CHARTERED SECRETARIES AUSTRALIA

Leaders in governance

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Dear Ms Tse

Charitable investment fundraisers: Consultation paper 207

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals in Australia. 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.

CSA has unrivalled depth and expertise as an independent influencer and commentator on governance and risk management thinking and behaviour in Australia. Many of our Members serve as officers of not-for-profit (NFP) organisations and charities. CSA itself is a NFP organisation, 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, training and the dissemination of information for the benefit of Members, applicants for membership and the public generally.

CSA welcomes the opportunity to comment on the Consultation paper 207: *Charitable investment fundraisers* (the consultation paper).

General comments

CSA recognises that charitable investment fundraisers may currently raise funds through the issue of debentures other than by way of certain limited offers or through the issue of interest in managed investment schemes. CSA notes that charities proposing to raise funds in this manner are afforded conditional exemptions from fundraising, managed investment, debenture and Australian financial services (AFS) licensing provisions of the *Corporations Act 2001* (the Act).

CSA notes that the proposed amendments to the exemption framework include either:

- removing existing exemptions, except exemptions from the Australian financial services (AFS) licensing requirements for fundraisers that only raise investment funds from associated entities, or

- retaining the existing exemptions (with some modification) and the introduction of additional conditions of relief

CSA is also aware that the consultation follows on immediately from a recent consultation undertaken by the Australian Prudential Regulation Authority (APRA) examining the removal of exemptions for religious charitable development funds (RCDFs) provided under the *Banking Act 1959*. CSA notes further that many RCDFs are also recipients of the ASIC exemptions outlined above.

As a result, CSA has concerns with the timing and scope of the consultation currently being undertaken.

We are cognisant that both the ASIC and APRA consultations on various fundraising and banking functions of charities provides an opportunity for review of their operations in light of 'shadow-banking' practices and calls for enhanced retail investor measures. Failures in the shadow banking sector highlight the difference between investment products which are regulated by APRA and similar products which are not regulated, and therefore, can not provide the assurances that regulated entities can in terms of governance and risk management. It is the role of both regulators to ensure that those who invest money in charities are protected from products which do not have the same level of oversight as other commercial and investment funds. CSA also appreciates that the consultations have been raised together because both sets of reforms may impact upon RCDFs, and the sum of the changes is not completely understood.

However, as the consultation paper itself alludes to there has also been an ongoing broader reform project occuring in relation to the not-for-profit (NFP) sector for over two years. The timing of the consultations, therefore, is concerning given the ongoing reform to the NFP sector and the fact that charities are not well equipped to continue to participate in ongoing consultations concerning reform.

Timing and clarity of the consultation for charities

While CSA accords with the principle of the reform, we are concerned by the timing of the consultation and proposed withdrawal of existing exemptions.

CSA notes that major reforms have just occurred within the NFP sector, with particular emphasis on charities, which have culminated in the introduction of a dedicated NFP regulator, the Australian Charities and Not-for-profits Commission (ACNC). Many charities have been engaged in the consultation process for the establishment of the ACNC and the broader regulatory framework over the past 12-18 months.

CSA itself has participated in over 20 consultations over the last 30 months on fundamental aspects of the reform process. CSA has also been involved with numerous indirect consultations, meetings with Ministers, presentations at seminars and conferences, and other advocacy efforts on behalf of our Members who operate within the NFP sector.

The impact of the continuing reforms to the NFP sector has been strongly felt. Charities are frequently staffed or managed by volunteers who are required to allocate both their time and resources to address the issues raised by the reforms while also ensuring that their organisation pursues its charitable purpose. CSA notes that charities, in the first instance, are currently making sense of the following:

- comprehending the new regulatory framework
- ensuring that their structures, practices and systems accord with their obligations for registration by the ACNC and in anticipation of requirements to meet forthcoming governance standards, and
- feeling comfortable with the new regulatory framework and assessing how it assists them to achieve their objectives.

CSA believes that the removal of the exemptions, particularly during the initial commencement period of the ACNC, has the potential to undermine the NFP reform initiative by placing significantly increased administrative burdens on the charities affected, which may lack the technical skills and resources to handle complex administrative matters.

CSA noted in our submission to APRA that while only a small population of charities may be affected by the reforms, the impact of change may be quite significant and costly for a charity. For example, the likely costs associated with compliance with APRA's prudential framework, the licensing requirements of the AFS, and the new ACNC regulatory framework for charities will be both unreasonable and prohibitive.

Developing compliance, governance and risk management frameworks to ensure ongoing viability will also be burdensome and unmanageable, while charities simultaneously ensure that they have assessed and understood all their obligations under the ACNC framework. CSA believes that any proposal to remove the current exemption will result in an onerous impost on charities.

CSA strongly recommends, therefore, that the proposals to reform the exemptions in Regulatory Guide 87 be delayed for at least 12 months to allow charities to properly align themselves with their new regulatory requirements.

In light of the proposed double change to the regulatory framework, **CSA also recommends** greater clarity be provided in the consideration of the likely and actual impacts of removing the exemptions for charities. This is also important in light of the potential for charities to have to comply with multiple regulatory frameworks, the additional compliance obligations must be spelt out for organisations that might be impacted.

Providing a level playing field

CSA believes that it is important that retail investors know what they are investing in. CSA also supports measures being put into place to ensure that concerns about 'shadow-banking' are properly considered.

It is unclear, however, why these concerns rest only with charities, and why they necessitate more stringent conditions for charities to comply with. CSA notes that charities and the rest of the not-for-profit sector have also been subject to an avalanche of regulation recently. By way of comparison, CSA notes that funded class actions, which already receive an exemption from ASIC, will remain only lightly regulated as a result of the *Corporations Amendment Regulation 2012 (No. 6)* which comes into force on 12 July 2013. CSA argues that the risks that face litigants are at least on par with investments made in charitable investment fundraisers.

CSA reiterates that prescriptive conditions for charities will create additional compliance obligations which will impact upon organisations that are least able to devote resources to ensuring compliance. Additional compliance risks placing charities in positions where the commerciality of their investments becomes unsustainable and ultimately leads to decreased investment. CSA cautions strongly that decreased investments means decreased funding for charities.

In addition, CSA notes that among the proposals for additional conditions of relief is one which insists that 75% of a debenture issuer's or scheme's assets must be held in charitable assets. CSA does not understand the policy rationale behind this new requirement and is concerned that charities will be stymied from having access to a number of investment options that would help ensure the ongoing survival of the charity.

CSA emphasises that while it is important that investors understand the risks in giving their money to charitable investment fundraisers, we do not want to stop investment occurring, otherwise the funding for charities will similarly cease. Charities should be supported.

Conclusion

In light of our comments above, CSA does not wish to comment further on the specific questions raised in the consultation paper. However, we would ask that our concerns be raised when ASIC considers its way forward.

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

Yours sincerely

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CHIEF EXECUTIVE