



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

26 August 2011

The Hon. Gai Brodtmann MP
Chair, National Policy Committee
Australian Labor Party
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By email: laborconnect@australianlabor.com.au

National Policy Committee Platform Review

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are 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 the actions of government through legislative and/or policy amendments and changes in a diverse range of industries and sectors.

CSA welcomes the opportunity to comment upon the Australian Labor Party's 'Platform Review' and apologises for the delay in providing our submission. The establishment of Labor's core values in the modern context provides the opportunity for a proactive role in the implementation and promotion of governance and risk management in the Australian business community.

The recent global financial crisis (GFC) exemplified the importance of governance in the business sphere. Of developed economies around the world, Australia emerged as among the least affected by the GFC and largely escaped the worldwide recession. Australia's banking sector was also less adversely affected than elsewhere, with no failures and profitability remaining strong, although down somewhat from previous levels and with increased bad debt levels. However, there was some failure of listed financial/investment companies and large investor losses from structured products and investment funds, prompting concerns about financial market practices and investor protection.

It is timely, therefore, to examine the existing corporate governance regime in Australia, in order to ensure that we continue to maintain a strong and prosperous economy.

CSA believes the policies outlined below are critical to foster greater confidence in Australian capital markets, enhance the performance of Australian organisations and reduce substantially the burden of continually increasing legislative and regulatory compliance.

Recommendation 1: Harmonising personal liability for corporate fault across the federal and state jurisdictions

The harmonisation of legislation across federal and state jurisdictions is an ongoing process which has been explored at various levels within the political landscape. The Council of Australian Government's (COAG's) *National Partnership to Deliver a Seamless National Economy* agreement sets out the commitment of the federal and state arms of government to reducing the level of unnecessary and inconsistent regulation across jurisdictions.

The Corporations and Markets Advisory Committee (CAMAC) in their report *Personal Liability for Corporate Fault* (the CAMAC report) issued in September 2006, following extensive consultation with a range of stakeholders, identified personal liability for corporate fault as an area in which there are considerable differences between statutes in various jurisdictions, even statutes with similar areas of regulated activity.

The CAMAC report identifies two principal areas of concern, namely:

- a marked tendency in legislation across Australia to include provisions that impose personal criminal sanctions on individuals for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions) unless they can establish an available defence, and
- considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.

The CAMAC report notes that much of the current inconsistency lies in the 'overreach in the treatment of individuals where the company is in breach of the law, together with lack of harmony in the standards of personal responsibility required under various provisions'. This includes the absence of a consistent defence that might apply to multiple provisions of legislation, that is, similar to the concept of a 'safe harbour' which currently exists in corporate law in the United States. A provision of this nature would apply to all decisions within the ambit of the relevant legislation and stop the courts from 'second-guessing' commercial decisions by boards of directors and companies. CSA would fully support a general defence that operates in this manner. CSA would also support a general defence that clarifies that, if a director or other officer has 'done the right thing', they will be protected.

Currently, directors and officers of corporations need to be cognisant to varying degrees of the details of the 539 statutes across Australia imposing personal liability. This situation, inevitably, leads to compliance uncertainty for many boards, officers and directors.

CSA is fully supportive of the undertaking by COAG to conduct a comprehensive and consultative review of the federal and state legislative framework of personal liability for corporate fault. CSA notes that this undertaking is intended to reduce the number of criminal liability provisions across federal and state legislation or harmonise inconsistent provisions where criminal liability is retained for public policy reasons.

However, this reform process seems to be flailing, due to the lack of any overarching body taking responsibility for the reduction and harmonisation process. The federal Department of Treasury sought input from Federal Government departments on where reductions or harmonisation could take place, but has no capacity to drive a wholesale reform process. Each department chose to retain its criminal liability provisions without recognising the need for overarching reform. The states are lagging in undertaking audits of criminal liability provisions in legislation in each jurisdiction, and again, there is no party or body driving the reform process. The piecemeal approach and lack of ownership for outcomes has seen no change in the

multiple statutes containing personal liability provisions, despite their significance to the commercial operations of many enterprises.

CSA recommends that the Australian Labor Party incorporate the recommendations for reform contained in the report by CAMAC on personal liability for personal fault, including the introduction of a nationally uniform model provision imposing personal liability on officers and directors, into their policy platform. CSA understands this will involve considerable consultation with the states and encourages the Australian Labor Party to take leadership on the issue.

Recommendation 2: The governance of Australia's superannuation industry

CSA notes that the superannuation funds make decisions on the fourth-largest pool of managed money in the world, which in Australia is built largely from compulsory savings¹. Yet there is no consistent governance framework within which they are required to operate. This results in low levels of transparency and disclosure among superannuation funds. Indeed, CSA notes that superannuation funds are far less transparent to members than are companies to shareholders.

In light of Australia's ageing population and the importance of appropriate disclosure to the beneficiaries of superannuation, CSA believes that superannuation funds should be required to adopt a more rigorous governance regime that implements good governance practice. This would align the governance practices of those investing in public listed companies with their investment vehicles, which is also important given that superannuation funds analyse and rate the governance practices of the companies in which they invest.

CSA recommends that standards of practice should be published by superannuation funds, against which the funds are required to publicly report. This would include the structure of the superannuation fund and the following information:

- the names of the directors on the trustee board and the manner of their appointment
- the name of the chief executive officer (CEO)
- any major outsourcing arrangements
- whether the superannuation fund has been granted a registrable superannuation entity licence
- the name of the auditor of the fund.

This information should be made publicly available, ideally by posting it to the superannuation fund's website in a clearly marked governance section.

CSA recommends that the following disclosures should be mandatory for all APRA-regulated superannuation funds:

- the fund managers to whom the trustee outsources the management and investment of the superannuation fund
- the performance of the fund (including all investment options) in the past 12 months
- the remuneration provided to the trustees/directors and the CEO
- any adverse findings issued by APRA against the superannuation scheme
- the names of all trustees or directors where it is a corporate trustee and the period of office held by each trustee or director in office at the date of the annual report
- the name of the CEO/fund secretary
- the number of trustee or board meetings held during the year and the number attended by each trustee/director
- whether performance evaluations of the trustees, or board and its committees have taken place in the reporting period

¹ Ferguson A, 2011, 'Murky world of super funds needs transparency', *Sydney Morning Herald*, 20 August 2011, <http://www.smh.com.au/business/murky-world-of-super-funds-needs-transparency-20110819-1j2em.html>

Recommendation 3: Not-for-profit reform

CSA notes the traditional under-resourcing and complex compliance provisions which have plagued the not-for-profit (NFP) sector. It has been evident through comparative corporate law reforms for the private sector, introduced over the past decade or so, that reform within the NFP sector has been lacking. This has been particularly disappointing, given the importance of this sector within the Australian economy and its contribution to the community.

CSA has responded to previous reviews and inquiries noting that the NFP sector requires a coordinated and holistic approach to reform. CSA therefore welcomes and supports the establishment of the Australian Charities and Not-for-Profits Commission (ACNC) and the appointment of the new chair of the advisory board² assisting the ACNC. These initiatives are likely to have a beneficial impact on the sector as a whole through the establishment of a coordinated regulatory framework for the sector, tailored to its needs, and the improvement of understanding of regulatory compliance within the sector and reduced compliance costs in NFPs.

However, the process is far from complete, and CSA believes that the Australian Labor Party should prioritise two areas of the NFP reform process when designing its policy platform.

Firstly, the role of the new NFP regulator, the ACNC, should be supported. However, CSA is concerned that the current focus on reform of taxation arrangements of NFP organisations has directed attention away from the overarching reform of the NFP sector to which the government and the NFP sector as a whole is committed. While there are genuine NFP taxation issues that require consideration, these should be dealt with not only separately from the broader NFP reform process but also sequentially. The diversion of attention from the broader NFP reform process is obscuring the fact that the functions given by the government to the new NFP regulator, the ACNC are not yet sufficient to ensure it will be a one-stop shop for NFP organisations

CSA recommends that the Australian Labor Party commit to extend the functions of the ACNC over time to the extent that it can operate as a one-stop shop for the NFP sector as promised (for example, removing the complex regulatory arrangements currently in place, streamlining reporting arrangements and reducing red-tape for government-funded NFP organisations).

Secondly, CSA asserts the importance of training, educating and investing in the upskilling of individuals within the NFP sector. The new regulator will, likely, undertake a review of the sector and make substantial governance framework changes. CSA believes that individuals with the requisite skills and dynamic abilities to manage the change process will be required within the NFP sector.

CSA recommends that the Australian Labor Party take a proactive position in training, educating and investing in the upskilling of individuals within the NFP sector.

Recommendation 4: Implementation of policy

Change in policy and regulation is necessary to ensure that the interests of business, the community and consumers are protected. However, there must be a high level of confidence among business and the wider community that there is a real need for new policy or regulation and that new proposals will be effective and not impose costs that outweigh their expected benefits.

To this end, CSA urges the Australian Labor Party to implement a clear commitment to the Council of Australian Government's (COAG) *National Partnership Agreement to Deliver a*

² The Hon Bill Shorten MP, 'Next Stage for Not-for-Profit Reforms Announced', Press Release, 27 May 2011

Seamless National Economy into their policy platform. In particular, CSA advocates for the introduction of improved processes to avoid the introduction of unnecessary regulation and to enhance the quality, efficiency and effectiveness of new regulation.

CSA notes that this should include appropriate consultation and review times in order to undertake effective discussions with stakeholders.

CSA recommends the:

- introduction of a process for legislation that is proposed in one portfolio to be cross-referenced to legislation in another portfolio, to ensure that any new proposals do not contradict existing laws or policies
- introduction of sunset clauses and review dates for major regulation to ensure whether policy objectives are actually being achieved.
- re-establishment of transparent and consistent consultation regimes which accord with the terms of the Banks Report³ and the requisite guidelines on consultation as found in Appendix C of the Department of Finance and Deregulation's Best Practice Regulation Handbook (June 2010).

Recommendation 5: Review the annual general meeting and whether its objectives can be achieved via different mechanisms

CSA research over eight years shows that shareholder attendance at annual general meetings (AGMs) is declining, which indicates that the AGM in its current form is dying a slow, painful death. Yet shareholders are demanding greater engagement with the companies in which they invest.

CSA notes that the AGM was created in an era of horse and coach; pen and ink; limited printing and a fledgling postal service that dictated that members would physically meet with directors annually. Yet we are now in an era of advanced technology: mobile telephones; cameras and text messaging; the internet; webcasting; powerful portable computers and geographically dispersed shareholders.

In this context, CSA believes that it is important to review how best to achieve the dual functions of reporting and decision-making that sit at the heart of corporate stewardship, accountability and transparency and for which the AGM currently provides the forum.

Several factors have reduced shareholder reliance on AGMs for the reporting of company information and have provided new options for shareholder decision-making:

- Continuous disclosure regulations ensures the 'real-time' release of financial information to the market (for listed companies) and has made the reporting of financial information at the AGM largely anachronistic.
- Sophisticated and targeted communication to institutional investors via analyst briefings gives institutional investors a forum for engagement separate from the AGM, such that they do not rely on the AGM.
- The advent of direct voting online has meant that member decision-making pertaining to director elections, remuneration and the like can be undertaken without having to be physically present at an AGM.

While there is strong support for real-time questioning of directors, it must be asked if the AGM is the best mechanism to achieve this, given declining support and attendance.

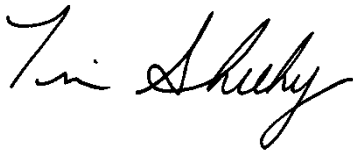
³ Treasurer of Australia, *Report of the Taskforce on Reducing Regulatory Burdens on Business – Final Government Response*, Media Release, 15 August 2006.

Against this background, **CSA recommends** that the Australian Labor Party incorporate into their policy platform a comprehensive review assessing the appropriateness of current legislative requirements regarding AGMs.

CSA believes that the aforementioned recommendations would provide the Australian business community and wider public with a better governance framework within which to reflect Labor's core values in a modern context.

CSA would be more than happy to expand upon or provide more information about the recommendations listed above with your office.

Yours sincerely

A handwritten signature in black ink, reading "Tim Sheehy". The signature is written in a cursive, flowing style with a large initial 'T'.

Tim Sheehy
CHIEF EXECUTIVE