CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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Manager
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Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
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By email: NFPReform@treasury.gov.au

Dear Treasury

Regulatory Impact Assessment of potential duplication of governance and reporting standards for charities

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 *Regulatory Impact Assessment of potential duplication of governance and reporting standards for charities* (RIA).

General comments

While CSA has been a staunch supporter of the NFP regulatory reform process, we have been concerned that there is the potential for a duplication of compliance obligations, given the continuing dual regulatory regime in Australia, with state and territory-based associations' legislation co-existing with the national regulation of charities. Any obligation to manage dual compliance obligations is, of course, at odds with the intent of the regulatory reform process to reduce red tape, which has been recommended in multiple inquiries into the regulation of the NFP sector over many years and actively welcomed by the sector itself.[1]

[1] There have been at least 5 reviews of the regulation of the not-for-profit (NFP) sector in Australia over the last decade, which have concluded that the regulation of the NFP sector would be significantly improved by establishing a national regulator and harmonising and simplifying regulatory arrangements. These reviews include: the 1995 Industry Commission inquiry report *Charitable organisations in Australia*; the 2001 Committee *Report of the Inquiry into the Definition of Charities and Related Organisations;* the 2008 Senate Economics Committee *Inquiry into the disclosure regimes for charities and not-for-profit organisations*; the 2010 Productivity Commission's inquiry report *Contribution of*

CSA commends the Council of Australian Governments (COAG) for commissioning the RIA. The RIA is essential to understanding if any duplication of reporting will arise from the establishment of the Australian Charities and Not-for-profits Commission (ACNC). It is also essential to understanding what steps COAG needs to take to provide for reduced red tape and a streamlined regulatory framework for the NFP sector.

Referral of power in the long term

CSA strongly encourages COAG to recommend the necessary changes to state and territory legislative frameworks that will remove any duplication of reporting and foster a regulatory environment of less red tape for the NFP sector.

To this end, CSA Members believe that for any regulatory reform of the NFP sector to succeed, it is essential that the sector is granted the same national context as the private sector. A fundamental aspect of the reform process should be for the states to agree to refer powers to the Commonwealth, as occurred with the Corporations Act, to provide for all incorporated and associations to be regulated nationally.

Advances in technology have facilitated the establishment of a national regulator. Online interaction means that state-based offices are not required, as in the past, to facilitate registration of entities and lodgement of reports. CSA does not believe that the states should retain any residual role in regulating incorporated associations in the long run (it is planned that the ACNC will regulate all NFP entities over the longer term), and certainly not in regulating charities that are also incorporated associations in the short term. The states have not retained a role in regulating private companies since 2001 and national regulation of the private sector has been of immense economic benefit and value to Australia.

Maintaining such dual regulation would be regressive, and condemn NFP organisations to continue being subject to a greater compliance burden than the private sector, which currently has recourse to a 'one-stop-shop' national regulator. There is no private sector company in Australia, no matter how small or local in its activities, that is required to meet the compliance requirements of a state-based regulator as well as those imposed by the Australian Securities and Investments Commission (ASIC) — this has been the case since the commencement of the Corporations Act in 2001. There is no public policy argument to support the imposition of dual regulation on charities, and eventually all NFPs, when our private sector companies have already been freed of such onerous obligations for more than a decade.

For example, even a small milk bar servicing a local community incorporated as a proprietary limited company with a sole director is regulated by ASIC, and information about that company is held on the ASIC register of companies.

In the long run, the NFP sector will benefit most from a referral of powers, as occurred with the Corporations Act. This will 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. The ACNC itself has noted in public forums that this will bring savings to the states and remove all uncertainty, confusion and duplication in any regulatory reform affecting the NFP sector.

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the not-for profit sector; and the 2010 Senate Economics Committee's *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010*

Harmonisation in the short term

However, CSA does recognise that the process of implementing a referral of powers could take some time to effect. The process of national and state agreement on legislative reform can be slow. Indeed, we recognise that even when there is agreement between the states and the Federal Government, as occurred with the harmonisation of OH&S legislation, states can withdraw from the process, thus delaying implementation.

CSA strongly urges COAG, therefore, to give consideration in the short term to harmonisation processes which can help incorporated associations transition to regulation under the auspices of the ACNC. CSA notes, for example, that South Australia announced at the end of 2012 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.[2] Deputy Premier and Attorney-General of South Australia, John Rau, has noted that 'the reforms would be of tangible benefit to NFP and volunteer organisations operating in South Australia'. He also stated that South Australia will examine its legislation and harmonise reporting processes for small, medium and large organisations within the framework of the new ACNC Act once the reform process is complete.[3]

CSA strongly commends this approach in the short term for any state which is not yet ready to refer its powers to the ACNC.

Example of companies limited by guarantee
We note, for example, that companies limited by guarantee (which currently sit within the regulatory framework of the Corporations Act with ASIC as the regulator) that are registered with the ACNC will not be subject to regulatory duplication issues that may arise for other entities, as regulatory responsibility is being transferred in phases from ASIC to the ACNC.[4]

This transition removes the potential for regulatory duplication for companies limited by guarantee, as governance and reporting standards will sit with one regulator only. These charities will not need to report twice.

Governance standards

CSA Members are of the view that the proposed governance standards are consistent with those currently in place for NFP entities.

Given they are consistent, CSA believes that the draft standards are not onerous for the NFP sector and appropriate in their expectations of individuals and registered charities.

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[2] 'Government Delivering Real Reductions in Red Tape for Charities', Joint media release with Mark Butler MP, Minister for Social Inclusion, Minister for Mental Health and Ageing, and Minister Assisting the Prime Minister on Mental Health Reform and John Rau, Deputy Premier, Government of South Australian and Attorney-General, 11 October 2012 from http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/116.htm&pageID=003&min=djba&Year=&DocType

[3] Ibid note 4

[4] ASIC Media Release 011.2012, 4 December 2012, No more ASIC annual review fees for charities: http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_011.aspx

Standard 4: Responsible management of financial affairs
We note that the RIA states, at paragraph 40 on page 29, in relation to proposed standard 4 requiring the responsible management of affairs that:

> Incorporated associations and cooperatives —– there is no exact equivalent in state or territory legislation for incorporated associations and cooperatives that have charitable purposes. Some states and territories require maintenance of records and lodgement of financial reports. There will be [an] additional compliance burden for entities that are not 'managing their affairs in a responsible manner'.

The object of this standard is 'to ensure that a registered entity manages its resources responsibly' and protects those resources from misuse. All charities should already be managing their resources responsibly, particularly as most charities rely on government sources and public donations for the majority, if not all, of their funding needs. The processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support, expenditure and staff and volunteers is central to a governance framework. Without appropriate processes in place to responsibly manage the affairs of the organisation, the directors or members of the management committee (the responsible entities) could well be in derogation of their duties as responsible entities.

CSA is of the view that this proposed standard focuses the attention of responsible entities on implementing sound internal controls and balances any relatively minor compliance burden with transparency and accounting principles appropriate to the funding sources referred to above. As such, it does not impose a compliance burden so much as steer NFP organisations to prudent management of their operations to enable them to fulfil their mission.

Standard 6: Duties of responsible entities
We note that the RIA, at paragraph 49, on pages 34—35 states that:

> **Incorporated associations** — although there is no exact equivalent most states and territories have requirements relating to misuse of position or information and some have provisions relating to avoiding insolvent trading. Only Victoria has legislation that requires officers to act in good faith and exercise care, skill and diligence. The differences in the requirements in some state and territory legislation may lead [to] additional compliance costs. The protections (which essentially provide defences) require the officer 'to take reasonable steps' and 'to have reasonable grounds' and this may reduce the burden of the standard. The charity will need to take 'reasonable steps, to ensure the responsible entity is subject to the duties but it is assumed that this can be satisfied by a board charter or code of conduct.

CSA Members are of the view that the draft standard is:
- not onerous for those with governing responsibilities in the NFP sector
- an appropriate benchmark for the sector, and
- appropriate in its expectations of individuals and registered charities.

That is, the additional standard of responsible entities having to act in good faith and exercise care, skill and diligence:
- should not be construed as an additional compliance burden but as ensuring that all those with governing responsibilities in NFP organisations conduct themselves appropriately as stewards of the organisation — it would be concerning if these tenets of stewardship and accountability were seen as a compliance burden rather than an appropriate standard
- could be satisfied (as noted in the RIA) by a board charter or code of conduct, which is sound practice and appropriate for any governing body to develop. This should not be

considered a compliance matter. Good governance and compliance are not synonymous.

Reporting requirements

Provision of information on the Annual Information Statement (AIS)
We note that concern has been expressed by some states that unincorporated associations will face additional costs if brought into a national regulatory framework. As set out in the RIA, duplication of reporting is not an issue with these entities. Currently there is no state or territory legislation requiring reporting by these entities.

However, these entities will face new reporting obligations. There will be an additional compliance burden for Tier 1 entities (less than $250,000 annual revenue). They will not have to submit financial statements to the ACNC but will have to submit an AIS. All medium and large entities will have additional reporting obligations in the form of the AIS.

Members and stakeholders of all NFP organisations should be able to have access to information that allows them to know the financial position of the organisation, that the organisation is being managed prudently, and that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution or governing rules.

CSA is of the view that the benefits of the information sought and collected by the ACNC on the AIS outweigh any additional compliance burden for two reasons:

1. All stakeholders interacting with any NFP entity will be able to access quickly and for no charge information about that entity on the ACNC website. Currently, not all NFP entities have their own website, or disclose the information required on an AIS on a website should they have one. NFP organisations have a multiplicity of often complex stakeholder relations to consider (for example, members, volunteers and grant makers — government, private foundations, corporate, the general public). CSA believes that members and stakeholders of all NFP organisations should be able to have access to information that allows them to know the financial position of the organisation, that the organisation is being managed prudently, and that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution or governing rules, as well as who constitutes the governing. This is the information being collected on the AIS. Access to such information provides for stakeholders to have confidence in an entity they are interested in supporting or understanding or interacting with in some way. The provision of this information is central to fulfilling one of the objectives of the reform process, which is to ensure public confidence in the NFP sector.
2. As the information is consistent for all registered charities (and in time, all NFP organisations), the ACNC website will, for the first time, provide information that is easily accessible on the NFP sector as a whole. The Productivity Commission report noted that it is currently difficult to access information about the sector as a whole, which makes it difficult to assess in full its contribution to the economic and social health of Australia. It is of benefit to the Australian community to understand the full extent of the activities and contribution of the NFP sector. A NFP sector information portal is essential to the health of the sector.

Financial reporting requirements in tiers
The reporting obligations for Tier 2 (more than $250,000 but less than $1 million in annual revenue) and Tier 3 entities, which are noted as medium and large entities, will result in some duplication where they have to report to both their state and territory regulator and the ACNC. CSA reiterates that a harmonisation process in the short term and a referral of powers in the long term will alleviate this compliance burden.

Some medium and large) unincorporated associations, charitable trusts and incorporated associations in Western Australia will have financial reporting obligations to the ACNC where previously they had no requirement to report.

However, CSA believes that maintaining proper financial records and making adequate financial disclosure to key stakeholders is essential to ensuring good governance and an understanding of risk management. As a matter of transparency for those interacting with NFP entities, CSA is of the view that production of some form of financial report is necessary and this is an appropriate compliance burden.

We have set out our views in our submission on the proposed financial reporting obligations, including our recommendation that, for organisations that have never had to publicly report previously, a 12-month transition rule should apply and hence their reporting requirements should be deferred until the year commencing 1 July 2014 to provide sufficient time to these entities to establish appropriate accounting systems. For those entities that already publicly report, a commencement date of 1 July 2013 should not be a compliance burden for them.

CSA recommendations on options set out in RIA

Option 1: Retain existing arrangements

As set out earlier in this submission, maintaining dual regulation between the states and territories and the federal government would be regressive, and condemn NFP organisations to continue being subject to an onerous compliance burden.

CSA recommends strongly against Option 1.

Option 2: Sharing of regulatory functions

As set out above, in the short term a harmonisation process could benefit the NFP sector, with state and territory governments applying the reporting and governance standards as a law of their jurisdiction. It would be a short-term fix only. It does not deal with the central issue, which is that advances in technology have facilitated the establishment of a national regulator. Online interaction means that state-based offices are not required, as in the past, to facilitate registration of entities and lodgement of reports. CSA does not believe that the states should retain any residual role in regulating incorporated associations in the long run (it is planned that the ACNC will regulate all NFP entities over the longer term).

However, Option 2, as set out in the RIA, is likely to add to the compliance burden facing the sector rather than streamlining it, which streamlining is the objective of the reform process. It is not a harmonisation process whereby the states and territories make amendments to their incorporated associations and charitable collections legislation to harmonise reporting requirements. Rather, it proposes that the ACNC would accept the requirements imposed by some or all states and territories, which in turn would require changes to the ACNC Act and Regulations. This would create additional confusion for the sector, which would be required to 'change course' to meet differing requirements. The situation would be not very different from the one existing now, which has state and territory-based associations' legislation co-existing with the national regulation of charities.

Moreover, the NFP sector has participated in ongoing consultations concerning national regulation and the establishment of the ACNC in good faith, with a view to those arrangements remaining in place for some time. Condemning the NFP sector to ongoing confusion as to its regulatory framework and compliance obligations would be a regressive step and cannot be supported.

CSA recommends strongly against Option 2.

Option 3: Changes to Commonwealth legislation to adopt a common regulatory practice

As noted above, a national regulator has been recommended in multiple inquiries into the regulation of the NFP sector over many years and actively welcomed by the sector itself. The sector has identified that it does not wish to retain a dual regulatory regime.

The RIA notes that:

> The identification of the different regimes for incorporated associations and cooperatives and the differences between the states and territories suggests that there is unlikely to be a 'common' regime. Direct costs to charities for lodgement of annual reports and returns under state and territory legislation are higher than under the ACNC Act as the Commonwealth has decided to absorb these costs of regulation.

CSA agrees that, in the absence of harmonisation of requirements across states and territories, this option would retain differences in requirements between jurisdictions. Such an option would be in direct opposition to the needs and desires of the sector and cannot be supported.

CSA recommends strongly against Option 3.

Option 4A: Harmonising charities' compliance burden

CSA is of the view that a harmonisation process is required in the short term, recognising that the process of implementing a referral of powers could take some time to effect.

CSA recommends that Option 4A be implemented *in the short term*. However, we stress that any harmonisation process be undertaken while the states and territories work towards a referral of powers to the Commonwealth.

Option 4B: Carve out charities

It is planned that the ACNC will regulate all NFP entities over the longer term. A national regulator has been recommended in multiple inquiries into the regulation of the NFP sector over many years and actively welcomed by the sector itself. At no point in time was the recommendation for a national regulator limited to charities alone. CSA does not support this option.

CSA recommends strongly against Option 4B.

Option 5: Referral of powers to regulate charities by states and territories to the Commonwealth

As set out above, CSA has been a firm proponent of the need for a referral of powers, as occurred with the Corporations Act to facilitate the private sector.

There is no public policy argument to support the states and territories retaining any residual role in regulating incorporated associations. The states have not retained a role in regulating private companies since 2001. National regulation of the private sector has been of immense economic benefit and value to Australia.

In the long run, the NFP sector will benefit most from a referral of powers, as occurred with the Corporations Act. This will 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. The ACNC itself has noted in public forums that this will bring savings to the states and remove all uncertainty, confusion and duplication in any regulatory reform affecting the NFP sector.

The RIA states that:

> This assessment does not consider regulation that arises as a result of fundraising or gaming legislation; contractual arrangements for the delivery of services; eligibility for state or territory tax concessions or local government requirements. ... This assessment does not deal with requirements relating to incorporation of charities. state and territory legislation provides a mechanism to enable incorporation (for incorporated associations and cooperatives with a charitable purpose) and this will remain with the states and territories. Similarly, ASIC will retain power to incorporate entities that have a charitable purpose at the Commonwealth level.

CSA is of the view that all fundraising and incorporation should be dealt with under national regulation, as it is for the private sector. These matters should not be retained for regulation by the states.

CSA recommends strongly that a referral of powers take place, but also recommends that it should not be limited to charities but expand to all NFP entities, and include fundraising and incorporation.

Conclusion

It would be a credit to all governments if they provide the NFP sector with the degree of consistency and support offered to the for-profit sector more than a decade ago.

The NFP sector accounts for nearly five per cent of GDP[5], growing at around eight per cent per year, and the sector is second only to the mining sector in terms of relative growth terms.[6] The sector makes a significant contribution not only to the Australian economy, but of course also to its social capital, through the provision of activities and services including health, social services, education, sport, arts, recreation and religious practices. It is a sector that deserves state and territory government action to remove all regulatory impediments to achieving the reform that will best assist it to deliver services to the community.

CSA recommends to COAG that its next priority in relation to NFP regulation should be a referral of powers to the Commonwealth to ensure the ACNC can be a one-stop-shop regulator for all NFP organisations. The states referred their powers to the Commonwealth when the Corporations Act passed into law and they should do so now to ensure that NFP organisations are not burdened with unnecessary duplication and red tape.

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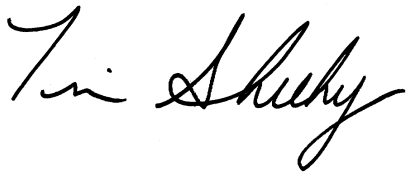
[5] Australian Government, Productivity Commission '*Contribution of the Not-for-Profit Sector'* Research Report Downloaded on 29 November 2011 from http://www.pc.gov.au/__data/assets/pdf_file/0003/94548/not-for-profit-report.pdf

[6] The Australian Government, the Treasury, *Australian Charities and Not-for-profits Commission Taskforce: Implementation Report*, p2, June 2012 from http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=publications/implementationreport/html/index.htm

While the process of a referral of powers is underway, all state and territory governments should embark on a harmonisation process which can help incorporated associations transition to regulation under the auspices of the ACNC.

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

Yours sincerely



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