CHARTERED SECRETARIES AUSTRALIA

Leaders in governance

24 May 2013

Mr Neil Grummitt
General Manager, Policy Development
Policy, Research and Statistics
Australian Prudential Regulation Authority
GPO Box 9836
SYDNEY NSW 2001

Email: exemptiondp@apra.gov.au

Dear Mr Grummitt

Banking Act exemptions and section 66 guidelines: Discussion paper

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 Discussion paper: *Banking Act exemptions and section 66 guidelines* (the discussion paper).

General comments

CSA is aware that, under the terms of the *Banking Act 1959* (the Banking Act), organisations that wish to undertake 'banking business' in Australia must be authorised by the Australian Prudential Regulatory Authority (APRA) as deposit-taking institutions (ADIs). We also note, however, that APRA grants exemptions to some organisations whose activities fall within the term 'banking business', provided that the organisation can demonstrate that it has met certain conditions.

CSA recognises that registered financial corporations (RFCs) and religious charitable development funds (RCDFs) comprise two classes of entity which have traditionally been granted this exemption, provided that they disclose to investors that they are not ADIs and are not supervised by APRA, and that the investments are not subject to the depositor protection provisions in the Banking Act.

While CSA supports, in principle, the proposed amendments to Banking (Exemption) Order No. 96 (RFC Exemption Order) and Banking Exemption No. 1 of 2011 (the RCDF Exemption Order), we are concerned about:

- the timing of the consultation
- ensuring clarity for charities in understanding how the reforms will impact upon them, and
- ensuring clarity with respect to the use of the terms 'banker' and 'banking business'.

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, particularly on the proposed changes to the RCDF Exemption Order.

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 approximately 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 reiterates that any proposed reform to the RCDF Exemption Order, 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.

While CSA accepts that the reforms affect only a small population of charities, the 59 RCDFs that operate under the Exemption Order are also responsible for over $7 billion in liabilities. CSA believes that further consultation and reform at this time is highly undesirable, particularly where the impact of the change may be quite significant and costly for a charity. For example, a charity may have to develop and monitor their compliance with APRA's prudential standards where little oversight previously existed while simultaneously ensuring they have assessed and understood all their obligations under the ACNC framework.

CSA strongly recommends, therefore, that the reforms to the RCDF Exemption Order be delayed for at least 12 months to allow charities to properly align themselves with their new regulatory requirements.

CSA is also aware that the Australian Securities and Investments Commission (ASIC) is concurrently consulting with charities about amendments to the exemption available to charitable investment fundraisers administered in accordance with Regulatory Guide 87 (RG 87). CSA notes that as a number of charitable investment fundraisers relying on the exemption provided by

ASIC are also RCDFs, these entities may be similarly impacted by changes to either or both regulatory frameworks. It should be noted, therefore, that CSA will be making the same recommendation to ASIC requesting a delay to any proposed reforms for a period of at least 12 months to allow RCDFs the time to align themselves with their new regulatory requirements under the ACNC.

CSA also recommends greater clarity be provided in the consideration of the impacts of the proposed reform to the RCDF Exemption Order for charities. As noted above, charities have limited resources with which to embark upon a detailed discussion and analysis of any proposed reform.

CSA is of the view that it is essential that charities be provided with detailed consideration of the potential impacts of reform upon their operations. Whereas organisations which operate within the financial industry may readily understand the differences between distinctly financial terms, such as 'deposit' and 'at call', charities may operate across a range of activities with only tangential aspects of their operations intersecting with the Exemption Order provided by APRA.

CSA notes further that the removal of the Exemption Order for some RCDFs may place an enormous secondary regulatory burden on their operations, that is, they may be required to comply with both the ACNC and APRA frameworks. CSA believes that if the removal of the Exemption Order leads to charities being required to comply with dual regulatory frameworks, this additional compliance obligation should be spelt out for organisations that might be impacted.

Revising the section 66 guidelines

While CSA recognises that there are restrictions placed on the use of certain financial terms so as to ensure that such terms are not used in a way that might mislead or give a perception that a business is regulated by APRA under the Banking Act, CSA believes that there needs to be a rethink of the use of the terms 'banking business' and similar terms involving variations of the word 'bank' in documents describing the services of ADIs or other financial entities.

CSA is particularly concerned about the way in which these terms may be misconstrued when referring to services provided by ADIs or other financial entities which are not banks. CSA points to the proposed amendment to the section 66 guidelines which recommends clarifying:

> that credit unions and building societies… may use the expressions 'banker' and 'banking' in marketing and branding material to describe their banking services, but may not use the term 'bank'.

CSA believes that the 'loose' use of the terms which include the word 'bank', such as 'banker' and 'banking business', has already led to unnecessary confusion and lack of clarity for organisations in the financial services industry and, more broadly, the public. The average depositor is not in a position to know that an organisation that describes itself as a 'banker' or as conducting 'banking business' is not in fact regulated as a bank. CSA is cognisant that the distinction between these terms is unlikely to be understood by those outside APRA-regulated entities.

CSA questions the benefit of APRA maintaining the concept of a licensed 'bank' when other organisations can describe themselves, in effect, as a bank. CSA does not believe that there is a recognised distinction among non-financial entities of the difference between the terms 'bank' and 'banking business' or 'banker'. CSA does not expect customers of a financial entity to be able to understand that an organisation which describes itself as conducting 'banking business' or as providing 'banking services', or as a 'banker', is not regulated in the same manner as a 'bank'.

As an illustration of the problems associated with permitting variations of the word 'bank', CSA notes the recent example of LM Investment Management which is under investigation by ASIC for advertising materials which contained a reference to 'bank-like' services which they purport to provide. CSA believes that such examples highlight how the use of the word 'bank' can be taken beyond the range of use that APRA intends.

CSA recommends, therefore, that APRA reconsider the term 'banking business' and 'banker' and consider adopting terms such as a 'deposit-taking business' or the like to properly describe the services offered by regulated financial entities which are not licensed as banks. Similarly, organisations which are currently considered by APRA as providing 'banking services' should not be described in those terms. CSA believes that the phrase 'banking services' should be reserved for the services provided by a licensed bank.

Conclusion

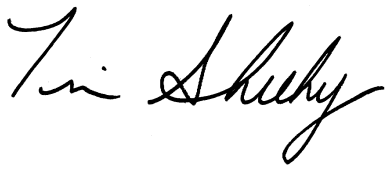
CSA notes that Chapter 5 of the discussion paper requests respondents to use the Business Cost Calculator (BCC) to assist with undertaking the cost-benefit analysis of the proposed reforms. CSA strongly supports this approach as it allows participants in the consultation to assess the potential costs associated with reform. This is a step which is often overlooked in consultations on proposed reforms.

CSA reiterates, however, our concerns with the pursuing the reform process during the current period of familiarisation for charities with the new national regulator, the ACNC. While CSA understands the underlying rationale for the proposed amendments to the RCDF Exemption Order, our concerns remain with ensuring that any amendments to the exemption orders do not cause disadvantage or unnecessarily divert the already stretched resources of charities from pursuing their charitable purpose.

In a similar manner, CSA also asks APRA to rethink how the terms 'banking' and 'banker' are used by regulated financial entities, as we believe that there is already the potential for members of the public to be misled by entities using these terms to describe the services they offer.

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

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE