CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

2 November 2012

Company Directors' Policy Team
Australian Institute of Company Directors
Level 30
20 Bond Street
Sydney NSW 2000

By email: DeregulationPolicy@companydirectors.com.au

Dear Company Directors' Policy Team

Business deregulation: A call to action
Working paper

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. CSA has unrivalled depth and expertise as an independent influencer and commentator on governance and risk management thinking and behaviour in Australia.

Our Members have a primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. As governance professionals, 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 amendment as well as advising their boards to ensure their oversight responsibilities are fulfilled.

CSA welcomes the Australian Institute of Company Director's (AICD's) working paper on business deregulation (the working paper). It is important that regulation of the private and NFP sectors is achieved through sound analysis, informed decision-making, and transparent procedures and CSA strongly believes that a rigorous system for assessing the regulatory impact of proposals is central to developing sustainable and relevant regulation.

General comments

CSA agrees with the sentiments of the working paper that highlight the increase in the volume and complexity of regulations in Australia in recent times. Unfortunately, the imposition of regulation has not always been coupled with either a regimen of removing redundant regulation, or a detailed system of reviewing existing regulation, and this has sometimes resulted in a

plethora of regulation and imposition of increased compliance burden for businesses across various sectors.

Aside from the increase in regulatory obligations, CSA has also been concerned with the increasing velocity of regulatory reform, that is, the combination of short time frames for consultation, the voluminous materials to be reviewed, and the lack of further consultation on identified concerns following submissions by industry bodies.

CSA notes, using the Commonwealth Treasury department as an example, that in 2007 the Commonwealth Treasury undertook 16 consultations with an average consultation period of 53 days (including non-business days). That has since jumped to 122 consultations by the Commonwealth Treasury in 2011 with a lower average consultation period of about 32 days (including non-business days). CSA has particularly noted the compressed time frames and increase in proposed regulatory reform, having participated in over 30 consultations to date in 2012 compared to only 19 consultations during the whole of 2007.

The expansion of regulatory reform, and in particular, the failure to remove regulation where it is no longer required or applicable, presents an ongoing risk to businesses as well as an increase in the imposition of compliance obligations. Furthermore, the increasing speed of consultations on proposed regulatory reform in an environment where feedback from consultation is not always heeded can result in a greater opportunity for unintended consequences to arise; including:

- uncertainty in the implementation of new regulations
- conflicts between various regulations, such as between state and federal jurisdictions
- a lack of clarity in the interpretation of regulations, or
- regulations having effects that were not intended and producing outcomes that are not consistent with the intention of the regulatory policy.

CSA notes, for example, the unintended consequences which arose from drafting errors in the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (the Act). A drafting anomaly in the Act resulted in the chairman being prohibited from voting undirected proxies on the remuneration report resolution, even where the shareholder expressed confidence in the chair by appointing him or her as their proxy to vote on their behalf. The error was not able to be rectified in time to prevent a great many shareholders being disenfranchised in the 2011 AGM season. In another example, the insertion of a provision in the *Corporations Amendment (Corporate Reporting Reform) Act 2010* that ties the calculation of ‘assets’ and ‘liabilities’ to the International Financial Reporting Standards in relation to the reform of the test for the payment of dividends introduced an unintended onerous compliance burden for smaller companies, while the introduction of s 254T introduced discrepancies between the approach of the Australian Taxation Office (ATO) and Treasury to the franking of dividends.

It is imperative, therefore, that a well-crafted and strong regulatory reform process is in place to guide the process of regulation creation and reform. CSA notes that, while the Australian Government’s Office of Best Practice *Best Practice Regulation Handbook* (the Handbook) provides excellent guidance on the appropriate measures required for regulatory reform, to date it has been implemented haphazardly and not in accordance with regulatory best practice.

CSA believes that the most appropriate way to improve regulatory processes is to support the recommendations made in the Handbook with principles that reinforce the management of the regulation process. These principles should include:

- 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

- 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 not appropriate across diverse sectors and organisations
- accountability of decision makers for regulatory decisions, and for ensuring that regulatory reform is progressed in a timely and considerate manner to all stakeholders, and
- leadership by Ministers and agencies which provides a clear outline of how the regulatory processes will be undertaken to achieve their stated policy aims.

CSA believes that decision makers can be encouraged to adopt these principles by reporting on the recommendations of the Handbook. A reporting regime which resembles the ‘if not, why not’ framework of the Australian Securities Exchange (ASX) Corporate Governance Council’s *Corporate Governance Principles and Recommendations* (Principles and Recommendations) would require decision makers to report on why the recommendations of the Handbook have not been followed. Such an approach could be used to encourage better standards of accountability and transparency.

In this light, CSA’s comments on the working paper will focus on ways in which these principles can be put into practice with respect to regulatory enactment and reform.

Reducing regulatory red tape

CSA notes that there are many examples of poorly designed and implemented regulations which impose unnecessary costs on organisations across all sectors. The problem, in many instances, is the over reliance on ‘black letter law’ to address perceived problems which may be more efficiently dealt with through other means.

A ‘black letter law’ response, while immediate, is a rigid and direct approach. This often forces conformance from businesses but may not adequately address the specific policy or practice at issue. Black letter law promotes a ‘tick-the-box’ mentality and does not promote organisational thinking about the core problem the regulation is trying to address. It is also difficult to repeal or amend legislation once enacted, and there is also the possibility that there may be unintended consequences that inevitably results in costly litigation or for courts to determine the basis of what Parliament intended by the application, scope or meaning of the legislation.

For example, for many matters relating to the governance of organisations, CSA believes that it is more appropriate for regulation to be principles-based. This approach sees high-level requirements relating to governance supported by guidance documents, including standards and fact sheets to assist organisations to understand and meet their responsibilities. There is often no one ‘right answer’ to many governance issues facing organisations. CSA believes that it is for stakeholders to test the thinking and behaviour of those in charge of the organisation, who must also be held accountable for their decision-making and stewardship. Each organisation is unique and its circumstances may change dramatically and suddenly.

The Principles and Recommendations provide a good example of a flexible framework for corporate governance and a practical guide for listed companies, irrespective of their size or industry, their investors, the wider market and the Australian community. CSA notes that the Principles and Recommendations are not prescriptive. If a listed company considers that particular Recommendations are not appropriate to its circumstances, it has the flexibility — under the ‘if not, why not’ approach — not to adopt them, under the Listing Rules, as long as it explains the reason(s) why in its Annual Report.

While it may be tempting for a government to be seen to be reacting to public outcry over aspects of business failures; numerous bodies, reports and initiatives, noted in Part Two of the working paper, have highlighted the need for the informed consideration of issues and appropriate consultation before the implementation of regulation.

Better outlining of reform initiatives

In developing the right approach to reform initiatives, CSA believes that appropriate consideration must be given to the form of proposed regulation and the manner in which implementation will occur. It has been evident in some consultations that the drafters of regulations do not fully understand the issues the legislation is seeking to address, or the industry in which the issues are perceived to exist.

In such instances the exposure drafts have been less than optimal, with extensive consultation and, in some cases, amendments to legislation required post implementation. CSA notes that this is an inefficient approach to regulation and one which impacts negatively on businesses' costs.

CSA believes that diversity in experience and extensive pre-consultation can ensure that regulatory drafting reflects the underlying policy objectives. CSA is aware, for example, of a formal staff exchange program which was previously run between the Business Council of Australia and the Commonwealth Treasury department. CSA strongly endorses this type of interchange of ideas and approaches as a positive step in developing a deeper understanding by regulators of the business practices they are regulating.

While some regulatory organisations do a good job of identifying the issues, consulting with stakeholders, evaluating the impact of regulatory proposals, and making succinct and workable recommendations, there is great inconsistency in practice across all regulators. In some quarters, there appears to be a lack of commitment to best practice regulatory consultation or a lack of awareness of the best practice processes and outcomes required.

Part of the inconsistency appears to arise because of the lack of transparency about the regulatory reform process whereby investigations are begun, reports written, and recommendations published and endorsed by government, but the implementation processes then become obscure and opaque. CSA believes that a lack of leadership contributes to the inconsistent implementation of regulatory reform.

Designing, producing, administering and enforcing regulations

The key consideration is to have a process of regulation creation and review which provides for an understanding of the issue and desired policy outcomes, transparency as to the process, accountability of those seeking to create or modify the regulations, and leadership to ensure that the eventual regulations meet the desired outcomes.

CSA notes the recommendations of the *Independent Review of the Australian Government's Regulation Impact Assessment Process* (the RIA Review)[1], and in particular the proposed introduction of a two stage Regulatory Impact Statement (RIS) process which would split the process into an 'options stage RIS' and a 'details stage RIS'. CSA understands that the 'options stage RIS' is the stage at which the decision makers would consider the options available to addressing the issue under consideration, while also noting the objectives of the reform. Following consultation with stakeholders, the 'details stage RIS' would then consider the impact of regulatory reform, provide for further consultation with stakeholders on the preferred option(s)

[1] Borthwick, D. & Milliner, R. (2012) *Independent Review of the Australian Government's Regulatory Impact Analysis Process* (RIA Review), Report, p11, 20 April 2012

and formulation of conclusions and recommendations, and also provide an outline of the implementation and review processes. CSA believes that these ‘stages’ should be mandatory for all proposed regulatory reform, with disclosures, consistent with the ‘if not, why not’ framework, required at each stage to evidence progress against the criteria.

Disclosures which articulate the accountability and transparency lines, including who retains responsibility for the making of decisions, when decisions are required to be made, and who is responsible for the process, should also be embedded in the framework. CSA notes that in the corporate world, decisions are often made against clear, unambiguous criteria with a stronger emphasis on accountability and transparency, and such clarity should also be required in the creation of the regulatory framework.

CSA believes that the introduction of markers or ‘toll gates’ which map out the reform path would add value to the reform process by maximising the likelihood that the desired policy objectives are in fact met with no unintended consequences. Decisions would be required and publicly disclosed at each ‘toll gate’, which might include the seven stages currently required in the preparation of a RIS with the final ‘toll gate’ being a post-implementation review.

CSA strongly supports the need for post-implementation reviews and believes that regulators should be required to produce statements about the time frames for periodic reviews of regulatory enactments to assess whether the regulations have achieved their desired objectives and/or are still required. CSA notes that review periods between three and five years after the implementation of regulation are appropriate.

Reviewing and reforming existing regulations

CSA echoes the concerns of the working paper with respect to the current state of regulation, and notes that consultation practices have been largely inconsistent across sectors and issues. This makes the task of reviewing existing regulation extremely large and cumbersome.

In the first instance, however, CSA believes that stakeholders would be interested in joining roundtable discussions about particular issues which might be identified as requiring industry or sector input. CSA notes that in most instances organisations are willing to participate in consultation where the process is transparent and clear.

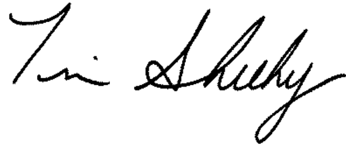
Secondly, CSA believes that a strong government commitment to reforming the process of regulation review is required. The willingness or otherwise of governments to adopt the proposals of businesses provided as feedback to proposals, and the lack of accountability in progressing regulatory reforms have been traditional stumbling blocks to the improvement of regulatory processes. CSA notes, for example, that in many instances associations, business groups and other stakeholders provide considered advice on how particular regulations should be drafted or implemented; however, this information is often not pursued. It is not acceptable that so much time and effort on the part of regulators and other stakeholders should be applied to seeking to address flaws in regulatory changes when the processes by which they were developed were themselves unsatisfactory.

Conclusion

Transparency, accountability and leadership of regulatory reform should be established as the overriding principles of any regulatory system. At the core, decision makers need to form a better understanding of how regulation will impact upon the decisions or actions of organisations and of the sector to which the regulations are targeted.

CSA has previously noted that the Office of Best Practice Regulation (OBPR) is the appropriate office to hold government and agencies responsible for regulatory reform in line with best practice recommendations. As the chief body administering the Regulatory Impact Assessment process it is incumbent on the OBPR to be active with government and agencies through education and training which promote best practice.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE