CHARTERED SECRETARIES
AUSTRALIA

Keeping good companies

23 May 2001

Mr David Creed
The Secretary
Parliamentary Joint Statutory Committee
on Corporations and Securities
Parliament House
Canberra ACT 2600

By facsimile: (02) 6277-5809

Dear Mr Creed,

Financial Services Reform Bill 2001

Chartered Secretaries Australia (CSA) is pleased to make this submission to the Parliamentary Joint Statutory Committee on Corporations and Securities on the Financial Services Reform Bill 2001 (FSR Bill). CSA is the Australian Division of the Institute of Chartered Secretaries and Administrators, an international professional association with over 46,000 members worldwide.

CSA is Australia's peak membership body for corporate governance, and is fully qualified to comment on the FSR Bill. In Australia there are over 8,000 members representing the majority of public companies listed on the Australian Stock Exchange as well as non-listed public companies and proprietary companies. Members of CSA deal on a day-to-day basis with the ASX, ASIC, APRA and the ACCC and have a working knowledge of the operations of the markets, the finance industry and the extensive compliance requirements in force for industry today.

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 the introduction of the FSR Bill. In addition, we would welcome the opportunity to appear before a public hearing when these are conducted.

Executive summary

- Chartered Secretaries Australia (CSA) is generally supportive of the thrust and intent of the legislation, in particular, the inclusion of a cooling off period, the need for industry guidelines and the potential to reduce future litigation.

- There are two overall concerns that deserve attention:

    1. CSA believes that consideration needs to be given to ensuring the protection extends to small businesses in the same way that it will extend to individuals, and

    2. The failure to produce the transition legislation makes it difficult to plan properly for implementation.

- Specific concerns revolve around:

    1. A potential for conflict with the Privacy Act

    2. The requirement to record telephone conversations during a takeover is impractical and unnecessary, and that there has been no previous consultation on this matter

    3. There is a need for ASIC to consult widely prior to varying product definitions

    4. Product definition statement requirements may be too prescriptive and onerous

    5. State requirements with CTP insurance will produce different cost structures

    6. Proposed civil penalties for insider trading are a move in the right direction, but need to go further.

- Certain aspects of the FSR Bill may inadvertently act to restrict the entry of new players

    1. The ‘retail’ requirements for Pooled Superannuation Trusts will prevent some new products from being released.

    2. Requiring custodians to satisfy the requirements oh holding a dealers license is unreasonable.

1. The FSR Bill overall

Chartered Secretaries Australia is generally supportive of the thrust and intent of the legislation. We see the legislation as designed to assist consumers by requiring all persons providing financial services to make available all information that will enable consumers to make an informed decision. We applaud these intentions.

In addition we support the general thrust of the legislation as it:

- Provides for a sensible cooling off period for consumers
- Provides officers with minimum standards by requiring the industry to develop guidelines.
- Should reduce litigation by providing information at the outset.

There are two general concerns that we would like to address that we believe need consideration, namely:

- **extension to smaller companies**

  In one overarching aspect, CSA is of the view that the FSR Bill does not go far enough and extend provisions to small business enterprises as purchasers of financial services. Currently there are over one million small companies, many of which are small business employers that do not have the skills or resources that are needed to make informed decisions on their own. We believe that consideration needs to be given to ensuring the protection extends to small businesses in the same way that it will extend to individuals.

- **lack of information on transition arrangements**

  The failure to produce the transition legislation makes it difficult for anyone to plan properly for implementation of what will be a significant change to the law and compliance in this area. We would have thought that this would have been made available with the full legislation and not held back as it is the transition legislation that will impact operators in this area the most.

2. Specific comments

In looking closely at the FSR Bill, CSA is concerned about the detail of selected sections. In terms of specific aspects of the FSR Bill, we wish to raise the following concerns:

- **potential for conflict with the Privacy Act**

  CSA is of the view that there may be a conflict between the provisions of Section 766B(3) of the FSR Bill – Personal Advice, and National Privacy Provision (NPP) 8 – Anonymity.

  There will be many circumstances where an individual will contact a provider of financial products to obtain general information and wish to remain anonymous. The person may be collecting basic information about product conditions, options and/or a basis for a price. In order to be provided with information they may need to disclose some information, such as the suburb they live in, the make of a car or building materials used. At this stage they could still be considered ‘cold calling’ and no ‘personal’ information as defined in the Privacy Act is necessary in order to obtain this basic level of information.

However, in ASIC Proposal Paper No. 1, Policy Proposal C, the following statement is made in C5 –

"*An issue arises as to whether advice passed on to a consumer by a mere conduit can constitute personal advice where the provider has not had direct contact with the consumer and has not directly considered the objectives, financial situation or needs of that consumer. We consider that such advice will be personal advice where the advice passed on by the mere conduit is, in fact, tailored to the consumer's particular circumstances…"*

Based on the above requirement, if a consumer provides sufficient information to obtain a useful quote or basic information – personal advice has been given – triggering the disclosure requirements associated with personal advice such as the provision of a Product Disclosure Statement (PDS). To enable provision of a PDS the consumer's name and address will be required to facilitate delivery, which would appear to be in conflict with NPP 8 – Anonymity.

- **telephone monitoring during takeovers**:

  CSA is of the view that to record telephone conversations during a takeover as proposed (section 648J) is impractical and unnecessary. We believe there is no evidence of past takeover activity that warrants a requirement such as this. In addition, compliance with this requirement will add a significant amount to the cost of doing business. The type of facilities required for large-scale telephone recording facilities exist for most trading operations, but largely not beyond that.

  There are many discussions during takeovers between the suitor, the target and the fund managers where there are shares and these do not go through the trading room. To require all to be recorded probably will mean that all calls to particular fund managers will need to be recorded. That is unreasonable and some exclusion will need to be inserted to take account of this.

  In addition, CSA is disappointed that there has been no previous consultation on the provision as has been the case for the remainder of the FSR Bill. Issues of recording of telephone conversations were raised during the debate of ASIC's 'Heard it on the Grapevine' paper where there was strong criticism due to the impracticality of implementation. CSA is surprised to see a similar initiative surface again.

- **right to change by Regulation**:

  CSA is supportive of the intent to give ASIC the right to vary product definitions, and what constitutes certain products, by regulation rather than changes to the act. Whilst this is an admirable initiative in the interest of speed, there is also a potential for a lack of consultation. CSA firmly believes that constant consultation is needed to ensure that there are no unintended consequences stemming from any variations.

- **product definition statements are too prescriptive**:

  For the last several years, successive governments have put considerable effort into simplification of the Corporations Law, and have been expressly moving away from being prescriptive. To now specify exactly what is required in a Product Definition Statement (PDS) we believe is changing the flexibility that the existing prospectus requirements have been creating in the Corporations Law. Surely the use of guidelines, which are favoured for privacy, would be equally applicable here.

- **share certificates**:

  Section 1070(c) compounds the above problem by specifying what information needs to be contained in share certificates. However, to the best of our knowledge, no publicly listed company in Australia issues share certificates. We are interested to understand what this provision is meant to cover. Is the provision meant to cover only proprietary companies or is it designed to cover both? If the provision is designed to cover both publicly listed and non-listed companies then this provision will need to appear in the listing rules, and as far as we are aware that does not appear to have been considered.

- **multiple product definition statements:**

  CSA is of the view that the requirement for a service provider to publish a separate Produce Definition Statement (PDS) for each product where that provider has a suite of products, often provided by a different company within the group, is overly onerous and may act in reverse of its intention. As each company in a related group of companies will need to produce a separate PDS there is a strong potential for a wasteful duplication of material that is only likely to create information overload in the hands of recipients. Instead of consumers being more protected due to increased access to information, they potentially could end up being more exposed because they are unlikely to read more than one document, yet take up a number of products that are on offer.

- **CTP Insurance**:

  CSA is concerned that there is a potential for different cost structures (and cost to consumers) to appear between States depending on how CTP is provided in that State. At present two States place their CTP insurance with private insurers whereas the remainder use Government insurance agencies. The effect is that the CTP insurers in the States where private insurers supply the product will experience greater costs because they will be subjected to the operation of the FSR Bill. In States that place their CTP with Government insurers there will not be the additional compliance costs that stem from the introduction of the FSR Bill.

- **insider trading:**

  CSA has been a vocal supporter of broadening the avenues that can be taken for breaches of insider trading provisions. The proposal to introduce provision for civil penalties is commended.

  In addition, CSA appreciates the Government's intention to have as little change as possible before the Companies and Securities Advisory Committee (CASAC) completes its review. However, we see the FSR Bill's move towards civil penalties as only a step in the right direction rather than the ultimate solution.

  CSA is of the view that insider-trading provisions should be a completely civil matter, with the victims (in most cases shareholders) bringing the action at their own cost through the more efficient civil court process. If public interest is involved, then ASIC can be adjoined as an interested party. This way we are far more likely to see successful actions against insider trading, rather than the non-event that it is today.

3. Restricted entry for new players

There are two aspects of the FSR Bill that we believe may inadvertently act to restrict the entry of new players:

- **pooled superannuation trusts**:

  CSA believes that the requirement that Pooled Superannuation Trusts (PST) be considered retail and thus be subject to the requirements for a full retail product is unreasonable. These products were created to service the needs of the "sophisticated investor". The retail requirement will prevent some otherwise useful products from being released in the PST format because of the stringent requirements of the retail concept as opposed to what would be required to satisfy the current disclosure requirements of the sophisticated investor. Only those with larger budgets will be able to implement the PST strategy.

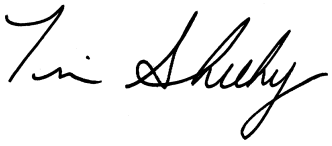
- **custodians to be responsible entities**:

  Currently custodians do not need to satisfy the requirements to hold a dealers license, one of the prerequisites to being a responsible entity. To now require this is unreasonable and will have the effect of restricting the number of custodians. Only the larger financial organisations will be able to comply with the additional compliance requirements that a dealer's license will mean, namely a compliance plan and external members to the compliance committee. This will necessarily mean that fees will rise and some smaller operators will be forced out.

  The custodian's function is one of record keeping and compliance with a manager's request. They rarely, if ever give advice and thus we cannot understand the reasoning for requiring that they do this. The state legislation also covers their obligations. This is a doubling up of legislative control. The industry already uses custodian consultants, which ensures that only the effective and well-administered custodians get the work. We believe the current self-regulating framework is working effectively.

Thank-you for the opportunity to make a submission regarding legislation as important as the Financial Services Reform Bill. As stated in the opening of our submission, Chartered Secretaries Australia would welcome the opportunity to participate in public hearings if these are scheduled.

Yours faithfully,



Tim Sheehy
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