21 October 2011

BRCWG Secretariat
Deregulation Group
Department of Finance and Deregulation
John Gorton Building
King Edward Terrace
Parkes ACT 2600

Email: BRCWGS@finance.gov.au

Dear BRCWG Secretariat,

A Future COAG Regulatory Reform Australia

We refer to the Business Regulation and Competition Working Group’s recent stakeholder consultation paper and forum, and the request for feedback on appropriate COAG reform priorities going forward.

In April this year the Australian Institute of Company Directors provided comments on options for the Future COAG Regulatory Reform Agenda. We now re-attach a copy of our previous submission for your consideration.

We hope that our comments will be of assistance to you. If you are interested in any of our views please do not hesitate to contact me on +61 3 8248 6600.

Yours sincerely,

[Signature]

Rob Elliott
General Manager of Policy & General Counsel
Dear Senator Wong and Senator Sherry,

A Future COAG Regulatory Reform Agenda

The Australian Institute of Company Directors welcomes the opportunity to comment on options for a future COAG Regulatory Reform Agenda.

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with over 28,000 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.

The Australian Institute of Company Directors has closely monitored the progress of the current COAG reform agenda set out in the National Partnership to Deliver a Seamless National Economy given the importance of these reforms to business and productivity. The development of a future COAG regulatory reform agenda by the end of 2011 is therefore of keen interest to Australian directors.

We respond to the request for views as to areas of future national reform below.

1. Summary

In summary, the Australian Institute of Company Directors is of the view that:

(a) before any future reform priorities are agreed, a commitment must be made to address the outstanding director liability and occupational health and safety reforms on the current agenda, as a matter of priority;

(b) unless the director liability and occupational health and safety reforms are completed, any future productivity agenda will be hindered;

(c) we recommend that the future COAG reform agenda include as a priority a review of the civil liability imposed on directors in Commonwealth, State and Territory legislation.
(d) we recommend that the future COAG reform agenda include the requirement to conduct a comprehensive and well resourced review of existing legislation and regulations on the Commonwealth, State and Territory statute books with a view to removing ineffective, redundant or unnecessary regulation;

(e) in conjunction with a comprehensive review of existing regulation, the future reform agenda should include as a key priority the structural reform of the process for making and reviewing regulation at a Commonwealth, State and Territory level;

(f) we recommend that any new COAG reform priority relating to the review of the regulation making and review process be underpinned by the following principles:

(i) discipline around the introduction of new regulation (for example, ‘one-in-one out’ and the use of sunset clauses);

(ii) a case for regulatory reform must be established before new regulation is considered;

(iii) regulatory proposals should not be put forward without an examination of the alternatives to regulation;

(iv) the likely cost to business for proposed regulation needs to be rigorously calculated;

(v) effective consultation with stakeholders should occur at all stages of preparing the regulatory proposal (including the use of policy ‘green papers’ on significant matters);

(vi) a rigorous regulatory impact statement must be prepared;

(vii) post implementation reviews must be conducted; and

(viii) there should be better and structured consultation with business.

(g) In summary, we are of the view that a comprehensive deregulation initiative combined with a review of the process for making and reviewing regulations at a Commonwealth, State and Territory level will accrue significant and ongoing productivity gains and savings to business and the economy.

2. COAG needs to complete outstanding reform priorities before a future agenda is agreed

In February 2011, the COAG Reform Council released the National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-10 (2010 Progress Report). The 2010 Progress Report revealed that of the 39 competition and reform streams two key areas of concern for business, namely, director liability and occupational health and safety are at significant risk.1

The Australian Institute of Company Directors is firmly of the view that before any future reform priorities are agreed, a commitment must be made to address these two outstanding reforms as a matter of priority. We are of the view that unless these two significant reform priorities are finalized, the role of business in assisting the nation to increase productivity will be significantly hindered.

1 National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-10 at Executive Summary pages xxii and xxiii.
Our comments regarding the need to finalise the director liability and occupational health and safety reforms are set out below.

2.1 Director Liability Reforms

Reform of corporate regulation and especially laws which have a direct impact on directors and the way they operate, is a significant issue for the business community, the economy and Australian society as a whole.

The Australian Institute of Company Directors has long standing concerns with the number of laws that hold directors personally liable for acts of the company. In addition to the Corporations Act 2001 (C’th) and other Commonwealth statutes, there are more than 700 State or Territory statutes that hold directors liable for breaches of the corporation, in many cases even when they have no personal involvement in those breaches. Unlike other defendants, in some cases directors are also required to prove their innocence\(^2\) – a reverse onus of proof - with no clear statement of duties or defences.

“Derivative liability” or “positional liability” laws of the type imposed on directors stifle business, investment and job creation. These laws also hinder productivity because they encourage directors to take an overly cautious approach to decision-making and focus directors’ minds excessively on risk avoidance rather than on ways to improve value, competitiveness and profitability. In turn, the laws undermine our economy by limiting capital investment, opportunities for employment growth and by having a chilling effect on board recruitment and retention.

A survey of the director community, conducted in late 2010\(^3\) by the Australian Institute of Company Directors found:

- the current plethora of laws involving director liability is having a negative effect on board recruitment and retention;
- concerns about director liability are having a negative effect on board decision-making; and
- the compliance burden is hampering directors when it comes to carrying out their primary role of delivering shareholder value and protection because of concerns about the risk of personal liability.

Further, the Australian Institute of Company Directors Boardroom Burden Report Card (2010)\(^4\) measures the ‘business-friendliness’ of legal regimes on a state-by-state basis. It rates each State in terms of the content of laws imposing liability on directors, the number of those laws in operation and the procedural fairness with which they are administered. The Report Card highlights that directors face a personal liability risk pursuant to hundreds of pieces of legislation at the State and Territory level alone.

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\(^2\) The fundamental principle that a person should be presumed innocent until proven guilty has been confirmed by its inclusion in the *Universal Declaration of Human Rights* 1948 (Article 11) and in the *International Covenant on Civil and Political Rights* at Article 14 (2) to which Australia is a party.


The results of these surveys reinforce the view that the current state of director liability laws in Australia requires substantial reform. It also highlights that director liability is not just an issue that impacts on directors, the issue has wider economic ramifications.

For these reasons the process of reforming Australia’s onerous director liability laws needs to be completely re-booted after the evident breakdown of the current approach.

The director liability reforms targeted pursuant to the National Partnership to Deliver a Seamless National Economy are limited to the reform of legislative provisions which impose personal criminal liability on directors. Pursuant to this process, governments around Australia were to undertake legislative reviews to reform and harmonise laws on director liability after the States and Territories conducted audits of their legislation on the basis of certain principles. Unfortunately, of the audits completed, few changes to existing legislation have been recommended. At the time of the release of the COAG Reform Council Report in 2011, Tasmania and Northern Territory had not provided audits to the ministerial council.

Unfortunately, the 2010 Progress Report also reveals that the principles underlying this process, agreed by the Commonwealth and the States and Territories through the Ministerial Council for Corporations (MINCO), were fundamentally flawed and allowed the States far too much scope to avoid genuine reform.

As far as the agenda for future reform is concerned director liability represents unfinished business and must be carried forward onto the agenda for 2012-2015.

2.2 Occupational Health and Safety Reforms

The 2010 Progress Report also identified that the Occupational Health and Safety (OH&S) Reforms were at significant risk. Achieving national reform of Occupational Health and Safety Laws in Australia is necessary to ensure that across the country the system is fair, consistent, conducive to business productivity and above all, ensures safety in the workplace.

The variations in duties, legal defences and penalties for directors between State, Territory and Commonwealth jurisdictions have created real uncertainty and substantial costs for business. In some states and territories existing OH&S legislation again carries criminal liability for company directors even where they have no personal involvement in a breach and some provisions reverse the onus of proof. These provisions deny directors the presumption of innocence which is a fundamental principle of our legal system.

The Australian Institute of Company Directors welcomed the agreement in 2009 by the Workplace Relations Ministers’ Council and COAG, to harmonise State and Territory legislation and to implement a uniform national approach to OH&S.

The agreement reached by COAG and the Workplace Relations Ministers’ Council (in 2009) addressed the uncertainty created by divergent OH&S laws by bringing national uniformity (with the exception of Western Australia, which refused to sign

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5 National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009–10 Executive Summary, page xxii
up, and NSW, which in October 2010 indicated it would go back on its earlier support of the agreement).

Importantly, the model legislation agreed to as part of the deal also removes some of the most egregious aspects of the existing laws in some states and territories, including, particularly, in NSW. We believe that laws governing safety in the workplace need to be stringent and carry appropriate penalties. However, these laws should be fair, consistent, provide for due process, observe fundamental principles of justice and be proportionate to the matter they seek to address. While we do not agree with every aspect of the model national legislation, we believe that it is workable and addresses some fundamental problems in existing state and territory legislation.

We have therefore urged Western Australia and NSW to join the other states in creating a truly national OH&S regime. As such, we are of the view that the OH&S priorities in the current agenda should be finalised as a matter of urgency before attention is diverted to a raft of new reform priorities.

3. The Future COAG Reform Agenda

Once a commitment is made to complete the outstanding reforms priorities on the current COAG agenda, in particular, personal criminal liability for directors and occupational health and safety, future reforms can be considered.

As a general approach, we are of the view that the future COAG regulatory reform package should narrow the scope of the reforms tackled to achieve a level of focus. We also propose that the three key areas of reform be targeted going forward, these include:

(a) a review of the provisions imposing civil liability on directors at a Commonwealth, State and Territory level;
(b) a comprehensive review of existing regulation on the Commonwealth, State and Territory statute books with a view to removing ineffective, redundant or unnecessary regulation; and
(c) an examination of the process of regulation making and review at a Commonwealth, State and Territory level.

These areas for future reform are discussed in more detail below.

3.1 Review of Provisions Imposing Civil Liability on Directors

As set out above, the current COAG Partnership to Deliver a Seamless National Economy includes a priority to reform and harmonise the laws imposing criminal liability on directors. Going forward, we are of the view that the civil liability provisions facing directors at a Commonwealth, State and Territory level should be examined. In particular we are of the view that consideration should be given to ensuring that a business judgment defence is inserted into legislation that imposes civil liability on directors.

For the same reasons articulated in respect of the criminal liability provisions currently being reviewed, the threat of civil liability, without access to an adequate business judgment defence, fosters an overly cautious business environment where optimal business decisions are forgone in favour of an excessively conservative approach.

Business, and the nation’s prosperity, relies on responsible risk taking by businesses. Reform would enable the majority of directors, who carry out their
duties diligently, to better focus on strategic decision making, thereby enhancing company performance and economic prosperity more broadly.

3.2 A Comprehensive Deregulation Initiative and Structural Reform of the Regulation Making and Review Process

The Australian Institute of Company Directors is of the view that red tape distorts the smooth operation of the market, slows up the engines of growth and stifles job and wealth creation in the economy. In Australia, we are now facing an accumulation of laws impacting business which is beyond any reasonable need and is now dysfunctional.

We recommend that the future COAG reform agenda include the requirement to conduct a comprehensive review of existing legislation and regulations on the Commonwealth, State and Territory statute books with a view to removing, ineffective or unnecessary regulation and identifying areas where regulation overlaps or is now redundant.

This deregulation initiative should be adequately resourced and each jurisdiction should be required to make a concerted effort to revisit rarely used or redundant statutes and remove them from their statute books.

In addition, we note that the existing National Partnership Agreement to Deliver a Seamless National Economy expressed the commitment of the parties to:

(a) continue to reduce the level of unnecessary regulation and inconsistent regulation across jurisdictions;
(b) deliver agreed COAG deregulation and competition priorities; and
(c) improve processes for regulation making and review.6

Subject to our comments in section 2 of this document, some progress has been made in respect of the first two commitments ((a) and (b)). However, little progress had been made in respect of the third commitment, the commitment to improve the process for regulation making and review.

3.2.1 Problems with the current volume of regulation and the process for making and reviewing regulation

Each year, regulations and restrictions imposed on business continue to increase. Despite the negative impact of excessive regulation on productivity, governments in Australia keep introducing legislation that is often impractical, unworkable and disproportionate to the “problem” it is purporting to solve.

As an example, figures obtained from the Commonwealth Office of Legislative Drafting and Publishing show that 338 regulations and court rules were made during 2010 and only 10 were repealed.

While effective regulation can support the smooth functioning of business and society, excessive regulation can create economic disincentives, slow growth and may detract from companies and individuals understanding and complying with the law. As stated by the Rule of Law Institute: “The explosion of legislation and

6 National Partnership Agreement to Deliver a Seamless National Economy at page 4.
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.\textsuperscript{7}

Excessive regulation and simply adding to existing regulation without removing redundant and unnecessary provisions, is also problematic for the members of the judiciary who are responsible for interpreting the law in the cases before them. As an example, the Honourable Chief Justice Keane of the Federal Court of Australia has stated: "Opening the Tax Act is like entering the door to a parallel universe. At the end of the day, our job is to make the best we can out of what emerges from the sausage factory."\textsuperscript{8}

In addition to the volume of laws that currently exist and are continually being added to, the consultation process conducted by Australian governments, is also an issue of concern for directors and businesses across Australia. In recent times, there have been a number of examples where inadequate consultation with business ahead of measures being announced or introduced into parliament, raised the prospect of unintended consequences from new legislation. For example, inadequate consultation with the business community created issues in respect of the proposals to reform Employee Share Schemes in 2009 and created ambiguities in respect to the payment of dividends provisions set out in the Corporations Amendment (Corporate Reporting Reform) Act in 2010.

In October 2010 the Productivity Commission\textsuperscript{9} criticised the federal government over its consultation process, which it said were a 'weak point.' The report noted that "in many areas consultations lacks transparency, continuity and time frames are too short."

The concern over short consultation times and the drafting of legislation as a 'knee-jerk' response to issues of the day, without consideration being given to the long term implications or the practical application of the legislation, continues to be a concern of directors and the wider business community.\textsuperscript{10}

\subsection*{3.2.2 Costs of excessive regulation and ineffective regulation making and review}

The growth of regulation and administrative compliance costs has been a large and expensive problem for business and, therefore, for Australia. The annual cost of complying with regulations has been calculated by the Productivity Commission to be 4\% of gross domestic product, or over $50 billion, and the estimated economic gains from removing unnecessary regulation to be 1.6\% of GDP, or $20 billion a year.\textsuperscript{11}

\begin{thebibliography}{9}
\bibitem{7} "Top Judge Hits out at Federal Laws" \textit{The Australian Financial Review}, 21 January 2011
\bibitem{8} "Top Judge Hits out at Federal Laws" \textit{The Australian Financial Review}, 21 January 2011
\bibitem{9} \textit{Annual Review of Regulatory Burdens on Business: Business and Consumer Services – Research Report} (released on 12 October 2010).
\end{thebibliography}
The costs of regulation, however, are pervasive yet difficult to readily quantify. Previous attempts to do so suggest there are three ways to think of the costs of regulation:

- administrative costs to the government and taxpayer;
- compliance costs to business; and
- efficiency costs to the wider economy.

Administrative costs are those related to developing, implementing, enforcing and updating regulation. In 2003-04, funding of 16 major federal government regulatory agencies cost Australian taxpayers $4.2 billion. The cost of funding the Australian taxation office alone accounted for $2.3 billion.\(^{12}\)

Compliance costs relate to the direct costs incurred by businesses in the process of complying with regulation. In 2006 the Productivity Commission stated compliance costs could be as high as 4% of GDP and that implementing the Council of Australian Government’s New Reform Agenda had the potential to reduce these costs by up to 20%, resulting in a potential resource saving of $8 billion, in 2005-06 dollar terms.\(^{13}\) Further, the Regulation Taskforce suggested “the costs would be significantly greater if they included the effect that such red tape can have in limiting innovation.”\(^{14}\) The Taskforce, in its 2006 report on Reducing Regulatory Burdens on Business, stated “submissions indicated that compliance issues can consume up to 25% of the time of senior management and boards of some large companies – which among other things risks stifling innovation and creativity.”\(^{15}\)

A recent Australian Institute of Company Directors survey of company directors also supports these findings. In 2010, 75% of directors surveyed said they are concerned that the time their board devotes to compliance with regulations detracts from them focusing on issues like enhancing corporate performance and productivity.

Overly burdensome regulation is not just time consuming, it creates efficiency costs to the Australian economy by stifling productivity and economic growth. Examples of the efficiency costs to the economy have been estimated in numerous reports.

In 2011 the World Bank ranked Australia poorly in a number of key measures relating to the degree of difficulty faced by domestic businesses. Australia ranked 63\(^{rd}\) out of 183 economies in 2011, down from 62\(^{nd}\) in 2010.\(^{16}\)

In 2005 the Australian Chamber of Commerce and Industry estimated the cost to the Australian economy of regulation to be as much as $86 billion, or 10.2% of GDP.\(^{17}\) In contrast to this approach, Access Economics estimated that the efficiency gains to the Australian economy from significant deregulation over the

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two decades preceding a 2005 report for the Business Council of Australia, could have been as high as 10.8% of GDP.\textsuperscript{18}

If Australia is to be competitive and improve productivity, these indicators draw attention to the importance of ensuring that Australia's regulatory framework is effective. For this to occur, a comprehensive deregulation initiative and the process for making, reviewing and removing regulations must both become the focus of national reform, given that the benefits of deregulation are not isolated to "one-off" savings but will continue to accrue year or year.

3.2.3 \textit{Required Reforms}

The Australian Institute of Company Directors is of the view that the Commonwealth, States and Territories must embark on a comprehensive and structured review of the existing legislation and regulations in each of their statute books. Each piece of legislation 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 in the legislation are used and effective. Where the legislation (or aspects of the legislation) have outlived their usefulness, overlap with other laws or are redundant, the legislation or regulations should be repealed.

In addition, the whole system and approach to creating and removing regulation needs to be reformed, not just the regulations themselves. As there is a structural bias towards excessive regulation we are of the view that the solution must also be structural.

The processes that create new regulations must ensure they genuinely are needed, are as efficient as possible and that proper consultation takes place with business and other relevant stakeholders.

A reinvigorated national reform plan, including improving the mechanisms used by the Commonwealth and the States to create new regulations and assess existing ones, should be introduced. This should be aimed squarely at accelerating the reduction of their red-tape burdens. There must be a requirement to frequently and routinely review existing regulations, to rigorously assess them against cost-benefit principles and remove them where they are no longer justified.

At Commonwealth and State levels, basic principles such as "one in, one out" – where removing regulation is a prerequisite for adding new ones - should be the "default mode" for reform. Further, Governments should include sunset clauses and review provisions in legislation to provide a mechanism to ensure that new regulations are assessed after a period of time and, if found to be ineffective or no longer required, removed from the statutes.

There should also be a firm requirement to consult business when formulating new regulation. Fundamentally, there should be a recognition that regulation and legislation is not the only way to achieve change and that alternative approaches, such as education and self-regulation, can have (and has had) an impact on issues of importance to directors, such as executive remuneration and gender diversity on boards.

Business and other stakeholders need to be consulted before decisions are made on whether government intervention is necessary and, if so, in what form. Business should also be consulted on estimates by officials of the likely cost to business of regulatory and other alternatives.

As the detail of regulatory proposals will affect the ultimate cost to business, business and other stakeholders should also be consulted on final legislation before it is introduced into Parliament.

The process of regulation making should include recognition of the recommendation made by the Taskforce on Reducing the Regulatory Burden on Business (the Banks Taskforce) that, for matters of major significance: "an initial policy 'green paper' should be made available to relevant parties; and, prior to finalisation, the details of complex regulations should be tested with relevant business interests, including through exposure drafts for significant matters." 19

The time period for consultation for significant proposals should be sufficient (e.g. at least 30 to 60 days but longer for very lengthy or complex proposals) and feedback should be given to business about how the consultation was used to make a regulatory decision.

In 2006, the Banks Taskforce recognised that reform of the regulation making system was crucial to stem the tide of regulation. Included in the recommendations were various improvements in the process and consultation processes for regulation making.

The Federal Government endorsed the six principles of good regulatory process set out in the Banks report:

- establishing a case for action;
- examining alternatives to regulation;
- adopting the option that generates the greatest net benefit to the community;
- providing effective guidance to relevant regulators and affected stakeholders;
- reviewing regularly to ensure the regulation remains relevant and effective; and
- consulting effectively with stakeholders at all stages of the regulatory cycle.

The business community, including the Australian Institute of Company Directors, also endorsed these principles and, with The Business Alliance for Red Tape Reform, released a Business Checklist for Commonwealth Regulatory Proposals to monitor government action in meeting its commitments to cut red tape. In the light of this, we believe that all Australian Governments should commit to the Good Regulation Principles.20

In order for the process of regulation making and review to be reformed on a national level, there needs to be a whole of Government approach. Governments acting in isolation create regulatory regimes that are inconsistent and overlap

20 See Appendix 1
across jurisdictions, creating costly minefields for businesses operating across state borders. Reform must be national in focus, because much of the problem lies in regulations imposed by state or local governments or in the interaction between them and rules at the Commonwealth level. There has to be co-ordination across the states.

Targets need to be set and proper funding put in place, with progress 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 the Government responsible for the outcomes.

We hope that our comments will be of assistance to you. If you are interested in any of our views please do not hesitate to contact me on +61 3 8248 6600.

Yours sincerely,

[Signature]

John H C Colvin
CEO & Managing Director
APPENDIX 1: Good regulation principles

1. **A case for regulatory action must be established**
   New proposals for regulation should not be brought forward unless there is a clear case made out for regulatory intervention. A problem needs to be identified and sufficiently demonstrated and there needs to be evidence that the issue requires an immediate response from government. It also needs to be shown that existing Commonwealth or state regulation is not sufficient to deal with the issue.

2. **Regulatory proposals should not be put forward without an examination of the alternatives to regulation**
   These include the alternative of taking no action and of self- and co-regulatory responses. Utilising non-legislative incentives, rather than regulatory sanctions, to influence behaviour may also be considered. Alternative options, along with the regulatory proposal, should be fully costed.

3. **The likely cost to business of proposed regulation needs to be rigorously calculated**
   This should be done by a suitable independent body, like the Productivity Commission, and in proper consultation with business.

4. **Effective consultation with stakeholders should occur at all stages of preparing the regulatory proposal**
   Business and other stakeholders need to be consulted before decisions are made on whether government intervention is necessary and, if so, in what form. Business should also be consulted on estimates by officials of the likely cost to business of regulatory and other alternatives.

   As the detail of regulatory proposals will affect the ultimate cost to business, business and other stakeholders should also be consulted on final legislation before it is introduced into Parliament. The time period for consultation for significant proposals should be sufficient (e.g. at least 30 days but longer for very lengthy or complex proposals). Feedback should be given to business about how the consultation was used to make a regulatory decision.

5. **An adequate Regulatory Impact Statement must be prepared**
   Unless there are exceptional circumstances, a regulatory proposal with material business impacts should not proceed to Cabinet or other decision-maker unless it has complied with the Government's RIS requirements, which should include full and rigorous costing.

6. **Post-implementation reviews must be conducted**
   Review is essential to ensure the benefits argued as justification for regulatory intervention are actually realised and the desired results are achieved effectively and efficiently.