CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

9 November 2012

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

By email: DeregulationPolicy@finance.gov.au

Dear Secretariat

Independent Review of the Australian Government's Regulatory Impact Analysis Process

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance. CSA has unrivalled depth and expertise as an independent influencer and commentator on governance and risk management thinking and behaviour in Australia.

Our Members have a primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. As governance professionals, CSA Members are directly affected by amendments to legislation, and/or policy in a diverse range of industries and sectors through various reviews, inquiries and consultations. They are responsible for implementing the changes to processes and frameworks to ensure compliance with legislative amendment as well as advising their boards to ensure their oversight responsibilities are fulfilled.

CSA welcomes the independent review of the Regulation Impact Analysis (RIA) framework and process. CSA also notes the government's commitment to providing a rigorous system for assessing the regulatory impact of proposals which are likely to impose an obligation on business or the not-for-profit (NFP) sector. It is important that regulation of the private and NFP sectors is achieved through sound analysis, informed decision-making, and transparent procedures.

General comments

CSA supports the recommendations of the *Independent Review of the Australian Government's Regulation Impact Analysis Process* (the RIA Review) and is pleased to see the government's endorsement of the RIA Review's recommendations. CSA believes that the Office of Best Practice Regulation's (OBPR's) *Australian Government's Best Practice Regulation Handbook* (the Handbook) provides the most useful guidance on the appropriate measures required for

regulatory reform, and the OBPR remains the most appropriate office to hold government and agencies responsible for regulatory reform in line with best practice recommendations.

It is evident, however, that in contrast to the government's commitment to the RIA process, the last few years has seen the introduction of additional regulation that has not always been coupled with either a regimen of removing redundant regulation, or a detailed system of reviewing existing regulation. In short, the recommendations of the Handbook have been implemented haphazardly and not in accordance with regulatory best practice. This has resulted in a plethora of regulation which in turn has led to the imposition of an increased compliance burden on businesses across various sectors.

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

CSA concurs with the stakeholder observations which have been made in Chapter 6, 'Stakeholder observations on RIA process' of the RIA Review. The feedback from stakeholders reflects CSA's concerns about the consultation process whereby the increasing speed of consultations on proposed regulatory reform in an environment where feedback from consultation is not always heeded can result in a greater opportunity for unintended consequences to arise; including:

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

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

Improving the RIA process

The concerns raised in the RIA Review highlight the need for there to be:

- increased transparency in the decision-making processes concerning regulatory enactment or reform, including clarity on the structure, implementation and operation of regulations, and more importantly, the reasons for undertaking particular regulatory processes and their desired policy objectives
- appropriate deliberation on the form of regulation to be enacted — CSA notes, for example, that governance regulations need flexibility as the 'one-size-fits-all' approach

of black letter law is often inappropriate when applied across diverse sectors and organisations
- more accountability of decision makers for regulatory decisions and for ensuring that regulatory reform is progressed in a timely and considerate manner to all stakeholders, and
- better leadership by Ministers and agencies which provides a clear outline of how the regulatory processes will be undertaken to achieve their stated policy aims.

Adoption of an 'if not, why not' approach to the RIA process

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

CSA is of the view that Recommendations 1, 2, 4, 7, and 9 could all be enhanced through the introduction of a reporting regime which requires Ministers and agencies to disclose the Regulatory Impact Statement (RIS) process. This would be an alternative to implementing Recommendation 11 which calls for legislative backing in the event that the government believes that the 'RIA process cannot be made to work effectively and consistently'.[1]

CSA does not support an approach which calls for legislative backing, or 'black letter law'. Such an approach, while immediate, is a rigid and direct approach which forces conformance, but does not adequately address the specific policy or practice at issue. For matters relating to the governing of regulatory processes, CSA believes that an 'if not, why not' disclosure regime with specific reporting triggers would be much more useful to enable Ministers and agencies to understand and meet their responsibilities. A process of this nature would also allow stakeholders to test the thinking and behaviour of those in charge of the regulatory process, who must also be held accountable for their decision-making and stewardship.

The Principles and Recommendations provide a good example of how a flexible framework can change behaviour and achieve the desired policy outcomes. The Principles and Recommendations are not prescriptive. If a listed company considers that particular Recommendations are not appropriate to its circumstances, it has the flexibility —under the 'if not, why not' approach — not to adopt them as long as it explains the reason(s) why in its annual report. It is for the market to test the thinking of the directors in relation to the corporate governance framework they have chosen, with disclosure and transparency the key to ensuring accountability.

CSA recommends that, rather than asking the OBPR to publicly report on consultative practices which 'are not adequate',[2] the onus should be on Ministers and agencies to report on the RIS process as outlined in Recommendation 3.

---

[1] Borthwick, D. & Milliner, R. (2012) *Independent Review of the Australian Government's Regulatory Impact Analysis Process* (RIA Review), Report, Recommendation 11, p11, 20 April 2012

[2] Ibid, Note 1 at p11

Two-stage RIS process
CSA strongly supports the proposal to introduce a two-stage Regulatory Impact Statement (RIS) process which would split the process into an 'options stage RIS' and a 'details stage RIS'. CSA understands that the 'options stage RIS' is the stage at which the decision makers would consider the options available to addressing the issue under consideration, while also noting the objectives of the reform. Following consultation with stakeholders, the 'details stage RIS' would then consider the impact of regulatory reform, provide for further consultation with stakeholders on the preferred option(s) and formulation of conclusions and recommendations, and also provide an outline of the implementation and review processes.

CSA believes that these 'stages' should be mandatory for all proposed regulatory reform, with disclosures, consistent with the 'if not, why not' framework, required at each stage to evidence progress against the criteria. That is, disclosures should be made on each of the various stages of the RIS process and where the RIA Review process, or a particular disclosure which is required to be made, is not made accordingly, an explanation should be provided by the decision-maker instead.

Disclosures which articulate the accountability and transparency lines should also be embedded in the framework. These would include:

- who retains responsibility for the making of decisions
- when decisions are required to be made, and
- who is responsible for the process.

CSA notes that, in the corporate world, decisions are often made against clear, unambiguous criteria with a stronger emphasis on accountability and transparency, and such clarity should also be required in the creation of the regulatory framework.

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

Post-implementation reviews
CSA strongly supports the need for post-implementation reviews, as outlined in Recommendation 14, and believes that regulators should be required to produce statements about the time frames for periodic reviews of regulatory enactments to assess whether the regulations have achieved their desired objectives and/or are still required. CSA notes that review periods between three and five years after the implementation of regulation are appropriate.

Conclusion

In mapping out this approach, CSA recommends that the role of the OBPR must be strengthened. As the government's response to Recommendation 7 outlines, the OBPR does 'not currently have a role in assessing the adequacy of stakeholder consultation in relation to the development of legislation'.[3]

CSA strongly believes that the OBPR does have a role to play in ensuring that the principles in the Handbook are properly complied with. Where compliance is lacking, sufficient notice and

[3] Ibid, Note1 at Recommendation 7, p11

reason should be provided to those who will be affected by the regulatory change and the OBPR should be able to direct government agencies and Ministers to provide such notice.

Furthermore, at present, it appears that government bodies seem to be largely unaware of the OBPR's and Handbook's recommendations.

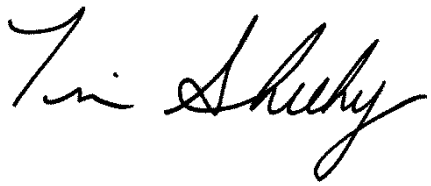
CSA recommends, therefore, that the OBPR, as the chief body administering the RIA process, should play an active role in promoting best practice education and training with government and agencies.

While CSA commends the work of the RIA Review and the subsequent endorsement of the recommendations by the government, we are of the view that more needs to be done, in order to ensure that the recommendations are properly implemented.

CSA is of the view that unless the recommendations set out in the Handbook are reinforced, consultations will not appropriately engage in sound analysis, informed decision-making and transparent conduct. Australian policy formulation will be the poorer for it.

CSA would be more than happy to discuss its concerns further with your office.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE