



CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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Dr Joyce Chia
ACNC Regulatory Approach Consultation
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By email: consultations@acnc.gov.au

Dear Joyce

ACNC Regulatory Approach Statement: Consultation

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* (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, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information.

CSA welcomes the opportunity to comment on the *ACNC Regulatory Approach Statement: Consultation* (regulatory approach statement) and draws upon the experience of our Members in formulating our submissions on the matters canvassed in the consultation paper.

General comments

The Australian Charities and Not-for-profits Commission (ACNC), as the regulatory body for not-for-profits (NFPs), is charged with maintaining, protecting, enhancing, supporting, and sustaining the NFP sector. In administering the *Australian Charities and Not-for-profits Commission Act 2012* (the ACNC Act) and associated legislation this will require the ACNC to take on different roles to assist a diverse sector with their compliance and regulatory obligations.

As the ACNC will be aware, the sector is extremely diverse with 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)¹. 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.

CSA notes that it is common for those involved in the operations of NFP organisations to come from backgrounds which carry no experience in organisational administration, financial administration or business management in general. Of course, while a failure to know your responsibilities is not a defence after something goes wrong, CSA believes that the key to improving the transparency, accountability, stewardship and integrity of NFPs is to provide a supportive regulatory environment.

In this context, CSA is pleased to note that the ACNC regulatory approach will incorporate the values of fairness, accountability, independence, integrity and respect, and in particular recognise that a majority of the mistakes made by charities are made not through deliberate intent, or through reckless disregard, but most likely from inadequate understanding of the organisation's obligations.

It is, therefore, pivotal that the national regulator of the NFP sector plays an educational as well as a compliance and enforcement role, and CSA commends the ACNC on its proactive educational approach and engagement with charities during the initial stages of implementation of the regulatory framework.

As such, CSA strongly supports the approach set out in the regulatory approach statement, and has only several points which we wish to have further clarified.

Fairness

CSA strongly supports the presumption of honesty which is articulated in paragraph 4.2 of the regulatory approach statement. As noted above, CSA agrees with the sentiments that mistakes made by those in charge of charities are usually honest mistakes, or made because of a lack of knowledge, expertise or capacity.

CSA recommends, therefore, that the third sentence of paragraph 4.2 be amended to specify that the 'intentionality' of the action of a responsible person of the charity should be directed at breaching the regulations, rather than simply being intentional. CSA notes that the sentence could be amended to state the following, or words to the effect of:

If a charity is having problems, we will look at whether the conduct was an intentional breach of the regulations, and whether those responsible for the charity (such as committee members, directors, or trustees) knew about or participated in the conduct.

CSA is similarly pleased to see, in paragraph 4.5, that the ACNC will generally contact the charity, or in some instances, those affected by an ACNC decision, to clarify matters or raise concerns. It is important to give charities an opportunity to address concerns, or to provide charities with reasons for decisions and information on what they can do to challenge ACNC decisions. This is likely to improve practice over time as understanding and knowledge expands within the sector.

CSA recommends, however, that the ACNC provide further information about what will constitute a 'reasonable opportunity' for a charity to respond to a decision of the ACNC. CSA notes that charities may be staffed by volunteers or pro bono staff, and that timelines which might be appropriate in the 'for-profit' business sector will not necessarily be reasonable for

¹ 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

charities. CSA believes that the provision of further guidance on timeframes, noting that each circumstance will be different, will enable charities to better prepare their governance and compliance frameworks.

In light of the impact which ACNC's decision-making process will have on charities, CSA is pleased to see, in paragraph 4.8, that a design for a consistent decision-making process will be created. CSA notes that a transparent decision-making process is important because many charities will not have operated in a regulated area before, and may be unsure about how decisions by the regulator affecting their operations have been made.

In order to maintain public trust and confidence in the regulator, **CSA recommends** that the ACNC publicly consult on the proposed decision-making processes with stakeholders. A public consultation on the decision-making process will provide charities with an opportunity to understand how the decision-making process will affect their operations.

When and how the ACNC will act

CSA notes the ACNC approach adopted in chapter 9 of the regulatory approach statement which emphasises a supportive environment for regulating charities rather than an enforcement approach.

Unfortunately, there will be instances where charities will have failed to comply with the legislation and the regulatory framework, thereby prompting the intervention of the ACNC. CSA agrees that the best approach in these situations is to not involve the regulator in internal difference of opinion, employment disputes, or regulating the service quality of charities. However, CSA notes that there may be instances, such as fraud, whereby the ACNC will be commenting on the service quality of a charity. As such, **CSA recommends** an amendment to the final sentence of paragraph 9.3, to state that the ACNC will not *normally* regulate the service quality of charities (emphasis added).

Conclusion

While the consultation on the regulatory approach statement provides the ACNC with an opportunity to spell out its plans for regulating the NFP sector, it is vitally important that charities are also provided with a consistent regulatory framework within which to operate.

In this regard, CSA points to the proposed consultations on the external conduct standards, companies limited by guarantee, the statutory definition of charity, and fundraising regulations which still need to occur. CSA notes that there are also concurrent consultations occurring on the draft governance standards, draft financial reporting regulations and the impact of any duplication of reporting for the charities sector to consider. The reform to the regulatory framework is well underway and will result in benefit to the sector, but there is much more that still needs to be achieved before all the pieces of the puzzle make sense.²

However, CSA is also cognisant that assurance for charities will arise from certainty about the framework within which they will operate. For example, CSA notes that without a statutory definition of charity, there remains some uncertainty as to how charities will come to define themselves, and thereby interact with the regulatory framework. Finalising the statutory definition of charity, for example, will be crucial to assisting charities in this regard. Establishing the definition of charity will assist organisations in complying with their regulatory obligations

² CSA notes with relief that on 31 January the Federal Government announced that the budget measure 'better targeting of NFP tax concessions' will now commence on 1 July 2014. The announcement suggests that this will be to allow for further consultation and engagement with the NFP sector on these measures, which CSA and others have consistently recommended.

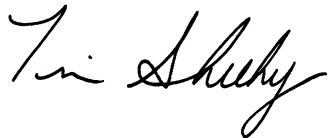
and subsequently allow the sector to react positively to the reform project rather than fearing it is intended to undermine their capacity to operate, which sentiment still prevails in some quarters of the sector.

CSA notes that until such other statutory instruments are consulted upon and finalised in legislation, some uncertainty remains within the sector, and it is difficult to provide comprehensive feedback on the consultation regulatory approach statement accordingly.

However, CSA otherwise commends the ACNC on the development of the regulatory approach statement, particularly in allaying the initial fears within the sector that regulation would be burdensome, prescriptive and overbearing. The regulatory approach statement provides some comfort to charities and reflects a good understanding of the needs of the sector.

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

Yours sincerely

A handwritten signature in black ink, reading "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy
CHIEF EXECUTIVE