CHARTERED SECRETARIES AUSTRALIA

Leaders in governance

30 April 2013

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Dear Susan

Best Practice Regulation Handbook

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 have primary responsibility to develop and implement governance frameworks in publicly listed and unlisted and private companies, and not-for-profit and public sector organisations. 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 reform as well as advising their boards to ensure their oversight responsibilities are fulfilled.

CSA welcomes the opportunity to review the draft *Best Practice Regulation Handbook* (the draft handbook) and draws on the views of our Members in providing our response.

General comments

CSA recognises that deregulation and the practice of regulation making (regulatory policy) have been a subject of interest and debate over the past few years. Regulatory policy can, if properly structured and implemented, achieve desired public policy objectives in a cost-effective manner. This allows governments to achieve important economic, social and environmental objectives while also protecting public health and safety, and facilitating everyday economic transactions. Of course, for any regulation to be effective, it requires a high level of confidence among both business and the wider community that the need for any new regulation is real and any new proposals will be effective in meeting the objectives and addressing the targeted shortcomings in the operation of the market without imposing costs that outweigh their expected benefits.

CSA is pleased, therefore, to note that the draft handbook implements much of the feedback received from stakeholders in previous consultations. In particular, CSA also notes the intentions of the regulatory impact analysis (RIA) requirements which purport to achieve better regulation by supporting:

- sound analysis of perceived problems
- informed decision making which understands the implications of options for implementation, and
- transparency of information available to the government when regulatory decisions are made.

However, in contrast to the government's commitment to the processes outlined in the draft handbook, the last few years have seen the introduction of additional regulation that has not always been coupled with either a regime of removing redundant regulations, or a detailed system of reviewing existing regulations. In short, the recommendations of the draft handbook have been implemented haphazardly, inconsistently and not in accordance with regulatory best practice. This has resulted in a plethora of regulation being introduced that has led to the imposition of an increased compliance burden on businesses across various sectors. New regulation has also from time to time had a distorting or negative effect on the existing regulatory regime.

As an example, we point to ongoing legislative amendment of the Corporations Act in relation to the regulation and disclosure of executive remuneration, which we believe has led to a distorting or negative effect on the existing regulatory regime.

The *Corporations Amendment (Improving Accountability on Termination Payments) Act 2009* extends beyond the key management personnel (KMP) of the parent company — those whose termination payments were the focus of community and political concern. It captures a much wider range of executives than the KMP, as it also captures any executive serving as a director on a subsidiary company. This has a *distorting* effect in relation to policy objectives. The disadvantage to executives in Australia and other jurisdictions who are offered board positions on subsidiary boards is significant. In many instances, the executive is assisting the company by taking on a board position on a subsidiary board. The reasons behind a request for an executive to consent to act as a director can be either as a consequence of local law, the desire to provide opportunities for long-term development to an executive, the group role performed by the executive or a combination of these.

Many companies have also been keen to progress gender balance at senior levels by offering female executives a position as a director on a subsidiary board. The board position provides them with access to the next level of management which in turn provides an opportunity for women to develop board-level skills. Over time, this increases the pool of female talent available for board positions generally.

The intent to provide such long-term development opportunities to these women, as well as non-KMP men being offered subsidiary board positions either in Australia or overseas, can be hampered by the application to these executives of the termination payment provisions. The disadvantage to such executives, whose remuneration is not material to shareholders, is massive — many companies have found executives in other jurisdictions and female executives in Australia unwilling to serve on subsidiary boards as a result of being captured by this legislation. There is no public benefit to shareholders in capturing payments made to middle management in the parent company, or external nominee directors of subsidiary companies.

The remuneration report (required by s 300A of the Corporations Act) is a very good example of the *negative* effect that occurs when additional regulation is not coupled with either a regime of removing redundant regulation, or a detailed system of reviewing existing regulation. Since the requirement to put the remuneration report before shareholders was introduced almost a decade ago (s 250R), there has been a substantial number of new requirements added to the Corporations Act in relation to this disclosure requirement. Each new requirement supplements rather than replaces existing remuneration disclosure requirements. The stated policy objective is

simplification; however, adding layers of regulation rather than taking a holistic view results in complexity and confusion for shareholders and other stakeholders.

Accordingly, we believe that there is an urgent need for an approach to legislative requirements concerning remuneration reporting that aims to simplify reporting, rather than adding further layers of complexity, in order to provide investors with the clarity they seek. We believe that legislative change in this area does not accord with the regime set out in the draft handbook.

In reviewing the regulatory policy process which exists, CSA also believes that there are more measures which can be implemented to achieve uniformity in the application and implementation of the RIA process.

CSA recommends, therefore, that the regulatory impact assessment process be enhanced with:

- increased transparency in the decision-making processes concerning regulatory enactment or reform, including clarity on the structure, implementation and operation of regulations, and more importantly, the reasons for undertaking particular regulatory processes and their desired policy objectives. Stakeholder consultation in the form of roundtables and briefings should take place prior to the release of discussion, options or consultation papers or exposure drafts to ensure that all issues are robustly and rigorously discussed, with those subject to proposed regulation and those seeking greater accountability through increased regulation being able to hear from and challenge each other and gain greater clarity as to the issues being addressed. Consultation should also canvass other approaches, such as whether a particular matter would be better dealt with through industry-led guidance and education, rather than turning to legislation in the first instance
- appropriate deliberation on the form of regulation to be enacted — CSA notes, for example, that governance regulations need flexibility as the 'one-size-fits-all' approach of black letter law is often inappropriate when applied across diverse sectors and organisations
- more accountability of decision makers for regulatory decisions and for ensuring that regulatory reform is progressed in a manner that is timely and considerate to all stakeholders, and
- better leadership by Ministers and agencies which provides a clear outline of how the regulatory processes will be undertaken to achieve their stated policy aims.

Role of the Office of Best Practice Regulation

CSA continues to support the Australian Government's *Best Practice Regulation Handbook* as the most useful guidance for government agencies on the appropriate measures required for regulatory reform, and the Office of Best Practice Regulation (OBPR) remains the most appropriate office to hold government and agencies responsible for regulatory reform in line with best practice recommendations.

However, it is clear that not all reform to regulation utilises the knowledge and experience of the OBPR. CSA notes that recently, consultations in the not-for-profit (NFP) sphere concerning the governance standards and the statutory definition of charity, which are two major pieces of legislative reform for the NFP sector, did not contain any reference to regulatory impact statements (RISs), and whether or not they were subjected to any oversight by the OBPR.

We are on the record as having raised this issue previously in our submission on the regulatory impact assessment review in March 2012, where we stated:

> 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.
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> As previously noted, there have been multiple consultations about the fundamental regulatory reform underway that will impact the NFP sector. These consultations include the:
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> - 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.
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> 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. ... 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 notes that, since our submission in March 2012, a further 10 consultations on the NFP sector have been undertaken with only three of them containing a RIS, despite each of the consultations having a significant impact on the regulation of the NFP sector.

Where a RIS has been provided, CSA is concerned that the provision of the RIS provides only a historical record of the actions involved in implementing the reform. The RIS which was provided in the explanatory memorandum accompanying the Australian Charities and Not-for-profits Commission Bill 2012, and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (the ACNC Bills), provides an example of this approach. The RIS which accompanies the ACNC Bills, while detailed and comprehensive in nature, provided little value to the NFP sector, as by the time it was presented to the sector, several major decisions concerning the reform process had already been made. Providing stakeholders with a summary of options for reform in that situation, therefore, was unlikely to facilitate a change in approach, particularly when the RIS accompanied legislation which established one of the options under consideration.

CSA believes that the emphasis must be placed on preparing and providing a RIS at the commencement of the consultation process rather than towards its completion.

CSA believes, therefore, that the OBPR needs to consider how it can engender better leadership by Ministers and agencies on the issue of regulatory reform, including by providing them with clear guidance on adherence to the principles outlined in the draft handbook.

CSA strongly recommends that the OBPR play a more active role in ensuring compliance with the principles in the draft handbook. Where compliance is lacking, sufficient notice and reason should be provided to those who will be affected by the regulatory change and the OBPR should be able to direct government agencies and Ministers to provide such notice.

CSA also recommends that the OBPR, as the chief body administering the RIA process, should play an active role in promoting best practice education and training with all other government and agencies.

CSA is also on the record as having previously recommended the introduction of an 'if not, why not' approach to reporting on the principles identified in the two-stage RIS process. CSA believes that an 'if not, why not' disclosure regime, with specific reporting triggers, would be much more useful to enable Ministers and agencies to understand and meet their responsibilities. A process of this nature would also allow stakeholders to test the thinking and behaviour of those in charge of the regulatory process, who must also be held accountable for their decision-making and stewardship.

CSA continues to recommend, therefore, the introduction of reporting obligations for Ministers and agencies to demonstrate that they have complied with the regulatory impact analysis process in the handbook.

When does a RIS need to be prepared?

CSA notes that the draft handbook explains that a RIS is mandatory for all decisions made by the Australian Government and its agencies that are likely to have a regulatory impact on business or the NFP sector, unless that impact is of a 'minor or machinery nature and does not substantially alter existing arrangements'.

In light of this understanding, CSA reiterates our concerns as to almost the entirety of the NFP reform process having effectively escaped the need to provide RISs for the consultations which have been ongoing for the sector over the past two or three years. As highlighted in the example concerning the ACNC Bills above, CSA believes that Ministers and agencies must be responsible for preparing and presenting a RIS at the beginning of the reform process.

CSA strongly recommends, therefore, that section 2.2 of the draft handbook, which details when a RIS is required, should include a paragraph which explicitly states that a RIS is required to be prepared and presented at the beginning, or at least during the initial stages of the reform process, for example during the options stage.

However, CSA is also concerned that there needs to be increased transparency and appropriate deliberation included in the decision-making processes for regulatory enactment or reform. Again, CSA is wary of the potential for reform consultations that are effectively undertaken to 'rubber stamp' a particular regulatory approach which the government has already decided.

The other important consideration with respect to appropriate deliberation concerning the decision-making process relates to the use of the 'minor or machinery in nature' exemption that is applied to allow a reform process to proceed without the preparation of a RIS. CSA notes that it is the role of an OBPR officer conducting a preliminary assessment to assess whether the proposal requires a RIS or not. Some of the information that the agency proposing the reform is required to provide includes:

- a description of the problem
- the objectives of the proposal
- an outline of the options available to address the problem
- whether the proposal is likely to impact on business or NFP organisations either directly or indirectly
- the nature of the impacts, and
- other recent proposals of a related nature.

CSA observes that the OBPR officer is also required to consider whether or not there has been an accumulation over a period of months which individually could be considered minor, but taken as a package could be considered significant.

The cumulative effect of ongoing legislative reform in a particular area is of particular concern. By way of example, CSA notes the recent consultation on the Corporations Legislation Amendment (Remuneration and Other Measures) Bill 2012 (the executive remuneration and clawback reforms), which included proposed changes to executive remuneration and the introduction of clawback measures for companies.

The executive remuneration and clawback reforms outlined clearly that the RIS had not been prepared for the reform process as the amendments were considered minor or machinery in nature. While CSA understands that in isolation this conclusion may be appropriate, we were disappointed that, in light of the extensive and ongoing reform to executive remuneration which has been evident over the last few years, no RIS was deemed necessary. We refer to our earlier comments that each new requirement supplements rather than replaces existing remuneration disclosure requirements. The stated policy objective is simplification; however, adding layers of regulation rather than taking a holistic view results in complexity and confusion for shareholders and other stakeholders.

In our submission to Treasury on the proposed amendments we noted:

> CSA has serious concerns with this proposed amendment, as we do not believe it will simplify remuneration reporting at all. Rather we are strongly of the view that it will serve to further confuse the target audience of remuneration reports.
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> That is, the proposed new requirements will supplement, rather than replace, the existing remuneration disclosure requirements.
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> The proposed disclosure requirement will see three additional numbers reported. Australian companies will have to disclose two differently calculated pay numbers for each executive. This is not simplification of remuneration reporting, but an additional convolution that will not provide investors with the clarity on remuneration that they seek.
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> CSA supports the principle that any new piece of legislation concerning remuneration reporting should not add further complexity to these already convoluted disclosures by imposing additional reporting requirements.
>
> CSA is of the view that there is an urgent need for an approach to legislative requirements concerning remuneration reporting that aims to simplify reporting, rather than adding layers of complexity, in order to provide investors with the clarity they seek.

We do not, therefore, consider that the proposed reform to executive remuneration and clawback is minor or machinery in nature.

CSA believes that an alternative approach could be to ask stakeholders whether or not the reforms are minor or machinery in nature. **CSA recommends**, therefore, that the OBPR consider advising Ministers and agencies to consult with stakeholders during the options stage consultation for feedback on whether they believe that a particular reform proposal is either minor or machinery in nature.

Timeframes for consultations

CSA is extremely disappointed to note that the draft handbook contains very little information in relation to appropriate timeframes for consultation on proposed regulation. The draft handbook does mention a 'guidance note' which details the application of the whole-of-government consultation principles outlined in the handbook.

CSA has consistently reiterated over the last few years the importance of allowing respondents sufficient 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.

In particular, CSA notes that inadequate timeframes for consultations have been problematic for the NFP sector, with reforms consistently pushing tight deadlines. By way of example, CSA points to the recent second consultation on the statutory definition of charity which provides respondents, mainly charities and associations, with fewer than 20 business days to provide a response on a matter of fundamental importance to the sector.

CSA is of the view that rushed consultations do not allow stakeholders to adequately explore the issues concerning the reforms, which can result in unintended consequences in the implementation of the reforms — see our earlier comments on the *Corporations Amendment (Improving Accountability on Termination Payments) Act 2009*. Consultation timeframes which are not appropriately structured to allow ample time for stakeholders to consider, respond and provide the necessary insight are not able to address the direct and indirect consequences of proposed legislation or legislative amendment.

Again, CSA reiterates that the current approach to consultation by many government agencies can be viewed as a 'box-ticking' exercise which has been undertaken after a policy decision has effectively been made, rather than one designed to seek input on policy formulation. CSA is of the view that this is not the appropriate approach to consultation with stakeholders. We do not support the utilisation of consultation as a way of legitimising policy outcomes when insufficient consultation has occurred.

CSA is on the record as previously having highlighted the importance of the OBPR educating Ministers and government agencies on their responsibilities concerning an appropriate consultation process.

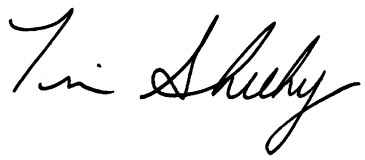
CSA again recommends that the OBPR consult with the government about the timeliness of their proposed consultations noting that:

- 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 or NFP organisations
- 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 and NFP organisations in particular 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 and consult with experts as required.

CSA is otherwise pleased to see that the draft handbook more clearly articulates the features and responsibilities of preparing a RIS for proposed reform. As highlighted above, CSA believes that more can be done, particularly in the broader context of educating and reinforcing the importance of an appropriate reform process to Ministers and government agencies.

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

Yours sincerely



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