CHARTERED SECRETARIES
AUSTRALIA

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Executive Officer
Public Accounts and Estimates Committee
Level 8
35 Spring Street
Melbourne VIC 3000

VICTORIAN PARLIAMENT PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE INQUIRY INTO CORPORATE GOVERNANCE IN THE VICTORIAN PUBLIC SECTOR

Chartered Secretaries Australia Limited (CSA) welcomes the opportunity to make a submission in relation to the Victorian Parliament's Public Accounts and Estimates Committee Inquiry into Corporate Governance in the Public Sector. The comments set out below reflect the views of representatives of CSA.

CSA is Australia's peak membership body for corporate governance. We firmly consider ourselves as fully qualified to respond to this matter. In Australia CSA has over 8,000 members from the public and private sector. Members of CSA regularly deal on a day-to-day basis with the ASX and ASIC and have a thorough working knowledge of the application of corporate governance in the public and private sectors. In addition, representatives from government and regulatory bodies regularly address members at our seminars and conferences.

Given the nature of the role of a Company Secretary and the professionalism of Chartered Secretaries we believe our members are ideally placed to comment on aspects of corporate governance in the public sector. In addition, we would welcome the opportunity to appear before a public hearing if and when these are conducted.

Introductory comment

Much has been written about preferred corporate governance practices over the last two decades. In the opinion of CSA the best governance practices for listed public companies are an appropriate starting point for the design of governance practices for government owned enterprises. There are, however, significant additional imperatives for public sector enterprises, such as public accountability considerations to be taken into account.

In CSA's view the most important issue to be rectified across government owned enterprises is a clear delineation of the roles of government as owner and as regulator. The second most important issue is the transparency of government decisions and directions, particularly as regulator. Solutions to many of the particular problems experienced by government owned enterprises are likely to flow from such separation and transparency. For example transparency is likely to lower the incidence of different and inconsistent directions to government owned enterprises by different arms of government.

Contemporary economic theory, reflected in National Competition Policy, promotes the separation of regulatory functions from government owned enterprises engaged in service delivery as a means of optimising the relevant industry's economic performance through the creation of an equitable trading environment. Such an approach also has advantages from a governance perspective. Together with explicit identification, adoption and funding of non-commercial community service obligations, separation of regulatory functions allows the adoption of clearer corporate objectives for government owned enterprises in a manner relatively free of the need for an enterprise to itself balance a range of competing objectives.

Directors of government owned enterprises are in a difficult position, not unlike that often faced by directors of subsidiary companies who are often expected to take account of the wider interests of the parent. While as much clarity as possible should be sought in the articulation of duties and the design of reporting arrangements for governing bodies, public sector governance structures need to recognize the tensions which arise in practice. CSA's comments below seek to achieve a governance system with greater rigor, but are not to indicate naivety of political realities.

Objective of this submission

Beyond the general comments made above, CSA believes that public debate or decision making about corporate governance in the Victorian public sector will not be advanced by a long exegesis about governance theory in abstract. Rather, CSA believes it is best to make specific comments directed to the questions posed in section 3.3 of the Committee's April 2002 *Issues Paper*, reflecting CSA's particular observations or the experiences of our members.

CSA's comments are mostly confined to those questions, which call for a policy view rather than agency-specific information.

Response to questions posed in section 3.3 of the *Issues Paper*

3.3.1 Public governance

1 While the principles in or underlying the *State Owned Enterprises Act* 1992 are generally sound, they are not applicable to all government bodies. Material differences of governance practice are undesirable and inconsistent with the promotion of best practice across the public sector. CSA believes that overarching legislation along the lines of the *Commonwealth Authorities and Companies Act* 1997 (Cth) should be considered for Victoria. The SOE Act actually has quite limited application whereas the Commonwealth Act addresses ongoing relationships of a variety of entity types.

2 Central agencies could adopt a more rigorous approach to legislative reform as a means of achieving best practice. With clearer statutory guidance, the need for guidance (other than pursuant to a government owned enterprise's request) is substantially lessened.

3 It appears to CSA that a number of agencies are not familiar with the Department of Treasury & Finance GBE guidelines.

4 Agencies generally are very diligent in identifying current and updated statutory requirements and procuring appropriate consideration by their governing bodies. A lack of formality or transparency of some requirements on agencies by various arms of government makes this a more difficult task than it should be in many cases.

6 Government owned enterprises should be accountable to one Minister as shareholder (preferably a central agency Minister) and to any others to the extent that they are properly exercising governmental regulatory powers or functions unrelated to the fact of government ownership. In turn, Ministers should be accountable to Parliament in the normal manner *in respect of the functions*, which they perform. In the case of a shareholding Minister, in the absence of an express statutory provision the Minister should not be regarded as responsible for every individual decision taken by the enterprise's governing body or management, but rather responsible for appointing appropriate members of the governing body and holding them to account. Similarly, the regulatory Minister should be accountable for the prevailing regulatory environment which allows (even encourages) or prevents optimal decision making by governing bodies of government owned enterprises, not those actual decisions.

7 The processes should differ for shareholder Ministerial monitoring and regulatory Ministerial monitoring.

8 Ministerial directions should be transparent. The difficult issue for agencies (which needs to be addressed as a matter both of law and of government practice) is where government gives an informal direction or makes a "request" of an agency.

Tabling in Parliament is consistent with that, is generally provided for and should be required (assuming tabling does not give rise to Parliamentary disallowance powers).

9 *Corporations Act* 2001 requirements for provision of governance and financial information should be a minimum, but are not enough given the public interest in the way that a public shareholder behaves. Private sector shareholders owe no fiduciary duties to the entity in which they hold shares and in practice assert significant influences on corporate reporting and behaviour in a way, which only rarely gives rise to legal action for infringement of the rights of others. By contrast, the state should be a model shareholder. There is arguably a place for additional reporting rules as to manner of reporting (eg publicly) and the shareholder's duties regarding its use of reported information (eg tabling, responses to be made public).

11 Annual reporting is generally adequate but consistent reporting of directions received from government is lacking.

12 No. See 6 above. There is too much informal direction and in some cases too many arms of government giving directions in a less than transparent way to give truly clear guidance to agencies.

13 See 6 above.

15 Given that each stakeholder, including shareholder Ministers and regulatory Ministers, have different roles, a particular Minister's powers should exceed other stakeholders in respect of the function of the Minister. It is appropriate and recommended that a Minister should consult other stakeholders, at least other Ministers, in the discharge of his or her own functions (eg a shareholder Minister proposing to appoint a director).

3.3.2 Relationships between governing bodies and public sector officers

1 A departmental appointee should owe first allegiance to the governing body. However the appointee's duty to act in the best interests of the government owned enterprise will generally entail reflecting the appointing department's regulatory or policy concerns, in the case of a regulatory department, or the appointing department's interest as shareholder (as all members of the governing body should). To the extent that the interest of the appointing body is properly held/formed, identification of first allegiance to a governing body should allow for an internalising of a departmental interest and a balance with competing interests. The alternative approach of first allegiance to the appointing department may not involve that officer striving for that result (particularly in a scenario where the department's interest becomes a minority view).

As a general rule, CSA believes that there should not be departmental nominees, in the sense of being directors who represent and seek to report to a department. Departments should have influence as either regulators or representatives of a shareholding Minister. Neither requires direct board representation.

2 Appointees logically ought to be able to generally report to an appointor, but subject to either not releasing truly confidential information or only to the extent absolutely necessary and subject to the same level of confidentiality protection, which the government owned enterprise, could properly claim. CSA believes, however, that collective reporting by the governing body is to be preferred.

3.3.3 Structures, systems and processes

No questions are sufficiently non-agency-specific to warrant a comment by CSA.

3.3.4 Strategic leadership, direction and stewardship

No questions are sufficiently non-agency-specific to warrant a comment by CSA.

3.3.5 Ethics and standards of conduct

No questions are sufficiently non-agency-specific to warrant a comment by CSA.

3.3.6 Relationships – boards and CEOs

As a general comment in CSA's view, the role of Boards in strategic leadership is more critical than in monitoring aspects and should be given appropriate attention.

6 Generally the CEO of most agencies has direct access to the relevant Minister for the agency. CSA believes that this is appropriate, but notes that good practice by government should treat this as a reporting and information sharing arrangement rather than one by which the Minister directs the agency. Ministerial directions should come through the board of an agency.

8 In similar vein to the comment made above, the CEO of a government owned enterprise should have prime responsibility to the governing body of the agency directly, rather than to the Minister. Of course the Minister has whatever overall responsibility he or she is given under the Westminster system generally or the relevant entity's constituent legislation in particular, but the CEO is an employee of the agency. In many cases, the CEO is not in fact a member of the board or governing body of the agency. As a corporate entity, it is the governing body, which legally speaks on behalf of and can commit the entity.

3.3.7 Independence and appointment of board members

1 In general, CSA believes that the chairperson of a government owned enterprise should be independent from management. While there are some cases of Victorian government bodies where this is not so (for example, the CFA), for a government owned enterprise which operates with non-regulatory powers and little or no community service obligations the traditional private sector corporate governance model of an independent chairperson is considered most appropriate.

6 Generally, members of the governing body of an agency are involved in the development of the agenda, usually through the person of the chairperson who determines the agenda in conjunction with the CEO and/or corporate secretary. CSA believes that this is appropriate; management alone should not set the board agenda because a board must, if it functions to its optimum level of value-adding, guide an organisation and not simply be a "rubber stamp".

General Comment

CSA believes that the appointment and the terms of appointment of directors and other members of governing bodies of agencies require some attention. In particular:

- Greater effort is required to ensure that directors appointed to government owned enterprises are, collectively and individually, the most appropriate appointees. CSA recommends that the existing board of an agency should have some say in the appointment of members to its ranks. The private sector parallel is that in many cases boards themselves appoint additional or replacement directors. In the public context, whilst appointments must always remain with the Governor in Council or the relevant Minister, the existing board should be invited to give its views on either particular skills which ought to be reflected in filling vacancies or even on the identity of appointees, either by suggesting names or commenting on proposed appointees.

- More appropriate remuneration is needed for directors of government owned enterprises taking into account obligations and responsibilities to be assumed. This does not always mean necessarily higher fees, but an agency's governing body should be allowed to either recommend remuneration levels which are appropriate to the duties of its members or alternatively set those levels but subject to Ministerial approval. Directors of government owned enterprises are expected to fulfill comparable obligations to those of private sector public companies, but the remuneration is not comparable.

- Regular reviews of board performance are desirable. While board members' self-assessment could be an element, some form of independent review is also desirable with the focus being upon "value adding" as opposed to the monitoring aspects of their role.

- As mentioned above (3.3.2), CSA generally believes that board members who are designated or seen to be "departmental nominees" are undesirable and for that reason careful consideration should be given to the appointment of departmental officers to boards of agencies which, by statute, are meant to be independent statutory bodies.

- Clear conflict of interest guidelines need to be established and enforced. At the very least, provisions comparable to the "material personal interest" provisions in sections 191 and 195 of the *Corporations Act* should be a model, but being publicly owned bodies the guidelines should go further. They should reflect the Victorian public sector code of conduct and standards of behaviour expected of Ministers and senior public servants in Victoria. CSA considers that the Docklands Authority's Conflict of Interest Principles are a model worthy of further examination.

- Consistent statutory provisions for indemnification of directors are desirable. Different approaches across existing legislation ultimately result in different cost implications for entities, rather than represent an appropriate risk allocation between government and individuals. This is because governing bodies without a statutory indemnity will resort to D&O insurance, usually at the entity's expense.

8 CSA notes that, even if in theory a government owned enterprise appoints its own chairperson from among the members of its governing body, in practice the chairpersons of most agencies are appointed by the relevant Minister. While the Minister has a very legitimate concern as to the identity of the holder of the office, CSA believes it is important that the chairperson be a person who has the support of the members of the governing body. CSA also notes the importance of the interactivity of that person with other governing body members and the workload borne by the chairperson. It is imperative that a person appointed as chairperson has sufficient time and resources to carry out the role to the extent and in the manner required.

3.3.8 Accountability and reporting

5 CSA believes that current public sector corporate governance reporting requirements are generally adequate. Obviously anomalies between different types of agencies can be found and should be rectified to the extent that the burden of a change to reporting requirements do not outweigh the current deficiencies.

6 Subject to not creating a requirement that confidential elements of corporate plans be made public where they otherwise would not be, CSA believes that some form of reporting of performance against corporate and business plans should be made public.

10 CSA notes that public sector agencies usually include information in their annual report or in other specific reports which in effect constitute a reporting of social responsibility policy matters. CSA is wary of a suggestion in broad terms for a mandatory social responsibility policy without a clearly developed and articulated idea of the content of, and reasons for, such a policy requirement. CSA notes that "triple bottom line" reporting also addresses this issue. In CSA's opinion reporting on detail on corporate governance matters in government bodies' annual reports ought be mandatory.

3.3.9 Public accessibility to information

1 CSA generally believes that current arrangements are sufficient and timely but qualifies its response by indicating that it has not considered the arrangements for each type of agency in detail. It notes that the requirements are not yet consistent across the government owned enterprises sector and suggests that some greater clarity and consistency, along the lines achieved at the Federal level by the *Commonwealth Authorities and Companies Act* 1997, should be considered for Victoria.

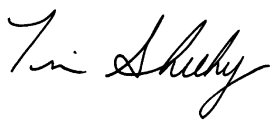
2 While it is too early to make a thorough or fully informed assessment, CSA believes that recent developments in relation to whistleblower protection are useful.

In relation to FOI, significant agency resources are consumed by extensive FOI requests made by the State Opposition, which would be unnecessary, if the Government allowed briefings by agencies. CSA believes that best practice is for all stakeholders to be kept informed (subject to true commercial confidentiality), and the State Opposition is a legitimate stakeholder. Moreover, the decision as to whether to brief certain stakeholders should be one made by an agency, not by the Minister.

3 in theory, current arrangements for public access to information is satisfactory. As a practical matter, adoption of more comprehensive website availability of information consistently across government owned enterprises would be of considerable practical assistance to ordinary Victorians seeking information for non-threatening reasons. Greater emphasis on immediate or real-time reporting will be significantly more efficient than traditional annual reporting and will reduce any appearance of undue secrecy which might attach to certain agencies.

General Comment

Consistent with CSA's comments above, the overall thrust of government owned enterprise governance regulation should be a consistent government's framework but one which allows for entity-specific differences where there is good reason for such differences. Each agency has its own constituent legislation. To the extent that differences between such legislation is founded in good policy reasons, any overlay of governance rules (either statutory or of a guideline nature published by central agencies) needs to be sufficiently flexible to accommodate the differences of constituent legislation and the needs and business practices of a specific entity.



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