Towards better regulation
Towards Better Regulation

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Executive Summary

Regulation in Australia continues to grow. In fact the Australian Parliament has passed more pages of legislation since 1990 than were passed during the first 90 years of federation.

Throughout our national engagement on the issue of deregulation, the Australian Institute of Company Directors has consistently highlighted the link between effective regulation and productivity growth.

Notwithstanding the many reviews and other initiatives undertaken by or on behalf of successive governments with the aim of reducing the regulatory burden on Australian businesses, this culture of over-regulation continues, as evidenced by the findings of the recent Independent Review of the Australian Government’s Regulatory Impact Analysis Process\(^1\) (Independent Review). There has also been a chronic and consistent lack of transparency and accountability with respect to the output of deregulation reviews, including a lack of commitment to the Regulatory Impact Analysis (RIA) process and inaction in reviewing and removing regulation which is redundant, overlapping or flawed.

Our consultation with Australian businesses and directors has revealed a solid and consistent theme that over-regulation is negatively impacting business productivity in Australia. It gets in the way of businesses doing their real job – improving corporate performance and shareholder returns and making good business decisions that lead to more jobs and investment.

Specifically, our consultation with business found that:

- Australian businesses are struggling to compete with their international peers as the current regulatory environment acts to handicap growth and innovation;
- Red tape and overregulation encourage boards to focus on conformance over performance;
- Regulation and red tape are hindering wealth generation as they discourage businesses from taking measured risks;
- Too often, new regulation is being developed as a knee-jerk reaction to a one-off event, rather than being developed through proper regulatory process involving a risk-based assessment and consultation;
- There has been a failure by a succession of governments at federal and state levels to adequately address this issue. Based on our analysis of the current regulatory

environment in Australia, it is clear that Australia already has the appropriate regulatory processes in place – they are just not being used;

• Regulatory reform will not succeed if government continues to support these processes ‘in principle’ but habitually avoids them in practice; and

• There is currently an excessive number of regulating bodies in Australia and regulators tend to adopt an unduly risk-averse approach to the administration of regulation and are often overly bureaucratic in their interactions with business.

The obstacles that this glut of regulation has created for Australian business lies at the heart of many of the key issues facing our members in their role as directors.

The directors of Australian businesses (small and large) are calling for the Australian Government to take action – beyond the reviews and rhetoric that we have seen to date – and finally reduce red tape and streamline regulation. This will, in turn, stimulate growth, jobs and a more vibrant economy that can compete with its international peers.

To tackle this complex and pervasive problem, in this paper the Australian Institute of Company Directors propose three pillars of regulatory reform – all of which must underpin efforts to tackle this growth in regulation:

**Pillar 1:** Clean up existing regulation.

**Pillar 2:** Get new regulation right.

**Pillar 3:** Regulator reform.

Each of these pillars is critical to successful regulatory reform; however, they do not need to be undertaken sequentially. Immediate action is required on all three pillars.

We are calling on the Federal Government to show leadership in implementing a reform agenda that will have long-term benefits for Australian businesses, Australian jobs and the economy as a whole. While the reforms should be initiated and supported by the Commonwealth Government, there needs to be a consistent national response to the reforms. A starting point for implementing these recommendations could be a Deregulation Summit within the first 100 days of the next term of government, bringing together business, senior ministers, key advisors and regulators to develop an action agenda for reforming the process of regulation creation and ‘destocking’ the existing accumulation of red tape.
Introduction

The Australian Institute of Company Directors is pleased to follow up its Discussion Paper ‘Business Deregulation: A call to action’.

Building on that paper, and based on the outcomes of our consultation with directors on the particular aspects of red tape and regulation impacting their businesses, we now set out a “plan of action” to move towards better regulation that we recommend be undertaken across all levels of government to finally address the pervasive problem of red tape and growing regulation and its impact on the productivity of Australian businesses.

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with individual members from a wide range of corporations; publicly-listed companies, private companies, not-for-profit organisations, charities and government and semi-government bodies. As the principal Australian professional body representing a diverse membership of directors, we offer world-class education services and provide a broad-based director perspective to current director issues in the policy debate.

While recognising the important role of good regulation in supporting the smooth function of business and society, we take issue with regulation that is excessive, redundant and poorly designed. Further, we are opposed to regulation that is impractical, unworkable and disproportionate to the “problem” it is purporting to solve. We have actively campaigned against the “regulate first, ask questions later” culture identified in the 2006 report of the Regulation Taskforce on reducing regulatory burdens on business (Banks Report)\(^2\).

This paper expands on the findings of our 2012 Discussion Paper and incorporates feedback received in response to that paper from numerous third-party stakeholders, including the Chartered Secretaries Australia (CSA), Group of 100 (G100), Insurance Australia Group Ltd (IAG), Australian Logistics Council and the Combined Small Business Alliance of WA inc. It also includes feedback received at a number of workshops conducted with various business groups, including Clubs Victoria, Cosmetic, Toiletry and Fragrance Association of Victoria (CTFA), Dairy Australia and Arup Pty Ltd.

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Legislation continues to grow

As can be seen in the graphs below, the growth in new laws continues to occur at an alarming rate.

Figure 1 (above) shows the Commonwealth legislation introduced from 1901 to 2012.
Figure 2 (below) shows the cumulative increase in the number of Commonwealth Acts since 1901. Figure 2 shows an exponential increase in the amount of legislation, with the trend continuing. While the graphs do not take into account the fact that some of the legislation may have been repealed, our analysis shows that the upward trend would remain.

A culture of ‘regulate first, ask questions later’

Part of the problem is the incentive structure of modern politics, which is both risk-averse and increasingly inclined to respond to media and public pressure to "do something" about any problem with piecemeal, Band-Aid regulatory solutions. As a consequence, legislation is being introduced with consultation either not being conducted or being conducted within increasingly tight (and inadequate) timeframes.
Policymakers do not always consider what regulation is needed to assist businesses to be compliant and successful. There are many occasions when decisions appear to be based on what is seen as being in the “public interest” – often reacting to one-off events or issues that are receiving media attention at the time. This risk-adverse approach can result in regulation being hastily introduced as a way to “fix” the problem. Ideally a risk-based assessment of the issue should be undertaken as part of the review of existing regulations or development of new regulations.

ARUP, 2013

“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...have highlighted the need for the informed consideration of issues and appropriate consultation before the implementation of regulation.”

CSA, 2012

This failure to properly consider and assess the potential impacts that proposed regulation will have on stakeholders through an adequate consultation process has resulted in legislation that is often inappropriate, disproportionate to the problem that it is purporting to solve and/or flawed. Without legislation being repealed at the same rate that it is being introduced, the regulatory burden of Australian businesses continues to increase.

The result is an excess of “red tape” that distorts the operation of the market, slows up the engines of growth and job creation and stifles wealth creation in the economy. Not only is red tape costly for the business, it gets in the way of management and boards doing their real job: improving corporate performance and shareholder returns and making good business decisions that lead to more investment and jobs for Australians.

Deregulation – the deliberate stemming of growth in new regulation and cutting back of existing red tape – should therefore form a crucial part of any government’s agenda for boosting national productivity.

The impact of red tape on business

Regulation should not hinder businesses from taking the measured risks necessary to generate wealth. We do not want to trade off economic prosperity for an excessively burdensome regulatory environment in an ultimately futile quest to “regulate away” this risk. Companies must be free to assess the level of risk appropriate to their own circumstances, not have myriad of “one size fits all” legislative restrictions imposed on them.
In terms of international competitiveness, the current regulatory environment is effectively handicapping Australian businesses in a global race where many competitor countries are doing everything they can to assist businesses by freeing up their economies from regulation.

Further, while effective and efficient regulation can support the smooth functioning of business and society, excessive, overly-complex regulation can detract from the ability of companies and individuals to understand and comply with the laws that apply to them. As noted by the Rule of Law Institute:

“The explosion of legislation and regulation presents a real threat to the rule of law as there is an inverse relationship between the growth of legislation and the community’s capacity to monitor, comprehend and comply with the law.”

According the results of our recent (April 2013) Director Sentiment Index, business is increasingly concerned about growing regulation and its impacts.

- More than 70 per cent of directors (up from just over 60 per cent in the last survey) believe that the level of red tape has increased in the last 12 months.
- Directors estimate red tape compliance as consuming an average of 26 per cent of their total board commitment.
- More than 70 per cent of directors identify employing workers and workplace health and safety as aspects of their business most affected by red tape.
- Further highlighting a growing concern in the business community that the nation’s productivity is being held back by poor policy, when asked to rank the impediments to productivity growth, directors identified general economic conditions. This was followed by excessive red tape and regulation, workplace laws and regulations and skills shortages.

In a recent “National Red Tape Survey” on the impact that excessive regulation and reporting obligations on Australian businesses undertaken by the Australian Chamber of Commerce and Industry (ACCI Survey), almost half of those surveyed stated that they spent 1 to 5 hours per week complying with regulatory requirements, with more than 11.7 per cent of respondents stating that they spend more than 20 hours a week on compliance. Almost three-quarters of the respondents reported an increase in the overall time spent on compliance in the last two years.

In 2006, the Banks Report noted that “submissions indicated that compliance issues can consume up to 25 per cent of the time of senior management and the boards of some large companies – which, among other things, risks stifling creativity and innovation”.

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3 ACCI "National Red Tape Survey" October 2012, page 6
4 Banks Report, page 9
5 ACCI "National Red Tape Survey" October 2012, page 7

Embargoed until 12.01am Wednesday 24 July
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When looked at in aggregate, the direct costs of red tape can be quite significant. The ACCI survey asked respondents to estimate the cost of compliance to their business, with almost a half responding that they had spent more than $10,000 on complying with government regulation and around 26 per cent indicating that they spent between $10,000 and $50,000 - which is equivalent to the cost of employing one full-time employer. In 2006, the Productivity Commission calculated the annual cost of complying with regulation to be 4 per cent of Australia’s gross domestic product (current cost of regulation to be considerably higher and estimates regulation to account for 10.2 per cent of Australia’s GDP. The Productivity Commission has estimated the economic gains from removing unnecessary regulation to be 1.6 per cent of GDP, or $20 billion a year.

With regulatory compliance costing Australian businesses so much, both in terms of money and time, and with these costs increasing each year, it is long overdue for the Government to take meaningful steps to implement regulatory reform in a way that is transparent and effective.

Examples of red tape and its impact on business

There are a number of solid examples of red tape and its impact that Australian businesses have identified, both through the consultation process on our Discussion Paper and also in a number of recent submissions and publications made by various business groups that similarly call for deregulation. Some of these examples are set out in the boxes below:

“When working across multiple jurisdictions...much time can be spent on unravelling the different requirements of the various pieces of legislation and departmental requirements in one State, let alone across a number. The clearer each State can make their expectations – via cross-department guidelines and clarity on communication and streamlined reporting, the more time companies can spend on ensuring their activities are safe, sustainable and compliant rather than focussing on all minor red tape processes that could inadvertently cause delay to critical timeframes.”

*South Australian Chamber of Mines and Energy, 2013*

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“...there is the need for a national regulatory framework (for the insurance sector). In particular, there is a need for the rationalisation of prudential regulation with APRA being the sole prudential regulator and the States and Territories removing overlapping or duplicate requirements in statutory and other classes of insurance”

IAG, 2012

“...the existing regulatory and reporting regime is characterised by unchecked creep, duplication fragmentation, inefficiency and waste:
- Universities typically have regulatory compliance departments with 15 to 20 or more dedicated staff ensuring compliance with over 100 separate State and Federal Acts directly regulating their operations. Universities incur direct regulatory compliance costs estimated to be at least $3 m per university or $120 m per annum (pa) for the sector.
- A typical university is required to report over 50 different data sets to DIICCSRTE [the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education] annually, comprising 200 reporting instances per year, and over 50 data sets to other Government departments. Total reporting costs are estimated at $4 m per university or about $160 m pa for the sector. So the total direct costs of regulatory compliance and reporting are estimated to be about $280 m pa for the sector.”

Universities Australia, 2012

Australia’s overly-strict regulatory regime (particularly with respect to low-risk products) and its failure to recognise international certifications has led to significantly higher retail prices for products in Australia as compared to overseas. Not surprisingly, Australian consumers are increasingly purchasing their products online from overseas retailers who do not need to comply with the same regulations that the Australian company must meet.

This is a clear case of the costs of complying with the regulation far outweighing any benefits that could be derived from it - particularly where the products in question are low-risk and have already received certification to a high, international standard.

CTFA, 2013

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Impact of red tape on directors: prioritising conformance over performance

Excessive regulation and badly targeted laws stifle business by encouraging boards to take an overly cautious, risk-adverse approach to decision-making and focussing directors’ minds excessively on risk avoidance and regulatory compliance rather than on ways to add value.

The expectation gap that exists with respect to the role of directors – that is, the gap between the public perception of what the proper roles and responsibilities of a director should be, what the law prescribes these roles and responsibilities to be and what best corporate governance practice recommends that these roles and responsibilities should be – could potentially impede optimal corporate performance and have a negative affect on Australia’s productivity. The impact of this expectation gap, and how government intervention has further widened the gap, is analysed in detail in the Company Director’s White Paper, “Mind the Expectation Gap – the role of a company director”:

“Many people believe that corporate boards and their directors (both non executive and executive) should be so closely involved in the affairs of the corporation that they can ensure nothing can go wrong.

[...]
This “expectation gap”, and the response to it by our parliamentarians and regulators is placing an increasing regulatory burden on corporate directors. The results are more time spent on corporate compliance and conformance, and less time available for strategy, entrepreneurship, risk management and prudential oversight to enhance effective corporate governance. The regulatory burden is adversely impacting financial outcomes, business efficiency and business reputation.”

This continues to be of primary concern for Australian directors. King & Wood Mallesons concluded in their recent report on director and board issues that the expectation gap has contributed to the general director sentiment that increasing red tape leaves directors insufficient time to devote to what they see as the fundamental purpose of a directors role – providing strategic direction and guidance to their companies. Almost 18% of those directors surveyed by King & Wood Mallesons identified regulatory challenges (such as red tape) to be the number one challenge of doing business in Australia, with almost a quarter of survey respondents seeing the increasing compliance burden as their number one concern as a director of an Australian company.

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9 Cole, Steven “Mind the Expectation Gap: the role of a company director” AICD 2012, VII - VIII.
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In addition to the compliance burden that has been created by an ever-increasing volume of red tape, company directors are also being faced with an increasing number of laws that impose criminal liability on directors. While this is being addressed in part by the introduction of the Personal Liability for Corporate Fault Reform Act 2012 which is intended to reduce and simplify the laws imposing personal liability on directors for corporate fault at both Federal and State levels, there are still concerns regarding the level of risk and uncertainty for directors in relation to their exposure to possible criminal liability for the actions of the company. As a consequence, boards are becoming increasingly risk-adverse rather than encouraging the pursuit of optimal business outcomes.

Essentially, red tape and over-regulation are encouraging boards to focus on conformance at the expense of performance.

Government action on deregulation to date

Our consultation process found that business generally has a favourable opinion of many of the formal regulatory reform principles that the Federal Government has endorsed in recent years with respect to how regulations are to be developed and reviewed. These have included:

- The OECD’s “Guiding Principles for Regulatory Quality and Performance” (OECD Principles) and endorsed by the Australian Government in 2005.
- The recommendations made by the “Rethinking Regulation: the Report of the Taskforce on Reducing Regulatory Burdens on Business” (Banks Report) and endorsed in part by the Federal Government in 2006, including the introduction of a “catch-all” requirement for any regulation that is not subject to sunsetting or other evaluation be reviewed every five years.
- Deregulation priorities and reform agenda endorsed by the Council for Australian Governments (COAG) in 2008 for the reduction of costs resulting from exiting regulation and to enhance productivity and workforce mobility in areas of shared Commonwealth, State and Territory responsibility (COAG Reform Agenda) and the “National Partnership Agreement to Deliver a Seamless National Economy” (NP Agreement) ratified in February 2009 and under which the Commonwealth, State and Territory Governments committed to reduce unnecessary and inconsistent regulation across jurisdictions, deliver on the agreed COAG deregulation and competition priorities and improve processes for regulation making and review.
- Australian Government’s “Best Practice Regulation Handbook” (Handbook), most recently revised in June 2010, which sets out the Government’s Regulatory Impact Assessment (RIA) process to be followed for all new Commonwealth regulation that

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imposes a significant burden on business and seeks to implement the OECD Principles.

- Reform measures announced in December 2012 in the “Australian Government Final Response to the Recommendations of the Independent Review”, including redesigning the RIA process set out in the Handbook to move to a two-stage assessment process and producing an annual regulatory plan to highlight major reform activity and likely stakeholder engagement opportunities.
- Red tape reduction targets set by a number of States (including Victoria, New South Wales, South Australia and Queensland) requiring departments and agencies to reduce existing compliance costs by a certain percentage or value within a specified time frame.

Notwithstanding the above principles and initiatives, there has been very little transparency and accountability as to the implementation of actual regulatory reform. Given that the volume of regulation impacting on business in Australia continues to increase at an unprecedented rate, there is a general perception that the commitment to regulatory reform and the principles of deregulation endorsed by Government are not being observed in practice and have therefore have had little or no effect on reducing the overall regulatory burden.

In essence, Australian businesses have heard all of the rhetoric on regulatory reform before from successive Federal and State Governments — now it is time for action.

A plan for action

The plan for action that we have set out in this paper is based on the findings of our Discussion Paper and subsequent consultation process. The plan reflects calls by Australian business for a rigorous system of structural reform of business regulation with increased transparency and accountability to ensure action is taken.

It calls on Government to implement policy that encourages vibrant and growing business activity, not hindering it or unreasonably burdening those who conduct it. It is about getting the balance right on regulation.

Transparency and accountability

To have a functioning and effective system for making, changing and abolishing legislation, it is imperative that the entire regulatory reform process is transparent and, as an important component of that, governments and regulators are held accountable for implementing reforms. Process audits and performance audits are important to verify that reforms have been implemented and, in the case of performance audits, that the stated objective has been achieved. To date, there has been little or no transparency with respect to government’s
progress towards implementing any of its announced regulatory reforms. Further, there has been no accountability for failing to implement these reforms. It is little surprise, then, that we have not seen any clear evidence of progress to date.

“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. [...] 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”

CSA, 2012

Three pillars of reform

There are three pillars of reform which must underpin any efforts to adequately tackle deregulation. This plan of action covers all three of these pillars.

The plan of action involves the following three pillars of reform:

**Pillar 1**: Clean up existing regulation.

**Pillar 2**: Get new regulation right.

**Pillar 3**: Regulator reform.

Each of these pillars is critical to successful regulatory reform; however, they do not need to be undertaken sequentially. Immediate action is required on all three pillars.

We are calling on the Federal Government to show leadership in implementing a reform agenda that will have long term benefits for Australian businesses, Australian jobs and the economy as a whole. While the reforms should be initiated and supported by the Commonwealth Government, there needs to be a consistent national response to the reforms.
“Best practice regulatory policy requires evidence and rigorous evaluation. It also requires institutional frameworks that encourage, disseminate and defend good evaluation and that make the most opportunities to learn. Where evidence is incomplete or weak, good processes for learning, and for progressively improving policies, become even more important”

IAG, 2012

Pillar 1 – Clean up the existing regulation

One of the key pillars for regulatory reform is the reduction of the existing regulatory burden on Australian businesses.

As noted in our Discussion Paper, this will require a nation-wide, systematic review of Australia’s existing stock of regulation with the Federal, State and Territory Governments each undertaking a comprehensive and structured review of all regulatory (including legislative and administrative) requirements imposed on business in their respective jurisdictions.14

There must be a national, whole of Government approach to the review, with a comprehensive agenda of regulation repeal across all portfolios with commitment by every minister and within every department, as well as co-operation between the States. This would be best conducted within the structure of a suitably revamped Council of Australian Governments (COAG) to ensure a national outcome, with the Productivity Commission potentially playing a key research, co-ordination and monitoring role. Given the scale of review required, it may also be useful for multiple working groups to be formed by COAG that focus on reviewing regulation that relates to a particular industry or sector.

Each regulation should be assessed for its relevance to the modern day functioning of Australian society and a review should be undertaken as to whether the provisions continue to be effective. Any regulation that is ineffective, excessive, overly burdensome, unnecessary, redundant, or overlap with other regulatory requirements, should be repealed or amended as appropriate.

In deciding on the best approach to be adopted in conducting these reviews, the recommendations made by the Productivity Commission in its report, “Identifying and Evaluating Regulation Reforms”15 should be applied.

In particular:

- the *Legislative Instruments Act 2003* be amended to enable the smoothing of pre-2005 regulation sunsetting over 2015 to 2018 and the packaging of related regulations for review;
- the establishment of clear and transparent processes for implementation of the reviews, including:
  - a forward agenda, identifying at the outset what actions are to be taken, both in relation to the specific reforms and further reviews;
  - indicative timeframes for the various components of the forward agenda;
  - processes in place to monitor and facilitate the progress of implementation of reforms across all levels of government; and
  - clarity as to the roles and responsibilities of different agencies (including who is responsible for ensuring reforms are carried out in a logical order); and
- developing a system to identify regulatory reform priorities (ie those reforms that will deliver the most benefits taking into account both the depth and breadth of potential benefits, as well as the human resource and other costs of achieving the reforms) and sequencing of reforms accordingly.

In the past, insufficient consideration has been given to the sequencing of regulatory reviews and to the way in which reforms are undertaken. This would be assisted through consultation with the business community at the outset to identify those regulatory areas requiring urgent review as a matter of priority, and those that can be dealt with later. The reform efforts of government should be directed to areas where the potential gains from reform are likely to be the highest.

Additionally, regulatory reform must be set as a specific objective by each minister for their relevant departments. This objective should then be enforced through the adoption of a red-tape reduction program for each department, requiring the setting of an annual red-tape reduction target for the department as a whole (either as a percentage or dollar target for compliance costs savings), with the achievement of these targets forming part of the KPIs of department/agency heads and senior management. Similar programs have been adopted in a number of Australian states, including Victoria, New South Wales and South Australia, as well abroad, and have achieved considerable compliance cost savings16.

In order for regulatory reform to be successful in reducing the existing regulatory burdens on Australian businesses, it will also be essential that:

- there is strong and visible political support to thoroughly review the stock of existing regulations, to rigorously assess them against cost-benefit principles and commitment to enact any recommended reforms, including the removal of any regulation that is no longer justified;

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- the reviews are adequately resourced and are completed within a reasonable timeframe;
- progress is monitored and gains are regularly quantified by a suitable, independent body, such as the Productivity Commission or, alternatively, a permanent body established for the express purpose of reviewing regulatory requirements and whose activities are reported at a Cabinet level, with Government responsible for the outcomes;
- the reviews are announced with a clear timetable, with adequate time for consultation, and which require reports to be made public in a timely way;
- stakeholders (including but not limited to the business community) are given an adequate opportunity for involvement at all key stages of the reviews. Ideally consultation processes should include:
  - release of terms of reference and information about the reviews;
  - issues papers and submissions, which are publicly available; and
  - publishing of draft reports, inviting feedback on initial review conclusions and reform recommendations;
- in making recommendations, the reviews give appropriate consideration to the regulatory burden of the legislation in question, including the cost to business to comply with the legislation;
- final reports are publicly released and timely responses made. These should be monitored and publicly reported as should implementation of the subsequent reforms; and
- each government commits to report on the progress of the implementation of the recommended reforms.

Pillar 2 – Get new regulation right

Even if the existing regulatory burden on Australian businesses is reduced to a more appropriate level, without stemming the rate at which regulation is currently being introduced, full regulatory reform cannot be achieved. It is therefore essential that the underlying causes of over-regulation also be addressed.
“While the Australian Government’s Office of Best Practice Regulation Handbook (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.

[...]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.” *CSA, 2012*

Achieving this will involve a number of steps.

**Step 1. Demonstrated commitment to the RIA process**

**Australia already has appropriate regulatory processes in place – it just isn’t using them.**

“...while the Handbook sets out in a straight forward and helpful way what should be done, it is too often ignored in practice... As a result, the likelihood is that many regulatory decisions are sub-optimal; detracting from the policy coherence that the OECD promotes and that Australia has committed to pursue.” *Independent Review, 2012*17

In assessing the Australian Government’s current regulation-making framework, being the Handbook and the RIA process that it sets out, the Independent Review concluded that the framework is, in fact, entirely consistent with the OECD Principles. However, the Independent Review did find that there was “substantial dissatisfaction by all major stakeholder groups with the RIA process” and, perhaps more concerning, that “there is widespread lack of acceptance of and commitment to the RIA process by ministers and agencies”18. To address these issues, the Independent Review made a number of recommendations aimed at improving the acceptance and uptake of the RIA process by ministers and agencies.

As noted earlier, the Federal Government recently reconfirmed its commitment to regulatory reform in response to the recommendations of the Independent Review, and accepted a number of the recommendations made by the Independent Review as part of a package of regulatory reforms19.

17 Independent Review at pages 45 - 46
19 Minister for Finance and Deregulation and Assistant Treasurer joint media release “Government to Improve Productivity Through Regulatory Reform Package” 4 December 2012.
However, those recommendations that were not accepted, or accepted only in part, bring into question the seriousness of this commitment and potentially undermines the Federal Government’s ability to achieve real success on regulatory reform.

In particular, the Government did not accept:

1. publishing the sponsoring minister’s reasons for seeking Prime Ministerial exemption from the requirement to undertake a Regulatory Impact Statement (RIS) on the OBPR website (Recommendation 6);
2. requiring that an RIS consider the option with the greatest net community benefit as the preferred option – or, where an alternative option is preferred, explaining the reasons for this decision publicly (Recommendation 12);
3. requiring Ministers to certify in the final RIS version that the seven RIA elements set out in the Handbook have been completed before it is submitted to the OBPR (Recommendation 12); and
4. introducing a sunset clause or a review provision into all primary legislation that has more than a minor regulatory impact on business and the not-for-profit sector (Recommendation 14).

Each of the above recommendations enhance the transparency and accountability of the existing RIA process and should be adopted by any Government if it is serious about achieving regulatory reform.

The first of these omissions is of particular concern. Pursuant to the Handbook, an RIS is required for all decisions made by the government and its agencies that are likely to have a regulatory impact on business or the not-for-profit sector. The only exceptions are where the impact is minor or machinery in nature and does not substantially alter existing arrangements or, in exceptional circumstances, where the Prime Minister provides an exemption. Over recent years, the Australian Government has introduced a significant volume of new regulation that has not complied with the RIA process. This has largely been the result of a Prime Ministerial exemption from the RIA process being granted – an exemption that is only meant to be granted in genuinely exceptional circumstances. While it is possible that such circumstances have existed in some cases, it seems unlikely that this has always been the case. Without requiring Government to publicly disclose the reasons for the exemption, there is no way for the public to know that these exemptions are being granted in appropriate circumstances.

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20 For the period 1 December 2007 to 31 December 2011 15,942 Commonwealth Act and legislative instruments were introduced and 5,792 were repealed. However, only 239 RISs were required over that period and only 3,295 Preliminary Assessments were undertaken (to determine whether an RIS was required under the Handbook) (see Independent Review, pages 16 – 17).

This lack of transparency has contributed to the lack of faith that many stakeholders now have in the current process for making, amending or reforming regulation.

The rejection of the Independent Review’s recommendation to require Ministers to sign off on the compliance of the final RIS with the RIA process is also disappointing. As noted by the Independent Review:

“...the Review is of the opinion it is highly desirable that ministers endorse the RIA Process is completed and accept that on occasions they may need to fully explain the basis of their regulatory decision, whether it conforms with or is different to what was proposed in the RIS. If this seemingly low hurdle is an obstacle, it begs the question whether there is, in fact, a ‘real’ Government commitment to take ownership of RIA.”

The refusal to commit to the inclusion of a sunset or review clause in primary legislation is also concerning as this requirement would ensure that regulation is reviewed and amended or removed as appropriate on an ongoing basis, and not just as a one-off exercise. Without the regular and systematic review of legislation following its introduction, it is likely that over-regulation will be an ongoing issue for Australian business. It is crucial, therefore, that the requirement be introduced into the Handbook.

If Australia is to move from merely having the right processes in place to having these processes fully implemented and adhered to, cultural change within government and bureaucracies is necessary. This will only occur if there is “an unequivocal commitment by Government ministers through the Cabinet and by agencies to a mandatory RIA process.”

**Regulatory reform will not succeed if the Government continues to support the process “in principle” and yet habitually avoids it in practice.**

Government must demonstrate their commitment to strictly adhering to the RIA process, as do each of their ministers and agencies. This should include requiring that the process be completed in accordance with the Handbook (and to satisfactory level) before a proposal can proceed to the Cabinet or other decision maker and that exemptions are only to be sought (and granted) in circumstances that are truly urgent and unforeseen or where the proposal is a matter of budget or other sensitivity and premature announcement could lead to unintended market effects or speculative behaviour. To demonstrate this commitment, all of the recommendations made by the Independent Review (particularly those set out above) that were previously rejected should be accepted by the Government and incorporated into the Handbook.

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23 Independent Review, page 47.
Towards Better Regulation

It should be recognised that the RIA process can itself create a type of red-tape and that the time and cost involved for both government and those businesses and organisations involved in the process can be significant. Before new regulation is proposed and an RIA process commenced, a clear case for regulatory intervention must exist. An RIA process should only be commenced if:

1. the issue requiring action has been clearly identified or demonstrated;
2. the proposal is aligned with clearly articulated policy goals and has sound legal basis, including being consistent with the principles of natural justice and the rule of law; or
3. the issue cannot be sufficiently dealt with under existing Commonwealth or state regulation.

There will be occasions where undertaking the full RIA process will not be possible as immediate legislative intervention is required. In these circumstances, the proper use of the Prime Ministerial exemption will be appropriate. However, such occasions should be exceptional and the regulation should be thoroughly reviewed within the first one to two years of its introduction.

Step 2. Preparing compliant RISs

Under the RIA process set out in the Handbook, the RIS is the document that formalises and provides evidence of the process that has been followed in developing a particular proposal. Once the OBPR has determined that an RIS is required (that is, the proposal is not minor or machinery in nature and has not received Prime Ministerial exemption), the relevant agency must prepare an RIS that has a degree of detail and depth of analysis commensurate with the magnitude of the problem and the potential impact of the proposal and that addresses each of the following seven elements:

1. The problem or issue that has given rise to the need for action – this should include evidence on the magnitude of the problem, detail of any relevant existing regulation and present a clear case for government action.
2. The desired objectives, outcomes, goals or targets of the proposed government action.
3. A range of options (including regulatory, non-regulatory, self regulatory options, as applicable) that may constitute feasible means for achieving the desired objectives;
4. An analysis of the impact of the options – this should involve identifying the groups that are likely to be affected by the options (for example, consumers, business, government and the community), specifying the impacts and assessing the costs and benefits of each option on the community as a whole, and assessing the impacts and compliance costs for business (including small business).
5. An outline of the consultation objective/s and how these were achieved – consultation should conform with the Consultation Principles set out in the

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Handbook, including setting out the views of those consulted and explaining how this has been taken into account. Where there has been no consultation, a reasonable explanation must be provided.

6. A conclusion that is supported by the analysis contained in the RIS and includes a clear statement of what the preferred option, why it is preferred and an indication as to the costs and benefits of the option.

7. Information on the strategy to implement, monitor and review the preferred option and detail of how the preferred option interacts with existing regulation.

“Legislative and regulatory proposals and public policy projects should be subject to an intensive cost benefits analysis before they are adopted. There is an impression that the cost benefits analysis undertaken in satisfaction of the RIS requirements is not sufficiently robust.”

G100, 2012

“...although there is generally a requirement to prepare an RIS, including cost-benefits analyses, the application of the requirement has been at best variable and at worse inadequate... [For example] the RIS prepared for the Clean Energy Package, introduced in 2011, which imposed on the transport sector a proxy carbon price through alterations to existing taxation laws...[and] customs tariff and excise legislation...contained no quantification of the costs that proxy carbon pricing would impose and the capacity such operators would have to pass on additional costs to consumers in a highly competitive environment.”

Australian Logistics Council, 2012

In the past, where an RIS has been prepared for a piece of regulation, the quality of the RIS has often been subpar. Inadequate consultation and a failure to undertake a proper, complete cost benefits analysis has often resulted in regulation being introduced that is flawed and/or disproportionate to the “problem” it is purporting to solve. The Independent Review noted that there is a view amongst businesses and not-for-profits that consultation was often just conveying what an agency had already decided and that the RIS was used as an “ex post justification of a preferred option rather than an ex ante mechanism to better inform decision making”25. This results in important issues being ignored and only becoming apparent after the legislation or regulation had been drafted – thus unnecessarily increasing the regulatory burden for business.

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By way of an example, in December 2012, the Australian Government proposed further changes to section 254T of the Corporations Act 2001 (Cth) dealing with the requirements to enable a dividend to be declared or paid. If passed, these will be the second tranche of changes to this section since 2010. The amendments seek to address concerns that had been expressed by a number of stakeholders regarding the drafting of the first tranche of amendments and how they interact with the franking status of dividends under the taxation laws. Notwithstanding specific stakeholder feedback provided to the Government, there have been no changes proposed to the taxation arrangements for dividends and the new proposed amendments still appear to contain flaws.

When governments are considering new laws, appropriate consultation needs to take place before measures are announced as firm policy.

The usefulness of an RIS, and therefore the RIA process, is seriously undermined if agencies already feel tied to a particular option, for example where regulatory measures have already been decided on and announced by the relevant Minister. There have been a number of examples of inadequate consultation ahead of measures being announced where real problems have emerged as a result. This includes the executive share scheme changes in 2009 and, more recently, the “Phoenix Companies” Tax Law Amendment Bill 2012.

Where consultation has taken place in recent years, it has often been inadequate. The time frames for consultation on legislation or discussions papers have become inappropriately
short, regularly less than a month, with consultation for major pieces of regulation often occurring over the Christmas/New Year period. This indicates that the consultation is being undertaken by governments as a mere formality rather than as a process seeking genuine engagement and input to formulate better regulation.

Engaging with business and undertaking adequate consultation before regulation is introduced is not about protecting business interests – it is about making sure that regulation actually works in practice and achieves the intended outcomes.

Governments of course have the right to make policy or pursue a particular political mandate that they were elected on. However, business can assist good policy making by providing a practical perspective on how, and whether, the policies and regulations likely to work in practice. This will lead to better policy for all stakeholders.

Additionally, in preparing an RIS and considering alternate options, greater emphasis should be placed on options beyond taking a black-letter law approach. Given its “one size fits all” nature, black letter law can often be overly-rigid and can fail to meet its objectives when applied to businesses of varying sizes and in different industries. The CSA, in its response to our Discussion Paper, suggested that the most appropriate form of regulation for matters relating to governance will often be principles-based, which provides high-level requirements supported by guidance documents, such as standards and fact-sheets. They point to the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations (Principles and Recommendations) that apply to all ASX listed companies as being a good example of regulation that is flexible enough to be appropriate for all companies, regardless of their size, industry or investor base. Such principles also have the benefit of being more easily be adapted to take into account changes to market conditions and community expectations.

Where it is determined that the introduction of black-letter law is the only way to achieve the desired policy outcome, the legislation and regulation be carefully drafted to ensure it is:

- simple;
- targeted at achieving the relevant policy objective;
- proportional to the problem being addressed;
- designed to minimise compliance burdens;
- not unduly prescriptive or restrictive;
- transparently and clearly communicated;
- consistent with existing laws and regulations; and
- readily enforceable.
Step 3. Transparency and accountability through public reporting

There is also a need for greater transparency and accountability with respect to how the RIA process is being implemented by decision makers. Strict compliance with the requirements of the Handbook is essential. However, it is not enough for this process to be viewed as a mere technical requirement – good regulations will only be made where the principles under the Handbook are applied in accordance with the Handbook’s intended spirit. It should not be allowed to become a mere “tick-a-box” exercise by government agencies.

Agencies will only be properly incentivised to follow the Handbook if they are held accountable for the proper implementation of the RIA process. The CSA has suggested in its response to our Discussion Paper that a reporting regime for RIA process compliance resembling the “if not, why not” framework of the Principles and Recommendations should be introduced. Under such a regime, decision makers would be required to report, for example to the OBPR, on whether the RIA process under the Handbook has been followed. Where it has not been followed, an explanation as to why would need to be provided. This reporting would then be made publicly available (for example, through the OBPR website).

We agree that such an approach would encourage better standards of accountability and transparency and would foster a culture that values and is committed to meeting the standards of regulation set out in the Handbook. We therefore urge that governments introduce this reporting into their existing regulation-making processes. The reporting should not be limited to reporting just on whether or not an RIS was undertaken – any non-compliance with the Handbook should also be reported on publicly, for example where consultation has been inadequate, options have not been fully explored or there has been insufficient quantitative and qualitative analysis of the costs and benefits of the options.

Step 4. Reviewing the effectiveness of new regulation

An essential part of the RIA process is the monitoring and review of new regulation once it has been implemented. This will generally take one of two forms, depending on whether a compliant RIS was prepared for the regulation:

1. Post Implementation Reviews (PIR) – to be undertaken with respect to regulation that did not have an RIS prepared or where the RIS was non-compliant; and
2. Ex post reviews – undertaken in accordance with the review strategy flagged in the RIS.

As per Recommendation 14 of the Independent Review, we agree that all primary legislation that has more than a minor regulatory impact on business should include a requirement to review the regulation, and preferably have a sunset clause (being a clause that provides for the expiry of the regulation at a particular time subject to action being taken by the relevant agency) embedded into the legislation itself to further enhance the likelihood of the review.
being undertaken in accordance with the RIS\textsuperscript{27}. We note that, in its response to the Independent Review, the government did not accept this recommendation\textsuperscript{28}.

**Post Implementation Reviews**

The Handbook requires Australian Government agencies to undertake a PIR of any regulation for which an RIS:

- should have been prepared (ie it was not minor or machinery in nature) but was not because a Prime Ministerial exemption was obtained; or
- was prepared but it was assessed as non-compliant.

The PIR is usually undertaken within one to two years following the introduction of the regulation.

A number of reports on the RIA process, including most recently the Independent Review, have suggested that a PIR be of a similar scale and scope to the RIS that should have been prepared for the regulation at the decision- making stage\textsuperscript{29}. The key difference will be, however, that the PIR should report on actual impacts that the regulation has had, rather than on expected impacts\textsuperscript{30}. Fulsome consultation and cost benefits analysis should still form an important part of the PIR and it should also include the consideration of alternative options to achieve the objectives of the regulation. Where the regulation has significant impacts, the PIR should be undertaken by an independent third party to ensure that an objective and appropriately robust review of the regulation can be undertaken (which would otherwise be difficult to achieve if the review is undertaken by the agency responsible for administering the regulation)\textsuperscript{31}.

While the proper use and execution of PIRs is essential to the RIA process as a fail-safe mechanism, it is important that it be recognised that they have limitations and should not be viewed as a substitute for a properly prepared RIS except where absolutely necessary. As the PIR occurs after the regulation has been introduced, it is likely large expenditures and compliance costs will already have been incurred by both government and businesses to adjust to the new regulation\textsuperscript{32}. This will inevitably impact on the cost benefits analysis of the regulation and resistance to changing or removing the existing regulation – even if that

\textsuperscript{27} Independent Review, page 77.
\textsuperscript{28} Minister for Finance and Deregulation and Assistant Treasurer joint media release "Government to Improve Productivity Through Regulatory Reform Package" 4 December 2012, page 10.
\textsuperscript{31} Independent Review, page 69.
change would yield more positive results – is likely to be significant. This further illustrates how crucial it is for the preparation of a full, compliant RIS to be mandated for all new regulation unless it is genuinely minor or machinery in nature or in those rare circumstances where an exemption from the Prime Minister is legitimately required (as outlined earlier). In other words, the preparation of an RIS should be the norm under the RIA process – not the preparation of a subsequent PIR. The Independent Review noted that there were around 60 PIRs outstanding at the time that the review was undertaken (with around 30 of those being with the Treasury), providing further evidence of the fact that the RIS process is not being properly applied in practice.

Transparency and accountability with respect to the preparation and quality of PIRs will also be important to ensure that they are done on time and to the standards required under the Handbook for an RIS. As such, the completion and compliance of PIRs by agencies should also be reported on the same “if not, why not” basis as suggested for RISs in section 3 of this paper.

**Ex post reviews**

As previously noted, one of the seven elements that a compliant RIS must address is the strategy to implement, monitor and review the preferred option. The review arrangements that are set out in the RIS should detail when the review of the regulation is to be carried out and how it is to be conducted. The appropriate timing for an ex post review will depend on the significance of the regulation and the circumstances of its formulation, but should typically be within three to five years of the regulation being introduced. It should follow a similar process to the RIA process, proportionate to the nature and significance of the regulation and broad enough to assess the performance of the regulation.

Ex post reviews play an important role in managing regulation once it has been introduced. They provide a systematic assessment of the regulation’s performance against its original purpose and a consideration of whether its objectives remain appropriate. Used properly, they can assist in stemming future growth in regulation by providing a system for flawed, inappropriate or redundant regulation to be identified through reviews that are conducted at specified times (the timing of these reviews will depend on the nature of the regulation). Once identified as flawed, inappropriate or redundant, the regulation can then be amended or repealed as appropriate.

The success of ex post reviews will, of course, be reliant on their recommendations actually being implemented. At present, it is difficult to ascertain if this is occurring, largely due to

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34 Independent Review, page 68.
the lack of transparency of the whole process. The regulatory framework needs to include systematic monitoring of the lifecycle of new regulation to ensure that the reviews are actually being undertaken and acted upon\(^{38}\). Again, as with the preparation of an RIS, to ensure transparency and accountability of the RIA process as a whole, the fact that an ex post review has been undertaken in accordance with the original RIS should be publicly reported on an “if not, why not” basis.

Implementing Pillar 2 should be undertaken in conjunction with the comprehensive review of existing regulation recommended under Pillar 1. The COAG Reform Agenda should include as a key priority reform of the regulation-making processes at a Commonwealth, State and Territory level. These reform efforts should be national in focus, requiring coordination between the Federal, State and Territory Governments and will require proper funding to be put in place.

To ensure accountability, progress of each of the steps should be monitored and gains regularly quantified by a suitable independent body, such as the Productivity Commission. Alternatively, a permanent body could be established which is dedicated to reviewing regulatory requirements and whose activities are reported at Cabinet level, with Governments responsible for the outcomes.

**Pillar 3 – Regulator reform**

The approach taken by regulators to the regulation of business can compound the problems caused by excessive and overly burdensome regulation. Regulators have tended to adopt an unduly risk-averse approach to the administration of regulation and are often overly bureaucratic in their interactions with business.

As noted by the Productivity Commission, poor regulator practices can discourage compliance, waste government resources and add to business costs and delays\(^{39}\). Even where new or reformed regulation is appropriate and well designed, poor enforcement practices can risk making the regulation ineffective, or unduly burdensome, or both\(^{40}\). Cultural change will be needed to promote a more balanced approach, and improve the way regulators interact and consult with business in relation to the regulations that they administer.


\(^{39}\) Productivity Commission, “Identifying and Evaluating Regulation Reforms” December 2011, page XV.

\(^{40}\) Productivity Commission, “Identifying and Evaluating Regulation Reforms” December 2011, page XV.
Where new regulation is introduced that significantly changes the regulatory burden or liability of companies, there is often little or no focus on providing support or education to businesses, and particularly small businesses, to assist with the transition to meeting the new requirements.

Most companies want to comply with the laws and regulations that apply to them – but with the sheer volume of regulation and the fact that it is constantly changing, the regulatory burden is often over-whelming.

The section of the regulatory impact assessment dealing with implementation should be required to address how those affected by the regulation will be supported and assisted when the regulation is introduced and what education will be provided to assist them to comply with the new requirements.

Roundtable participant, 2013

Unlike the extensive reviews and reports that have been undertaken on how regulation should be developed, there has been comparatively little work undertaken to date to determine what best practice for regulatory administration and enforcement is, and how to ensure these practices are followed. While administration and enforcement practices of regulators will vary depending on such matters as the nature of the regulations being administered and the characteristics of the businesses being regulated, there are some broad principles for good practice. The better practice guide published by the Australian National Audit Office\(^41\) provides a useful overview of these principles and, as a starting point, should be adopted by Australian governments and applied by both Federal and State government regulators.

There is also a need to improve co-ordination among regulators and avoid overlapping responsibilities among regulatory authorities and all levels of government. This causes unnecessary double-handling and therefore increased costs to government itself as well as to business. Addressing this would improve productivity within government.

There is currently an excessive number of regulating bodies in Australia. In addition to the Federal, State and Territory governments, numerous specialist agencies have been established to develop and/or enforce particular areas of regulation. Several joint Federal Government–State ministerial councils and national standard-setting bodies, such as the Environment Protection and Heritage Council, are also actively engaged in promulgating regulation. It is estimated that there could be up to 600 regulators Australia-wide\(^42\). This figure does not include local governments, of which there are approximately 700 Australia-wide, that develop and enforce their own regulations (such as by-laws). Without proper co-

\(^42\) Banks Report, page 7.
ordination, the actions and reporting requirements of each of these regulators significantly adds to the regulatory burden of Australian business.

As recommended by the Productivity Commission, there would be value in the Australian Government commissioning a study into “regulator practices and means of managing regulator performance, to enhance the administration and enforcement of regulation”\(^\text{43}\).