the recommendations are implemented haphazardly and not in accordance with the spirit of the regulatory impact assessment scheme.

Timeframes for consultations

CSA notes that there have been numerous examples of reform consultation periods not meeting the criteria specified in Part 3.6 or Appendix C of the Handbook, in particular with respect to timeliness.

In particular, the Handbook states that time frames for consultation should be realistic to allow stakeholders adequate time to provide a considered response, and that:

Holiday periods and the end of the financial year should be avoided particularly where stakeholders are small businesses.

CSA notes that, despite this advice, three submissions related to the NFP sector reform were released over the recent Christmas and New Year holiday period. These three consultation documents were the:

- Exposure Draft — Australian Charities and Not-for-profits Commission Bill
- Consultation Paper — Review of not-for-profit governance arrangements, and
- Australian Charities and Not-for-profits Commission: Implementation design discussion paper.

All three consultations related to fundamental regulatory reform, and all three were released on 8 and 9 December 2011 and scheduled (with the exception of the Australian Charities and Not-for-profits Commission: Implementation design discussion paper) for comments by 27 January 2012. Indeed, the original deadline for submissions on the governance arrangements consultation paper was 6 January 2012 and the deadline was only moved to the end of January following an outcry from the NFP sector.

CSA's submissions to both Treasury and the Australian Charities and Not-for-profits Commission (ACNC) captured our concerns with the timing of consultation periods held over holiday periods. We commented:

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.

Moreover, it was vital that charities were involved in responding to the NFP reform proposals, given that the ACNC will be regulating charities in the first instance rather than the entire NFP sector. Yet for many charities, Christmas is their busiest time of year, and they will not have had the resources to also attend to the consultations. Even in an organisation such as CSA, which has paid staff to address policy issues, time is required to liaise with Members and ensure their views are fully represented. Liaising with Members is difficult at Christmas and early in the new year, as many CSA Members take leave at this time. Indeed, we note that serving members of parliament take annual leave at this time of year, as is common for the majority of the citizenry.

The Productivity Commission Report, *The Contribution of the Not-for-Profit Sector* notes that there are some 600,000 NFP organisations (excluding body corporates) with a majority, some 440,000, being small unincorporated organisations (such as neighbourhood tennis, babysitting, or card clubs)¹. This means that two-thirds of NFP organisations, therefore, are small

¹ Productivity Commission, *Contribution of the Not-for-Profit Sector - Research report*, February 2010, available at <http://www.pc.gov.au/projects/study/not-for-profit/report>

businesses that were subject to consultation over the holiday period. CSA strongly believes that this is an unacceptable approach to consultation and not in the spirit of the Handbook.

A second major example of this occurred during the consultation process on the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (the Corporations Amendment Bill). CSA notes that only 30 days were provided for consultation during the 2010 Christmas holiday period for a major piece of legislation, which resulted in very few business days being available for review of the detail of the proposed reform.

CSA is aware that there have been several examples of short consultation time frames during 2011, including the:

- Exposure Draft: Legislative Framework for Public Ancillary Funds which was issued on 14 July and due for comment on 1 August — this provided a total consultation time of 19 days (13 business days)
- Exposure Draft: Corporations Amendment Regulations 2011 — Funded Class Actions which was issued on 27 July and was due for comment on 12 August — a total consultation time of 17 days (11 business days), and
- Exposure Draft: National Consumer Credit Protection Amendment (Enhancements) Bill 2011 which was released on 5 August and was due for comment on 17 August — a total consultation period of 13 days (a mere eight business days).

CSA notes that these time frames do not accord with the recommendations of the Banks Report² and, in particular, the principle which requires effective consultations with stakeholders. Furthermore, they do not accord with the Handbook guidelines on consultation as found in Appendix C 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.

It is evident that the consultation agenda for several major legislative reform consultations has not met these benchmarks, either in terms of time frames or the timing of the consultation period.

The *Business Checklist for Commonwealth Regulatory Proposals* (the Checklist), which has endorsement from a number of leading professional associations representing diverse stakeholder interests, furthers the principle of effective consultation and recommends that consultation periods be at least 30 days and longer for more complex consultations. A copy of the Checklist is attached to this submission.

CSA's concerns with inadequate time for consultations reside with the problems which arise from insufficient or inappropriate consultation. In the first instance, CSA notes that a short time frame provides insufficient time to canvass views and generate discussion among stakeholders and potential respondents. When stakeholders do not have sufficient time to review the proposed reforms and consider their impact, it cannot be said that effective consultation is taking place.

The second issue is that of unintended consequences attached to rushed drafting and insufficient time to provide input on the practical implications of the drafting. For example, during the Corporations Amendment Bill consultation, a drafting error saw many shareholders disenfranchised of their voting rights. In response to the drafting anomaly, the Australian Securities and Investments Commission (ASIC) issued an Information Sheet to seek to assist

² Treasurer of Australia, *Report of the Taskforce on Reducing Regulatory Burdens on Business – Final Government Response*, Media Release, 15 August 2006.

companies to be able to provide for their shareholders to be able to exercise their voting rights while not being in breach of the law. CSA Members spent considerable time working with ASIC and legal advisers to ensure shareholder voting rights were not curtailed. Regardless of the fact that the government has now announced that it will amend the Corporations Act to overcome this drafting error, it is not acceptable that so much time and effort, on the part of our Members, legal advisers, the regulator, and other stakeholders, should be applied to seeking to address the negative consequences of the original drafting error, particularly when it would have been avoided if sufficient consultation time had been provided, as it was brought to light not long after the close of the consultation period.

CSA reiterates that appropriate time frames for consultation are required to fully assess the implications of proposed legislative reform and provide informed comment on the proposed changes. Consultation time frames need to be appropriately structured to allow ample time for stakeholders to respond and provide the necessary insight into the direct and indirect consequences of proposed legislation or legislative amendment.

CSA holds strong concerns that the current approach to consultation by various government agencies is not one designed to seek input on policy formulation, but rather a 'box-ticking' exercise which has been undertaken after a policy decision has effectively been made. CSA is of the view that this is not the appropriate approach to consultation with stakeholders and nor is the utilisation of consultation as a way of legitimising policy outcomes, when in fact insufficient consultation has occurred.

CSA recommends that the Office of Best Practice Regulation (OBPR) consult with government agencies about the timeliness of their proposed consultations noting that the Handbook specifically recommends that:

- the timeframes for consultation should allow stakeholders sufficient time to provide a considered response
- holiday periods and the end of the financial year should be avoided, particularly where stakeholders are small businesses
- it is appropriate, as a guide, to provide between six to twelve weeks for effective consultation depending on the significance of the proposals, and
- where small businesses are potentially affected, they should be given sufficient time to consider the issue and respond, including allowing time for representative bodies to contact their members.

The requirement to have a Regulation Impact Statement

CSA understands that one of the responsibilities of the OBPR is to review whether decisions made by the Australian Government and its agencies are likely to have a regulatory impact on business or the NFP sector.

Part 2.1 of the Handbook clearly identifies that the OBPR is mandated to require the government agency to utilise a Regulatory Impact Statement (RIS) unless the regulatory impact is of a 'minor or machinery nature and does not substantially alter the existing arrangements'.

CSA notes that this process has not been followed with respect to the NFP sector reform currently being undertaken by the Department of Treasury.

As previously noted, there have been multiple consultations about the fundamental regulatory reform underway that will impact the NFP sector. These consultations include the:

- Discussion Paper — Charitable Fundraising Regulation Reform
- Exposure Draft: Australian Charities and Not-for-profits Commission Bill
- Consultation Paper — Review of not-for-profit governance arrangements

- Australian Charities and Not-for-profits Commission: Implementation Design discussion paper
- Consultation Paper — A Definition of Charity
- Consultation Paper — Better Targeting of Not-For-Profit Tax Concessions, and
- Consultation Paper — Scoping Study for a National Not-For-Profit Regulator.

CSA responded to the Consultation Paper — Scoping Study for a National Not-For-Profit Regulator, which was the first paper issued of relevance to the reform agenda. This paper was released on 21 January 2011 for consultation and did not include a RIS.

Since that initial paper there have been six more consultation papers covering major reform to the sector, including the introduction of a dedicated regulatory body for charities, and proposed reporting and governance changes. The proposed reforms could not be considered to be minor in nature, and will substantially alter the current regulatory framework within which NFP entities operate. Despite this, CSA notes that the Discussion Paper — Charitable Fundraising Regulation Reform is the only paper to contain a RIS. It is the most recent consultation paper — the previous six consultations did not include a RIS. CSA reiterates that this is an unacceptable approach to a major regulatory reform process, particularly when the targeted sector is comprised largely of volunteers and entities without the necessary resources to cope with substantial change.

CSA recommends that the OBPR reinforce the mandatory requirement that major regulatory reform be accompanied by a RIS, as currently required by the Handbook.

Conclusion

CSA notes that the OBPR is the appropriate office to hold government and agencies responsible for the terms of their consultation in line with best practice recommendations. As the chief body administering the Regulatory Impact Assessment process it is incumbent on the OBPR to be active with government and agencies through the provision of education and training materials which reinforce the importance of best practice.

CSA is of the view that unless the recommendations set out in the Handbook are reinforced, consultations will not appropriately engage in sound analysis, informed decision making and transparent conduct. Australian policy formulation will be the poorer for it.

CSA would be more than happy to discuss its concerns further with your office.

Yours sincerely



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CHIEF EXECUTIVE