CHARTERED SECRETARIES
AUSTRALIA

*Leaders in governance*

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Associations Incorporation Regulations RIS Submissions
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Dear Dr Lanyon

## *Associations Incorporation Regulations 2012*
## *Regulatory Impact Statement*

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.

Our members are all involved in governance, corporate administration and compliance with the Corporations Act and the various state associations' legislation. Many of our members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with companies limited by guarantee or incorporated associations. 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 Regulatory Impact Statement (RIS), and draws upon the experience of our Members in formulating our submission. We regret we were unable to contribute to the formulation of the Associations Incorporation Reform Act, which has introduced some significant responsibilities to members of boards of incorporated associations in Victoria.

Over the past 12 months, CSA has been deeply involved in the consultations leading to the creation of the federal Australian Charities and Not-for-profits Commission (ACNC). While CSA wholeheartedly supports these measures being taken by the State of Victoria to reform and improve its associations regulations, in the medium and longer term it believes that regulation of the not-for-profit (NFP) sector, including charities, by a federal body should be the preferred model.

This will introduce a measure of consistency in both regulation and education for the over 600,000 NFPs in Australia and will bring them into line with the companies regulated by ASIC. It will also overcome a significant duplication of reporting to multiple regulators that many NFPs face. This particularly applies to charities operating as associations that would have to report to both ACNC and their respective State Association Registrar with the additional administrative burden and costs that this incurs. In this regard, we note that South Australia will make amendments to its incorporated associations and charitable collections legislation to harmonise reporting requirements, and authorise charities to collect charitable donations in South Australia, once they have formally registered with the new national regulator, the ACNC.

### *General comments*

While CSA welcomes the change from Public Officer to Secretary as the regulator's main contact, we are of the view that there will be significant confusion where the two positions are held by different people. At information briefings held by the Department of Consumer Affairs on the legislative changes, the department has suggested that the person now called the Public Officer should be renamed the Secretary for the purposes of the regulator, while the person now called the Secretary and carrying out the administrative tasks including looking after the board/management committee should hold a different title.

CSA **strongly recommends** against such an approach. The title of Secretary as the provider of support to the board/management committee and administrator is embedded in statute, the common law and practice. Furthermore, the role of the Secretary can and does encompass a whole range of tasks, including compliance with the appropriate regulations. In the private sector, the Secretary will have responsibility for meeting compliance obligations with the Australian Securities and Investments Commission (ASIC) and, in the financial services sector, the Australian Prudential Regulation Authority (APRA). It is common for those called Secretary in NFP organisations to also fulfil these responsibilities.

CSA is of the view that the regulator should be able to deal with any person nominated by the organisation to be their main contact and should not advise organisations to change position titles for the convenience of the regulator. CSA firmly believes that this will lead to singular confusion with NFP organisations in Victoria, and would place the State of Victoria at odds with practice in other jurisdictions.

The Department of Consumer Affairs has also advised in information briefings that there is a 12-month transition period from the Act's effective date at the end of November and, therefore, organisations should not seek to make changes to their rules and structures before the 2013 AGMs if they have insufficient time and resources to do so. However, incorporated associations will need to maintain a watching brief on the department's website for updates to the legislative reform process, including the final version of the Model Rules and the new forms of Annual Statements, in order to effect changes. Given that many smaller incorporated associations do not necessarily have dedicated websites, nor their members access to the internet, CSA **strongly recommends** that:

- continuing communication and education needs to be undertaken by the department, and
- such communication and education should utilise all media, including hard copy sent by post as well as information posted to the department's website.

CSA also **strongly recommends** that the communication and ongoing education include clear and concise advice that an incorporated association's current rules will remain valid during the transition period, at the end of which they will be automatically replaced by the Model Rules, unless the organisation chooses to adopt its own rules. Should the organisation choose to adopt its own rules, they must include the obligatory provisions including grievance procedures; members' rights and obligations; access to the minutes of any members' meeting and committee meetings. The department should include in the advice that any rules other than the Model Rules that an organisation seeks to adopt must be approved by the department, and that this process incurs a cost.

## *Specific comments*

In relation to the consulting points in the RIS, CSA comments as follows:

**1. Benefits of access to publicly available data**

CSA advocates that the public availability of data relating to associations is a vital part of regulation and transparency, permitting members and stakeholders, including the providers of funds and donors, to check on the purposes of the organisation, its most recent financial information and the identity of office holders.

**2. Benefit of a properly regulated incorporated associations sector**

The proper regulation of the incorporated associations sector ensures that incorporated associations will receive the same amount of oversight as limited companies. As indicated above, CSA's preference in the medium and longer term is for a national regulator. Apart from introducing the measure of consistency it will provide associations across the country with one point of contact.

**3. Regulations that do not impose a material burden**

CSA is satisfied that the proposed Regulations 1-3 machinery provisions and Regulation 14 permitting people without appropriate insurance, for example, retired accountants, to act as liquidators of smaller associations on providing a security, do not impose a material burden. CSA has no comment on Regulation 13 permitting Aboriginal & Torres Strait Island Corporations to incorporate as associations.

**4. Time required to provide information**

CSA is satisfied from its Members' experience that the estimated time taken to make applications for incorporation, change of name and appointment are fair estimates.

**5. Information required**

CSA agrees that the information required on any of these applications is appropriate, although it notes that disclosure of the purpose of the organisation has been omitted and suggests that this is important information for stakeholders, particularly donors of funds.

**6. Contents of the proposed model rules**

CSA welcomes the changes made to the Model Rules which contain some major matters of governance, including provisions relating to conflicts of interest and the duties of committee members. Many of these changes will be welcomed by associations that prefer to use their own rules. CSA is, however, concerned that the Model Rules are intended to be seen as the default rules of an association if it does not adopt rules that may be better suited to its activities. The Model Rules are in some respects very complex and legalistic, particularly in respect of the handling of grievance and disciplinary matters, and may not be suitable or understood by the majority of very small associations. In this case 'one size does not fit all' and the Model Rules provide associations with no flexibility to meet their individual circumstances. CSA believes the Rules should be regarded as guidelines rather than prescribed, notwithstanding the provisions of s 49 of the Reform Act. Throughout the debate leading to the new ACNC legislation, CSA has supported the use of guidelines rather than regulation in the NFP sector, recognising the widely varied nature of organisations in the sector.

**7. Fee structure**

CSA is satisfied that the revised costs structure should not prevent an association, particularly smaller volunteer-based NFPs, from seeking incorporation, even it chooses to introduce its own rules rather than adopt the model rules. CSA does, however, believe that the doubling of fees for approval of changes to an association's own rules is not justified, as Consumer Affairs Victoria's (CAV's) only obligation will be to ensure that the matters set out in Schedule 1 are and continue to be in the association's amended rules. In this regard CSA asks, as many associations will be reviewing their rules as result of these changes, that in the 12-month transition period CAV waives the additional fee for those associations that do not use the model rules. Such a waiver would encourage associations to review and update their rules.

**8. Fees for lodgement of annual financial statements**

While the increases in fees for Tier 2 (128 per cent) and Tier 3 (357 per cent) associations appear substantial, CSA believes that their introduction will not impose an unreasonable strain on such organisations and recognises that it will provide a measure of subsidisation that will benefit the sector as a whole.

**9. Proposed fee structure**

CSA supports the proposed fee structure, which should allow CAV to provide an adequate source of funds to properly regulate the associations reporting to it.

CSA does however sound a note of caution with regard to the significant codification of the duties of officeholders and the provision of advice to associations. CSA notes that officeholders already have duties under the common law. Any reiteration under the Incorporated Associations Act is likely to create confusion not clarity. While it might seem tempting to restate directors' duties in the state legislation, it effectively codifies the common law, attaching new obligations, yet directors and other officeholder are still subject to common law as well. We question why officeholders of NFP organisations should be subject to obligations that extend beyond those applying to directors in the private sector.

Furthermore, these changes are likely to require significantly higher levels of expertise at CAV, particularly in the pursuit of non-performing board members, than is currently available to CAV. There is high competition for appropriately qualified staff from other regulators, for example, ASIC, and from the private sector, with the new ACNC likely to provide additional competition. For this reason CSA has consistently publicly expressed support for one national regulator of the NFP sector, rather than each state attempting to properly regulate the associations incorporated in the state, placing additional compliance burdens on incorporated associations, creating confusion as to compliance obligations and regulator .

CSA notes in this regard that no comment has been sought in Section 3.6 of the RIS — Compliance and enforcement. While CSA recognises that compliance with the proposed regulations is expected to be high — 90 per cent — it suggests that the additional responsibilities take the new legislation to a higher level than the existing well-established scheme. Recent activity in the courts demonstrates the difficulty that even well-resourced regulators, such as ASIC, have in enforcing similar provisions.

**10. Increase in fees**

For the reasons set out in 7, 8 and 9 above, CSA does not believe the increased fees will act as an impediment to small associations incorporating and running under the Reform Act.

**11. Fees above full recovery**

For the reasons set out in 8 above, CSA believes it is acceptable for Tier 2 and 3 associations to bear above full cost recovery fees, but recognises there may some opposition to excessive recovery. They would not be acceptable to smaller associations.

**12. Full cost recovery**

While the fees under the full cost recovery option are not substantial, CSA suggests that the increases required could provide an impediment, particularly to smaller associations.

**13. Introduction of fees to cancel incorporation or to notify change of secretary**

CSA suggest the introduction of a fee to cancel incorporation is unlikely to be effective, since an association is more likely to merely allow its registration lapse, rather than pay to have itself deregistered. In any event it may not have sufficient funds to pay the fee.

CSA does not support the imposition of a fee for the notification of the change of secretary. This is an important corporate action and any fee could act as a barrier to full compliance.

**14.** CSA notes that this question is in the same wording as question 12 and refers to the answer above.

**15,16 & 17 Reduced information requirement in Option 3**

CSA suggests that the difference between the amount of information sought in Options 2 and 3 and the time required to record the additional information is so minimal that it is unlikely to result in a reduced cost of compliance. CSA suggests that the information sought in Option 3 is appropriate and sees little value in reducing it to the level of Option 2

**18&19 Fines**

CSA does not support the imposition of fines by associations on members who breach the rules of the association. As any breaches may vary in nature or impact, the imposition and setting of an appropriate level of fine is likely to cause more damage than the breach itself. CSA notes that the new Model Rules do not provide for the imposition of fines — Rule 21(2) provides that a committee may only take no action, reprimand, suspend or expel a member.

CSA notes that companies regulated by ASIC under the Corporations Act do not have a power to fine recalcitrant shareholders — although there are some that wish they had! — and suggests that such a regime has no place in the NFP environment, which relies heavily on unpaid volunteers and members and will not necessarily lead to good management of the association.

**20. Impact of regulations on competition**
CSA does not believe the regulations will have any impact on competition in the mainly NFP environment. Few associations are in direct competition, other than in perhaps seeking funds.

### *Recommendation of harmonisation of reporting requirements*

Importantly, CSA is of the view that harmonisation of reporting or a referral of powers is essential to ensure national regulation of NFP organisations, and a reduction in red tape.

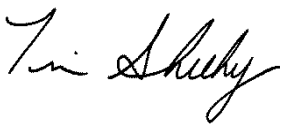
CSA notes that South Australia has announced that it will make amendments to its incorporated associations and charitable collections legislation to harmonise reporting requirements, and authorise charities to collect charitable donations in South Australia, once they have formally registered with the new national regulator, the ACNC.

CSA is of the view that, in the long run, the NFP sector will benefit most from 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. Otherwise, NFP organisations will be subject to duplication of reporting, which undermines the reform process. However, we recognise that such a referral of powers could take some time to effect. CSA strongly recommends, therefore, that the Victorian Government also make amendments to its incorporated associations legislation to harmonise reporting requirements.

### *Conclusion*

CSA would be happy to discuss any of these issues with you. We note that there are to be a number of information sessions held around the state at which the new Reform Act, Regulations and Model Rules will be discussed.

Yours sincerely



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