PROPERTY COUNCIL of Australia

Crushed:

Reducing the Regulatory Burden on the Property Industry

November, 2005

The **Voice** of Leadership

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Executive Summary

The Property Council of Australia welcomes the opportunity to make a submission to creation of the Taskforce on Reducing the Regulatory Burden on Business.

We share many concerns identified by other organisations, which are generic to businesses of all sizes and in all sectors, including:

- The lack of ongoing regulatory reform processes that involve the three spheres of government;
- Considerable compliance costs that force businesses, particularly small businesses, to spend an inordinate amount of time complying with government requirements;
- A lack of national consistency in policy and regulations, creating barriers and costs for businesses operating across state borders;
- A lack of accountability or transparency, which has resulted in regulation being developed with limited consultation;
- A departure from the concept that regulation represents minimum standards that are acceptable to the community, not the prescription of leading practices;
- Over-regulation, through duplication, high benchmarks, and the sheer volume of regulations with which industry must comply;
- A lack of effective review of existing regulations, which means that standards are set and forgotten; and
- The current inadequacy of regulatory impact statements and powerlessness of the Office of Regulatory Review to bring rigour into regulatory assessment.

Clearly these are all areas in dire need of improvement, and this submission has identified a number of recommendations that could help to resolve industry's concerns.

In terms of specific areas affecting the property sector, the Property Council has suggested reforms in relation to:

- Development assessment and building control;
- The need for a borderless Australia to improve business efficiency;
- Taxation policy;
- Regulations affecting capital markets; and
- Changes to international accounting standards.

The Property Council has been developing extensive thinking on each of these areas and is happy to discuss them with the Taskforce.

Recommendations

Principles of Regulatory Efficiency

1. The Taskforce should consider the recommendations of the OECD Guidelines when developing its report on regulation.

2. The Council of Australian Governments should formally adopt the principles and key features outlined in the OECD Guidelines as a basis for ongoing regulatory reform.

3. The Taskforce should examine:

   a. the regulatory reform experiences of other western countries; and

   b. the recommendations of previous reviews of Australian regulatory systems

   with a view to gaining useful ideas for improving the regulatory system.

4. The Taskforce should recommend that a process be established to assess regulation on an ongoing basis, in order to curtail the incidence of over-regulation.

Ongoing Regulatory Reform

5. The Council of Australian Governments should establish a Regulatory Reform Working Party. This group would be responsible for:

   a. establishing a framework for the development and consideration of regulation;

   b. examining areas of regulatory overlap and making recommendations for resolving them;

   c. developing a programme for reducing regulation at all levels of government; and

   d. recommending ways of reducing the number of regulatory authorities.

Compliance Costs

6. The Taskforce should adopt ACCI's proposal that departments be required to develop an annual regulatory budget, which

would be tabled by the Prime Minister in Parliament and available on a centralised website.

7. The Taskforce should recommend that a similar approach to regulatory budgeting be adopted at state and territory level.

8. The three spheres of government should commit to a regulatory policy approach which does not permit the introduction of new regulation unless existing regulation is extinguished (the 'one in, one out' concept).

Lack of National Consistency

9. The COAG must adopt a communiqué that:

   a. endorses the concept of national consistency;

   b. recognises that national consistency represents a minimum, not an optimum, standard; and

   c. commits all governments to developing nationally consistent policies.

10. The Federal Government should provide financial assistance to the state and territory governments to encourage them to simplify state regulations and make them nationally consistent.

Lack of Accountability or Transparency in Policy Development

11. Any new or proposed regulations should be subject to a public consultation process that identifies and seeks relevant stakeholders, giving them sufficient time to respond.

Minimum Standards

12. The Taskforce should reinforce the concept of regulation representing minimum standards that remove poor practice, with education and incentives delivering higher levels of efficiency.

Over-Regulation

13. All regulators should be required to prepare a clearly defined business case before developing regulation, which shows:

   a. the evidence that the department considers to demonstrate market failure;

b. the reasons the department considers regulation to be necessary;

c. the level at which the regulation is likely to be set, and whether it is appropriate level;

d. the options, such as incentive mechanisms or educational initiatives, that have been considered as alternatives to regulation and reasons they were rejected;

e. the thought processes the department followed in considering the various options; and

f. each of the stakeholders affected and how they are likely to be affected.

14. The business case should be developed with the advice of other sections of the bureaucracy, to ensure that all options are considered.

15. The business case should be released for public consultation and the feedback from that process should be provided to the relevant minister before a decision is made.

Lack of Effective Review of Existing Regulations

16. All regulations should have a sunset clause of no more than five years, which requires a department to consider the proposals and justify their retention, through a public review.

Role of the Office of Regulatory Review

17. The Office of Regulatory Review:

a. should be reconstituted as a independent statutory authority associated with, but not responsible to, the Productivity Commission;

b. should be responsible to a Cabinet Minister, but with a dedicated Parliamentary Secretary overseeing its activities; and

c. should provide an annual report outlining the stock of regulation reviewed and the outcomes of those reviews.

18. To provide sufficient objectivity in regulatory impact assessment:

a. the Office of Regulatory Review should be responsible for managing the development of all regulatory impact

statements and for commissioning consultants to undertake the work;

b. funding currently set aside by regulatory authorities to carry out analysis of regulation should be allocated to the Office of Regulatory Review to allow it to perform this function;

c. unless a strong case can be made in favour of a regulation through the regulatory impact process, it should be rejected.

19. A specialised modelling unit should be created within the Office of Regulatory Review, which would be responsible for:

a. developing a standard tool for assessing costs and benefits which could be applied to new regulatory proposals; and

b. analysing alternative economic methodologies proposed by consultants to determine whether they are appropriate for assessing the costs and benefits of regulation.

Regulatory Impact Statements

20. In order to ensure proper consideration of regulatory impact statements:

a. a comprehensive list of stakeholders should be identified prior to the release of the regulatory impact statement for public consultation; and

b. stakeholders should be notified of the impending release of the regulatory impact statement and issues needing consideration.

Development Assessment

21. The Government should continue to coordinate the work of the Development Assessment Forum.

22. The Government should endorse the DAF Leading Practice Model for Development Assessment and encourage state, territory, and local jurisdictions to adopt the ten principles into their planning and development assessment regimes.

23. The Government should continue to support the development of a National Communication Protocol for Electronic Development Assessment, through the DAF.

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Building Control

24. The Government should continue to implement recommendations of the Productivity Commission Review of Building Regulation.

25. The Government should work to encourage the New South Wales and Victorian Governments to sign the intergovernmental agreement on the Australian Building Codes Board immediately so that a new Board can be constituted.

26. The Government should work to remove all variations from the Building Code of Australia in order to ensure greater national consistency in building regulation.

27. The concept that regulations should be set at the 'minimum standard acceptable to the community' must be reinforced in the Australian Building Codes Board's charter.

28. The Government should collaborate with the states and territories to incorporate all building construction-related regulation into the Building Code.

29. Development of a model administrative framework for the application of the Building Code of Australia at state or territory level must be made a priority for the Australian Building Codes Board.

30. The role and use of Australian Standards in regulation should be reassessed and mechanisms introduced to prevent quasi-regulation being used to promote commercial interests.

31. The Australian Building Codes Board should review its consultation processes to ensure that a wider range of stakeholders are given an opportunity to respond to regulations that may affect them.

Borderless Australia

32. The Government, through the Standing Committee of Attorneys-General, should encourage and support state and territory land title regulators in moves towards reforming property transactions.

33. The Government should contribute to development work being done to introduce electronic conveyancing of property transactions, with a view to delivering faster, more consistent processes nationally.

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Taxation Reform

34. The Government should enhance the economic efficiency of the tax system by:

    a. minimising the tax burden and operating costs; and

    b. by providing greater simplicity and transparency in taxation law.

35. The Treasury review should consider areas where taxation rules could be made simpler for taxpayers, including:

    a. reducing the complexity of compliance calculations;

    b. lifting taxation thresholds and caps;

    c. reducing the incidence of double handling and processing;

    d. reducing uncertainty created by specific policies and legislative measures; and

    e. developing consistent definitions and interpretations for federal and state taxes.

36. The Federal Government should continue to press the state and territory governments to abolish the inefficient taxes identified by the BCTR.

37. The Government should develop and implement a comprehensive research program into the administrative, compliance and decision-making costs of the tax system and the drivers of those costs. Such a program would form the basis of a long-term reform strategy.

38. The Government review should develop a strategy to cut the administrative cost of taxation to half a cent per dollar collected. This may require a restructuring of the Australian Taxation Office and the current tax administration and collection network.

39. Reforms to tax administration should encompass an assessment of:

    a. the role of the tax system and its interrelationships with other fiscal programs;

    b. clear and specific goals for simplification generated by creative policy reviews; and

    c. the utilisation of new technologies.

Capital Markets

40. The Government should review policies concerning prospectuses and product disclosure statements, in relation to the following:

    a. property investment schemes should not be treated differently from public companies in relation to compliance requirements when raising capital;

    b. differences in content requirements for prospectuses and product disclosure statements should be resolved;

    c. incorporation by reference of material previously registered with ASIC into a PDS should be allowable;

    d. the pre-prospectus publicity requirements should be aligned with those that apply to the product disclosure regime; and

    e. to avoid the need for specific relief into the future, the time for disclosure regime relating to product disclosure statements should be amended so as to bring it into line with that which applies to securities.

41. The limit for Unitholder Purchase Plans should immediately be increased to $10,000 and processes put into place to review this amount on an ongoing basis.

42. Section 672D A(9) of the Corporations Act should be amended to extend the 2 day reporting period to 30 days for beneficial owners.

43. Formal arrangements should be developed and implemented for consultation and review of policy and regulatory proposals having a broad industry impact.

44. The Government should undertake a review of taxes on managed investments and develop a simplified and self-contained taxation system for managed investment products.

Accounting Standards

45. The Australian Accounting Standards Board must:

    a. conduct a harmonisation impact statement on all new standards to ensure they actually meet the goals of the internationalisation project; and

b. ensure that the operation of each accounting standard will genuinely improve Australia's competitiveness in international markets and not place Australian business at a disadvantage.

46. Section 285 of the Corporations Act should be amended only to require the disclosure of executive remuneration in managed investment schemes that has been directly incurred by the scheme.

47. The AASB should be brought into line so that industry consultation and support are needed before any policy is recommended to the Parliament. A thorough cost-benefit analysis of proposed changes should also be undertaken.

Logic of the Submission

The Property Council recognises that there is a legitimate role for regulation.

Regulatory instruments establish the rules within which business may operate, generally with the aim of preventing poor or dangerous practices from occurring.

However, over time numerous pieces of inappropriate and ineffectual regulation have been introduced by each of the three spheres of government, often with little consultation or review.

While this has usually been done with the best of intentions, the effects have been to impede economic growth, limit the scope for innovation, undermine entrepreneurial drive, and reduce productivity and competition.

In short, the sheer volume and complexity of existing regulations has placed considerable burdens on individual organisations and made it a considerable challenge to conduct business in Australia.

The Property Council of Australia has grave concerns about the amount of regulation currently in force and the approach taken by regulators when developing new rules.

In this we are no different to a number of other groups operating within the economy, many of which have made submissions already to this inquiry.

In this submission we do not propose to get embroiled in the debate about which industry sector is most heavily regulated, as this is a very subjective topic. Instead, we aim to consider:

- the fundamental principles underlying good regulatory systems;
- common problems experienced across industry sectors and possible solutions; and
- concerns about regulation as it affects particular aspects of the property sector.

In this we will obviously present a property-specific view and will concentrate on the 'rules' which directly control the activities of business, rather than those which merely influence market practices.

1.0 Principles of Regulatory Efficiency

For too long, the Australian regulatory system has been allowed to operate unfettered, enabling regulators to introduce ever increasing layers of red tape with little oversight.

This has led to the drafting of 104,729 pages of legislation and 64,605 pages of regulations between 1970 and 2000 by the Federal Government alone[1]. When state, territory, and local government rules are included, it is easy to see why businesses are having to spend a significant amount of time on compliance.

Clearly, it is necessary to develop a more effective framework within which:

- the need for regulation can be determined,
- the appropriateness of proposed rules can be assessed, and
- new and existing regulations can be reviewed.

1.1 OECD Guiding Principles

The Organisation for Economic Co-operation and Development has made recommendations on leading practice approaches to regulation. The *OECD Guiding Principles for Regulatory Quality and Performance* outlines seven principles designed to ensure that regulatory systems are relevant, transparent, and accountable.

Governments should[2]:

1. adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation;
2. assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment;
3. ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory;
4. review and strengthen where necessary the scope, effectiveness, and enforcement of competition policy;

[1] Submission by Senator the Hon. Michael Ronaldson to the Taskforce on Regulation (2005).
[2] *OECD Guiding Principles for Regulatory Quality* (2005), pp. 3 – 8

5. design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests;

6. eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness; and

7. identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

The OECD report also outlines a number of key features for the development of regulation. These identify that good regulation should[3]:

- serve clearly identified policy goals, and be effective in achieving those goals;
- have a sound legal and empirical basis;
- produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account;
- minimise costs and market distortions;
- promote innovation through market incentives and goal-based approaches;
- be clear, simple, and practical for users;
- be consistent with other regulations and policies; and
- be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.

The Property Council recommends that the Council of Australian Governments formally adopt these principles and key features as a basis for ongoing regulatory reform.

1.2 Overseas Experiences

The principles listed above are reinforced by reviews of overseas regulatory systems.

[3] Ibid, p. 3

The UK Better Regulation Task Force has been quoted by a number of submissions as identifying four possible situations when it may not be sensible to intervene in the market:

- when intervening in a market that is not operating perfectly seems likely to cause more problems than it solves;
- when the benefits, which are often difficult to quantify, look unlikely to justify the costs. In particular, when the costs of preventing a highly improbable event outweigh the estimated benefits;
- when any regulatory intervention would be difficult or impossible to enforce; and
- when the common law already exists in an area[4].

Similarly, the Irish Government released a white paper in January, 2004, entitled *Regulating Better*[5]. The paper identified six principles of good regulation:

- **Necessity** – is the regulation necessary? Can we reduce red tape in this area? Are the rules and structures that govern this area still valid?
- **Effectiveness** – is the regulation properly targeted? Is it going to be properly complied and enforced?
- **Proportionality** – are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?
- **Transparency** – have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?
- **Accountability** – is it clear under the regulation precisely who is responsible for whom and for what? Is there an effective appeals process?
- **Consistency** – will the regulation give rise to anomalies and inconsistencies, given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?

[4] Quoted in the Australian Chamber of Commerce and Industry position paper: *Holding Back The Red Tape Avalanche* (2005), p. 16

[5] Quoted in the Institute of Chartered Accountants submission to the Taskforce on Regulation (2005), p. 5

These principles represent a sensible approach to regulation and should be considered in any review of regulatory processes.

Some governments take a rigorous approach to the provision of evidence to support regulation. The United States of America, for example, under the *Data Quality Act*, requires all science-based advice going to government to be valid, objective, verifiable, and peer-reviewed. This ensures a proper evidentiary basis for regulation[6].

As noted by ACCI[7], other jurisdictions have also introduced mechanisms to reduce the regulatory burden on business and the community. The Taskforce would be well advised to consider moves undertaken in other jurisdictions as models for greater reform in Australia.

1.3 Reasons for Regulation

There are many reasons for introducing regulations, some good, some bad.

While nobody would disagree that there is reason to regulate when confronted with clear evidence of market failure (and other approaches have failed), it is not sufficient to introduce provisions merely to rectify 'errors' that may have occurred in enforcing existing requirements.

Nor is it appropriate to regulate where the delivery of government objectives has led to confusion and contradiction.

The worst reason for regulation is the introduction of 'policy-on-the-run'.

As noted by the Productivity Commission:

> *"Poor quality regulation-making processes are often associated with decisions being made in haste, with incomplete information about options and their impacts. Inadequate or ineffective consultation can also contribute to poor regulatory outcomes.[8]"*

Regulation should therefore be the last tool available for governments to introduce their policy platforms after incentives, education, and other initiatives have failed.

Industry recognises that governments are responsible for ensuring that there is a balance between the economic, environmental,

6 See http://www.whitehouse.gov/omb/fedreg/reproducible.html for more information
7 ACCI position paper: *Holding Back The Red Tape Avalanche* (2005), pp. 20 – 21
8 Productivity Commission, *Regulation and its Review 2004 – 5* (2005), p. xv.

social, and governance interests of the Australian community, delivering a competitive economy and a satisfied populace.

Unfortunately, the current approach to policy development suggests that greater economic, social, and environmental dividends are being missed, because of an over-reliance on prescriptive regulation.

If a government has clearly defined outcomes and specific policies it wishes to implement, then packages of initiatives should be considered to deliver them, rather than automatically reaching for the phone number of the Parliamentary Counsel.

1.4 Consolidation of Reviews

While the Property Council welcomes this review, we are concerned that this is the latest in a number of productivity studies undertaken by the Federal Government.

Since the 1996 Bell Report, entitled *Time for Business*, there have been a number of reviews and recommendations that sought to lessen the regulatory burden on business.

In addition, the Productivity Commission and the National Competition Council have themselves made numerous reform suggestions.

The fact that industry is still raising concerns about the amount of regulation and the lack of transparency in the regulatory process suggests that many of the recommendations of these reports have not been taken up.

The Regulatory Taskforce would do well to review these reports and draw from their suggestions.

1.5 Recommendations

1. The Taskforce should consider the recommendations of the OECD Guidelines when developing its report on regulation.

2. The Council of Australian Governments should formally adopt the principles and key features outlined in the OECD Guidelines as a basis for ongoing regulatory reform.

3. The Taskforce should examine:

    a. the regulatory reform experiences of other western countries; and

b. the recommendations of previous reviews of Australian regulatory systems

with a view to gaining useful ideas for improving the regulatory system.

4. The Taskforce should recommend that a process be established to assess regulation on an ongoing basis, in order to curtail the incidence of over-regulation.

2.0 General Problems with Regulation

A review of the submissions provided to the Taskforce to date demonstrates that many concerns about regulation and regulators are common across the economy.

The Property Council is no exception. In general, we seek a system of governance where regulatory solutions:

- seek to redress situations where there is clearly demonstrated market failure;
- are only considered after all other options, such as taxation incentives or educational programs, have been attempted;
- where implemented, are nationally consistent and, wherever possible, performance-based; and
- are properly supported with evidence of a demonstrable need prior to the development of the regulations.

The following recommendations will go some way to delivering these outcomes.

2.1 Ongoing Regulatory Reform

In order to maximise the benefits of the Regulatory Taskforce, it is essential that the three spheres of government embrace ongoing regulatory reform. This should be achieved through the Council of Australian Governments framework.

Recommendations

1. The Council of Australian Governments should establish a Regulatory Reform Working Party. This group would be responsible for:

    a. establishing a framework for the development and consideration of regulation;

    b. examining areas of regulatory overlap and making recommendations for resolving them;

    c. developing a programme for reducing regulation at all levels of government; and

    d. recommending ways of reducing the number of regulatory authorities.

2.2 Compliance Costs

The Australian Chamber of Commerce and Industry estimated that regulation costs the Australian economy approximately $86.0 billion, or 10.2% of GDP[9].

This would come as no surprise to practitioners in the property sector, where the time and expense of complying with a myriad of regulations adds to the cost of construction and reduces investment profits.

It does, however, raise questions about how regulation can so often be considered to be cost-effective by regulators.

Recommendations

2. The Taskforce should adopt ACCI's proposal that departments be required to develop an annual regulatory budget, which would be tabled by the Prime Minister in Parliament and available on a centralised website.

3. The Taskforce should recommend that a similar approach to regulatory budgeting be adopted at state and territory level.

4. The three spheres of government should commit to a regulatory policy approach which does not permit the introduction of new regulation unless existing regulation is extinguished (the 'one in, one out' concept).

2.3 Lack of National Consistency

Despite having become a nation over 100 years ago, Australia's governance arrangements have not kept pace with changes to the economic landscape.

While the introduction of a federal system should have been largely beneficial for business, it has instead been allowed to create significant barriers and inconsistencies for national organisations.

While the Property Council is not calling for the abolition of the states and territories, there is a patent need for greater legal uniformity if Australian business is to be internationally competitive, as this will deliver greater efficiencies and still protecting the citizenry.

In the absence of consistency, businesses in different jurisdictions face significant discrepancies in policy.

[9] ACCI Media release "Regulation Costs Australia $86 Billion Annually", 9 November, 2005

The current system also results in state and territory governments duplicating regulatory systems, rather than relying upon and contributing to a national structure.

With this in mind, it is interesting to note the submission from the Victorian Government, which claims:

> *"The Victorian Government has sought to tackle the burden of regulation through:*
>
> - *reducing regulation;*
> - *reducing administrative costs;*
> - *reducing compliance cost; and*
> - *preventing unnecessary legislation.*[10]*"*

The Property Council welcomes this position, and in particular the creation of the Victorian Competition and Efficiency Commission (VCEC).

However, it should be noted that a proponent of increasing regulation is Victorian Building Commission, which has long been a strong advocate for extending the scope and stringency of the Building Code of Australia, either through changes to the Code or by way of state variations.

While we appreciate that the Building Commission is a functionary of Victorian Government policy, the Property Council will watch with interest to see how VCEC responds to its current approach to regulation.

Recommendations

5. The COAG must adopt a communiqué that:

   a. endorses the concept of national consistency;

   b. recognises that national consistency represents a minimum, not an optimum, standard; and

   c. commits all governments to working towards nationally consistent laws and procedures.

6. The Federal Government should provide financial assistance to the state and territory governments to encourage them to simplify state regulations and make them nationally consistent.

[10] Victorian Submission to the Australian Government's Regulation Taskforce (2005), p. 1

2.4 Lack of Accountability or Transparency in Policy Development

Concerns about a lack of accountability amongst regulators or transparency in the development of regulation appear to be widely shared across the economy.

The common perception is that proposals are often developed by bureaucrats who have little understanding about the industry they are regulating and yet who neglect to consult with stakeholders prior to drafting the regulation.

As the regulators do not themselves experience the effects of their handiwork, and in the absence of a formal review process, there is a tendency for them to believe the regulations will have little or no significant effect on the industry.

Without proper transparency and consultation, and without regulators becoming more answerable to those they regulate, this attitude will undoubtedly persist.

Recommendations

7. Any new or proposed regulations should be subject to a public consultation process that identifies and seeks relevant stakeholders, giving them sufficient time to respond.

2.5 Minimum Standards

Prescriptive regulation will always establish a minimum standard.

This means that regulators should be attempting to introduce measures that target poor practices, rather than prescribing for good outcomes.

In other words, regulators should attempt to proscribe against what the community considers to be unacceptable rather than predicting what it would prefer.

Any desire to deliver leading practices should instead be achieved through the use of education and incentives, rather than by way of prescriptive regulation.

Otherwise flexibility, creativity, and innovation within the industry will undoubtedly suffer.

Unfortunately, it is the Property Council's recent experience that the concept of establishing minimum standards to remove poor practice is largely being ignored.

The proposed energy efficiency changes to the Building Code of Australia are a particular example of this push – the fact that some of these have recently been delayed due to opposition by ministers suggests that building regulators may have overstepped their authority.

As high levels of stringency are often only justified by inaccurate and biased assumptions, rather than solid empirical research, industry often becomes frustrated with the regulatory process and finds it difficult to persuade regulators to make amendments.

It is not clear whether the desire to regulate for leading practice is due to mistrust of industry on the part of regulators or a lack of faith in the efficacy of incentives or other policy instruments.

Either way, the effects on industry are significant, and such an attitude should be avoided if we are to continue to have an effective and productive market-based economy.

Recommendations

8. The Taskforce should reinforce the concept of regulation representing minimum standards that remove poor practice, with education and incentives delivering higher levels of efficiency.

2.6 Over-Regulation

Regulation is often considered to be the only solution to policy problems.

However, as noted above, it should instead be used as the last mechanism for delivering government policy once range of other options has been tried.

Claims of market failure requiring regulation often have very little evidentiary support and the decision to regulate is often based on flawed assumptions.

This has led to a heavy regulatory burden on industry where greater education and the use of incentives may have delivered more effective and reasonable outcomes.

The effect is compounded by the large number of regulators operating in Australia – an estimated five or six hundred regulatory bodies, compared with the United Kingdom's 31 (which their government intends to consolidate into nine).[11]

[11] Gary Banks speech, "Regulation-making in Australia: Is it broke? How do we fix it?", 7 July, 2005, p. 16

This increasing regulation leads to greater complexity, which requires even more regulation to clarify the Government's intentions.

As a result, each year individual businesses are being required to understand and apply an increasingly complicated array of requirements, which detracts from their core business responsibilities.

Unless a clear decision is made to slash the amount of red tape required by government departments, the future growth and prosperity of Australia's economy could be at risk.

Consideration should be given to introducing a "Whole of Government" methodology, which would require the strategy for delivering the policy to be drawn from across the Government, rather than just being developed by one department.

This would enable departments to demonstrate that options other than regulation had been properly considered in the development of the policy.

Recommendations

9. All regulators should be required to prepare a clearly defined business case before developing regulation, which shows:

    a. the evidence that the department considers to demonstrate market failure;

    b. the reasons the department considers regulation to be necessary;

    c. the level at which the regulation is likely to be set, and whether it is appropriate level;

    d. the options, such as incentive mechanisms or educational initiatives, that have been considered as alternatives to regulation and reasons they were rejected;

    e. the thought processes the department followed in considering the various options; and

    f. each of the stakeholders affected and how they are likely to be affected.

10. The business case should be developed with the advice of other sections of the bureaucracy, to ensure that all options are considered.

11. The business case should be released for public consultation and the feedback from that process should be provided to the relevant minister before a decision is made.

2.7 Lack of Effective Review of Existing Regulations

Too often regulation is developed and then forgotten.

This is particularly a problem in the construction sector, where amendments to the Building Code of Australia are developed by regulators without any legislated review requirements.

As many of those affected by regulation, such as the small suburban builder, are least in a position to advocate changes, it is important that the Government undertake an independent review of all regulations on their behalf.

The assumption in that review should be that regulations will automatically extinguish unless a strong case can be made for their retention. This will ensure they remain relevant.

Unless all regulations carry sunset provisions, there will be no onus on regulators to assess the provisions they set in order to determine whether they are truly cost-effective, achievable, and deliver their desired outcomes.

Recommendations

12. All regulations should have a sunset clause of no more than five years, which requires a department to consider the proposals and justify their retention, through a public review.

2.8 Role of the Office of Regulatory Review

The Office of Regulation Review has an appropriate role in the regulatory process.

However, at present that role is carried out very much in an advisory capacity.

So, while the Office is authorised by the COAG to oversee regulatory impact statements and ensure that they cover the right issues, its ability to require assessment of regulation to be more rigorous is rather constrained.

Yet, the perception within regulatory circles and the community is that regulatory impact statements are “signed off” by the Office – the suggestion being that the Office has authorised a statement as accurate and thorough.

Such a claim has been made recently by the Business Council for Sustainable Energy in its defence of the proposed energy regulations for housing, which stated:

> *"In addition, the 5 Star energy efficiency regulations have been subjected to a detailed and rigorous regulatory impact statement process that was open to public scrutiny and signed off by the Australian Government's Office of Regulatory Review.*[12]*"*

As this is not the function carried out by the Office, such claims are misleading and add a weight to regulatory proposals that is not necessarily warranted.

The Property Council believes that the Office should be given that responsibility. It should be set up as an independent statutory authority tasked with project managing the drafting of all regulatory impact statements and collating the responses.

This would mean that an agency which has developed regulation becomes just one stakeholder in the process, allowing it to advocate for its proposals but not dictate to a consultant how they should be assessed.

The fundamental principle of regulation should be that if an agency can prove its case, regulation should be accepted. Otherwise, it should not proceed. This is only really possible if there is a separation of the role of developing regulation from its assessment.

Recommendations

13. The Office of Regulatory Review:

    a. should be reconstituted as a independent statutory authority associated with, but not responsible to, the Productivity Commission;

    b. should be responsible to a Cabinet Minister, but with dedicated Parliamentary Secretary overseeing its activities; and

    c. should provide an annual report outlining the stock of regulation reviewed and the outcomes of those reviews.

14. To provide sufficient objectivity in regulatory impact assessment:

    a. the Office of Regulatory Review should be responsible for managing the development of all regulatory impact

[12] BCSE Media release "National 5 Star Energy Rating by May 2006 a Priority", 10 November, 2005

statements and for commissioning consultants to undertake the work;

b. funding currently set aside by regulatory authorities to carry out analysis of regulation should be allocated to the Office of Regulatory Review to allow it to perform this function;

c. unless a strong case can be made in favour of a regulation through the regulatory impact process, it should be rejected.

15. A specialised modelling unit should be created within the Office of Regulatory Review, which would be responsible for:

a. developing a standard tool for assessing costs and benefits which could be applied to new regulatory proposals; and

b. analysing alternative economic methodologies proposed by consultants to determine whether they are appropriate for assessing the costs and benefits of regulation.

2.9 Regulatory Impact Statements

The Property Council applauds the Government for its commitment to the development of regulatory impact statements for significant regulation.

Such an approach is intended to ensure that the burden of any new regulation is not detrimental either to the industries being affected or to the wider community.

Unfortunately, however, the RIS process is not as objective as it was originally intended to be, as the system is set up in such a way that the departments who develop regulation are then required to assess their own work.

Clearly departments that have spent considerable resources on preparing new regulation are unlikely to be hyper-critical of their own initiatives.

At the same time, consultants are unlikely to censure the bureaucrats to whom they answer and who are funding them.

This means that regulatory impact statements are often at risk of merely becoming marketing documents to promote new regulation.

As industry associations and individual practitioners have only limited resources with which to review and counter the arguments effectively, rigorous assessment of regulation is unlikely to occur.

This reinforces the need for regulatory impact statements to be developed separately from the regulatory authority responsible for the policy and managed by the Office of Regulatory Review.

A couple of examples relating to building regulation have been included in the appendices to demonstrate some of the Property Council's concerns in the management of regulatory impact statements.

Recommendations

16. In order to ensure proper consideration of regulatory impact statements:

    a. a comprehensive list of stakeholders should be identified prior to the release of the regulatory impact statement for public consultation; and

    b. stakeholders should be notified of the impending release of the regulatory impact statement and issues needing consideration.

3.0 Specific Policy Areas

The issues identified above, while generic in nature, all have relevance to the property sector.

However, there are some specific property-related areas where regulatory reform is warranted. These are outlined below.

3.1 Development Assessment

3.1.1 Planning Rules as Building Regulation

Although we are aware that the terms of reference for the Regulatory Taskforce look mainly at Federal issues, the Commonwealth Government has a clear responsibility for intergovernmental issues.

With this in mind, the role of the Government in facilitating the Development Assessment Forum (an outcome of the Bell Report) is worthy of examination.

Planning regulations have often been used to prescribe rules covering not only the nature and types of buildings, allowable in an area, but also to regulate aspects of construction already covered in the Building Code of Australia.

However, unlike building regulations, those covering planning and development assessment currently require no regulatory impact assessment.

This means that costly impediments are often placed on developers purely at the whim of a state or local authority, with little consideration of their implications.

The Property Council hopes that the impending intergovernmental agreement covering the Australian Building Codes Board will limit the current number of variations and ensure that building construction is only regulated by the Building Code.

This is essential if the integrity of a national system of building regulations is to remain intact.

3.1.2 Development Assessment Processes

Australia is governed by a Federal Government, six state governments, two territorial governments, and over 600 local councils.

This has resulted in disparate planning regimes and wide-ranging discrepancies in the way that development applications are lodged, assessed, and determined.

These inefficiencies were recognised in the Bell Report in 1996, which called for streamlining of referral and concurrence processes between the three spheres of government (recommendation 29).

As a result of that report and the Prime Minister's 1997 response, an intergovernmental and industry research body, called the Development Assessment Forum (DAF), was created.

DAF is chartered to examine development assessment processes and to identify leading practices that can be adopted in all jurisdictions.

Its mission is *"to encourage the harmonisation of Australian development assessment systems, through the promotion of leading practice regulatory reform."*

3.1.3 Leading Practice Model for Development Assessment

The DAF has created a *Leading Practice Model for Development Assessment*, which identifies ten key practices essential to the good management of development assessment systems.

These include:

i. **Effective policy development** – where elected representatives are responsible for the development of planning policies, in consultation with the community, professional officers and relevant experts.

ii. **Objective rules and tests** – requiring development assessment criteria to be written as objective rules and tests that are clearly linked to stated policy intentions.

iii. **Built-in improvement mechanisms** – jurisdictions systematically and actively reviewing policies to ensure they remain relevant, effective, efficiently administered, and consistent across the jurisdiction.

iv. **Track-based assessment** – development applications being streamed into a standard assessment 'track' that corresponds with the level of assessment required to make an appropriately informed decision. The tracks would be:

   a. Exempt;
   b. Prohibited;
   c. Self assess;
   d. Code assess;

e. Merit assess; and
f. Impact assess.

v. **A single point of assessment** – where only one body is responsible for assessing an application, using consistent policy and objective rules and tests.

vi. **Notification** – where assessment involves evaluating a proposal against competing policy objectives, opportunities for third-party involvement may be provided.

vii. **Private sector involvement** – where experts should be able to have a role at various levels in the development assessment process.

viii. **Professional determination for most applications** – where most development applications are assessed and determined by professional staff or private sector experts. For those that are not, an expert panel should determine the application.

ix. **Applicant appeals** – an applicant should be able to seek a review of a discretionary decision against the same policies and as the first assessment.

x. **Third-party appeals** – where applications are wholly assessed against objective rules and tests, opportunities for third-party should not be provided.

The purpose of these principles is to ensure a streamlined, efficient, and accountable approach to the assessment and determination of development applications.

The DAF has also created a National Communication Protocol to improve the interoperability of electronic development assessment systems.

By adopting the DAF leading practice model and implementing electronic development assessment, jurisdictions will be able to ensure appropriate scrutiny of development applications, while delivering faster, cheaper assessments.

3.1.4 Recommendations

1. The Government should continue to coordinate the work of the Development Assessment Forum through the Department of Transport and Regional Services.

2. The Government should endorse the DAF Leading Practice Model for Development Assessment and encourage state,

territory, and local jurisdictions to adopt the ten principles into their planning and development assessment regimes.

3. The Government should continue to support the creation of a National Communication Protocol for Electronic Development Assessment, through the DAF.

3.2 Building Control

The Property Council supports the retention of the Australian Building Codes Board.

We believe that it is more preferable to have a national body developing building regulation than struggling with eight different state and territory jurisdictions each introducing their own provisions.

Unfortunately, there are still too many examples where state or territory regulators, and in fact a number of local authorities, insist upon introducing variations to the Building Code of Australia.

This should be discouraged, as it undermines the whole purpose of having a national code and makes it harder and more costly for developers to work in more than one jurisdiction.

3.2.1 Intergovernmental Agreement

When considering the effects of building regulation on industry, the Regulation Taskforce would do well to consider the recent Review of Building Regulation conducted by the Productivity Commission.

As a result of this study, the Federal Government has developed an intergovernmental agreement establishing a clear role for the Australian Building Codes Board.

The Property Council supports this IGA, which should go some way to improving the efficiency of the Board.

Unfortunately, at the time of writing it was our understanding that two states – New South Wales and Victoria – were still to sign the agreement.

There is an urgent need for the IGA to commence, to allow the Board to plan for the future. The Government should work to encourage these states to sign the agreement immediately so that the new Board can be constituted.

3.2.2 Outcomes of the Productivity Commission Review of Building Regulation

While many of industry's concerns about building regulation have been addressed in the Government's response to the Productivity Commission review, a number of key issues (many of which were discussed previously) need to be reinforced:

- Building regulation should be designed to remove poor practice (or introduce standards that represent the 'minimum standard acceptable to the community'), not to set leading practice as the regulatory benchmark;
- All building construction-related regulation should be incorporated into the Building Code, so that inconsistencies can be minimised;
- Regulation should be nationally consistent, with as few variations as possible being allowed between the three spheres of government – planning regulations in particular should not be allowed to increase standards set by building control;
- This national consistency should be enforced through the intergovernmental agreement;
- A model administrative framework for the application of the Building Code at state or territory level should be a priority to improve national consistency;
- A strong case should be made for the existence of market failure before regulation can be pursued;
- Better consultation processes are needed to ensure that a wider range of stakeholders are given an opportunity to respond to regulations that may affect them; and
- The role and use of Australian Standards in regulation needs to be reassessed, in order to prevent quasi-regulation being used to promote commercial interests.

The Property Council is willing to provide copies of its submissions to the Productivity Commission inquiry to the Taskforce, if it is desired.

3.2.3 Recommendations

4. The Government should continue to implement recommendations of the Productivity Commission Review of Building Regulation.

5. The Government should work to encourage the New South Wales and Victorian Governments to sign the intergovernmental agreement on the Australian Building Codes Board immediately so that a new Board can be constituted.

6. The Government should work to remove all variations from the Building Code of Australia in order to ensure greater national consistency in building regulation.

7. The concept that regulations should be set at the 'minimum standard acceptable to the community' must be reinforced in the Australian Building Codes Board's charter.

8. The Government should collaborate with the states and territories to incorporate all building construction-related regulation into the Building Code.

9. Development of a model administrative framework for the application of the Building Code of Australia at state or territory level must be made a priority for the Australian Building Codes Board.

10. The role and use of Australian Standards in regulation should be reassessed and mechanisms introduced to prevent quasi-regulation being used to promote commercial interests.

11. The Australian Building Codes Board should review its consultation processes to ensure that a wider range of stakeholders are given an opportunity to respond to regulations that may affect them.

3.3 Borderless Australia

Australia has already recognised the benefits of introducing nationally uniform laws.

The success of Corporations Law has demonstrated the benefits to the nation of introducing a uniform system, particularly when it helps to ensure good business practices and to encourage greater investment.

From a business perspective, these laws have made it easier for companies to invest and operate across Australia by reducing inefficiencies and removing red tape.

Unfortunately, there are still many discrepancies confronting business, especially in the areas of:

- planning and development assessment;

- property law; and
- state taxes – including stamp duty and land tax regimes.

Planning issues were mentioned earlier, and taxation will be discussed next.

In relation to property law, while all jurisdictions have a Torrens Title system, differences in approach mean that any companies investing in property in more than one state still face significant barriers to efficient business practices.

This discourages international and interstate investment and could make property a less attractive investment vehicle for some Australian companies.

It also prevents practitioners from moving between jurisdictions, because their expertise is not transferable and hence requires purchasers to maintain a separate legal team in each state, rather than being able to rely on the same set of advisors.

Clearly differences in laws and practices add to the costs to undertaking business and pursuing uniformity should be a core priority of the COAG Working Party.

A more complete discussion of property law reform can be found in Appendix 2.

3.3.1 Recommendations

12. The Government, through the Standing Committee of Attorneys-General, should encourage and support state and territory land title regulators in moves towards reforming property transactions.

13. The Government should contribute to development work being done to introduce electronic conveyancing of property transactions, with a view to delivering faster, more consistent processes nationally.

3.4 Taxation Reform

It would come as no surprise that taxation reform is a very high priority for all industry sectors, and indeed for government itself.

Taxation law represents a sizeable proportion of the 104,729 pages of legislation mentioned earlier, and it creates barriers and disincentives to the efficient operation of the economy.

To ensure that Australia's strong economic performance continues, reforms are necessary.

Wherever possible, Australia should be looking to enhance the economic efficiency of the tax system by minimising the tax burden and operating costs, and by providing greater simplicity and transparency.

3.4.1 Reducing Costs

An inefficient tax system imposes a higher 'deadweight' cost than a more efficient system. These costs are a factor of:

- taxes which impose administrative, compliance, and other decision-making costs on the economy, thus reducing the share of income available for investment and consumption; and

- taxes which reduce economic growth and hence the future size of the economy, by effecting reductions in the supply of capital, investment and/or labour.

The Government needs to undertake a robust review of the taxation system with a view to reducing compliance costs and removing disincentives.

This review should also include an assessment of whether there should be an alignment of corporate and individual tax rates. By doing so, significant resources currently required to prevent avoidance could be saved for other purposes, which may enhance tax efficiency and limit administration costs.

3.4.2 Simplicity

Taxation in Australia is complex and costly, and while tax reforms have attempted to improve the situation, to date they have tended to increase rather than reduce complexity.

Following are some reasons why our taxation system is considered to be so complex:

- **the tax rules are more complex and elaborate than necessary** – for example, the integrity measures dealing with the tax treatment of infrastructure financing;

- **tax calculations often involve costly compliance, but ultimately deliver little or no revenue** – a common example is rental housing, which requires complex valuations and detailed record keeping to determine the eligible component of capital expenditures;

- **the coverage of the tax system is often very high and wide with low thresholds or caps** – examples of these are the GST registration threshold, low-expensing caps for equipment investments, and low thresholds for higher frequency of tax calculations and payments;

- **there is a lot of process duplication or double handling in the taxation system** –for example, the operation of the GST system with its value-added design feature involves repeated tax and credit calculations;

- **the practical difficulties in applying vague tax laws create uncertainty** – for example, the nature and practical application of the general anti-avoidance rule has resulted in increasing uncertainty over the years; and

- **there are inconsistent definitions between federal and state taxes**.

3.4.3 The Cost of Tax Collection

The impact of the tax system depends not only on the rules which define a taxpayer's liability, but also on the administration of the system and the extent of the cost taxpayers must incur in order to comply.

The Australian Tax Office (ATO) has reportedly collected more than $200 billion in taxes during the 2003-04 period. In the same period it had operating expenses of approximately $2.3 billion and about 21,000 employees. Its implied average tax collection cost is therefore a little over one per cent of revenue.

Internationally, this is close to being comparable with the United Kingdom (which is being reformed), but much more costly than the federal tax system in the United States, where the average cost of the IRS has been limited to less than half a cent per dollar collected.

3.4.4 GST and State Taxes

As part of the GST agreement between the Federal Government and its state and territory counterparts, the latter agreed to dispense with a number of indirect taxes on business, including stamp duty on commercial conveyances and payroll taxes.

These taxes have been identified by the Business Coalition for Taxation Reform (BCTR).

To date, the states and territories have reneged on this agreement, and many of these inefficient taxes still remain.

The Property Council supports the Federal Government's push to hold the states to their agreement and to fund the removal of these taxes through their GST windfall.

If they refuse to comply, the Government should consider withholding GST revenue until the states recommit to their agreement.

3.4.5 Ongoing Reform of Taxation

The confidentiality of Treasury advice to the Government has come to represent a traditional convention under Australia's system of Government.

However, this convention is not necessarily suitable and appropriate in respect of all Treasury recommendations.

Indeed, much of the systemic tax information and analysis held by the Treasury could be made available for community access. This would improve transparency and allow more opportunity for better reform.

Reforms to tax administration should be based on:

- a published strategic assessment of the role of the tax system;
- its interrelationships with other fiscal programs;
- clear and specific goals for simplification generated by creative policy reviews; and
- the increasing use of new technologies.

A high priority should be attached to developing and implementing a comprehensive research program into the administrative, compliance and decision-making costs of the tax system and the drivers of those costs.

This should form the basis for the long-term reform of tax policy and administration in order to deliver simplification and reduce costs.

3.4.6 Recommendations

14. The Government should enhance the economic efficiency of the tax system by:

    a. minimising the tax burden and operating costs; and

    b. by providing greater simplicity and transparency in taxation law.

15. The Treasury review should consider areas where taxation rules could be made simpler for taxpayers, including:

    a. reducing the complexity of compliance calculations;

    b. lifting taxation thresholds and caps;

    c. reducing the incidence of double handling and processing;

    d. reducing uncertainty created by specific policies and legislative measures; and

    e. developing consistent definitions and interpretations for federal and state taxes.

16. The Federal Government should continue to press the state and territory governments to abolish the inefficient taxes, as identified by the BCTR.

17. The Government should develop and implement a comprehensive research program into the administrative, compliance and decision-making costs of the tax system and the drivers of those costs. Such a program would form the basis of a long-term reform strategy.

18. The Government review should develop a strategy to cut the administrative cost of taxation to half a cent per dollar collected. This may require a restructuring of the Australian Taxation Office and the current tax administration and collection network.

19. Reforms to tax administration should encompass an assessment of:

    a. the role of the tax system and its interrelationships with other fiscal programs;

    b. clear and specific goals for simplification generated by creative policy reviews; and

    c. the utilisation of new technologies.

3.5 Capital Markets and Property

In the capital markets, property competes with equities, bonds and other asset classes for Australian and international investment capital.

However, it does so from a disadvantaged position in terms of its taxation and regulatory treatment by Australian governments.

It is the Property Council's view that the regulatory review process should seek to place all investment classes on a level competitive playing field in the capital markets.

The property investment sector is primarily subject to ASIC's managed investment regime.

This takes a "lowest common denominator" approach which quite properly seeks to impose protections and safeguards that are appropriate for smaller and more novel schemes.

However, as the regime applies uniformly to all schemes, it often contains restrictions which are inappropriate for listed managed investment schemes and wholesale schemes, of which a significant component are listed and unlisted property trusts.

While there are some exceptions to the uniformity of application, these exceptions are more "one offs" and have not been implemented on a consistent basis.

Listed property trusts, though traded on the ASX in the same manner as listed companies, are restricted in relation to capital raising and permitted investments, and so are disadvantaged in comparison to listed companies. While Class Order 05/26 sought to address the disadvantages, a number of areas, such as placements of securities with related entities and underwriting by related entities, were left unaddressed.

In addition, s601FC(4) of the Corporations Act imposes restrictions on the investments available to a managed investment scheme. These restrictions do not apply to companies or superannuation funds and fail to reflect the development of managed investment schemes as widely used investment vehicles.

It is the Property Council's recommendation that the capital raising distinctions between listed trusts and companies be removed. The rest of this section sets out our specific concerns in relation to the current regulatory regime.

3.5.1 Offer Documents

The product disclosure statement regime that applies for property investment schemes from a prospectus regime in several material ways.

Content

The content requirements for a prospectus and a product disclosure statement (PDS) are formulated differently in the Corporations Act.

In the case of a prospectus, the relevant test is:

all information that investors and their professional advisors would reasonably require to make an informed assessment of the assets, liabilities, financial position and performance, profits and losses and prospects of the body issuing the security.

In the case of a PDS, the relevant test is:

in addition to various stipulated information, all information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

It is not clear why there needs to be a distinction between investors and their professional advisers (prospectus) and a retail client (PDS), as in both cases the key trigger for the liability provisions is the same – namely, is there a misleading or deceptive statement in the offer document?

Incorporation by reference

In the prospectus regime, information that is required to be disclosed can be incorporated by reference.

To do so, a prospectus may simply refer to a document that has been separately lodged with ASIC and inform people of their right to obtain a copy of that document, rather than setting out all of the information contained in that document. Investors are able to inspect the relevant document on request and free of charge. This allows issuers to distribute a 'short form' prospectus.

There is currently no equivalent provision for incorporation by reference for Product Disclosure Statements.

The Property Council recognises that the recent Financial Services Reform Refinements Exposure Draft Regulations is an attempt by Government to address the problem of a short form PDS, but is concerned that the short form PDS regime will require the drafting of two disclosure documents concerning the same offering – a traditional long form document and a short form document.

While any move toward a more rational PDS for investors is encouraging we are concerned about the substantial additional implementation and compliance costs in producing two disclosure documents for a single product.

The Property Council agrees with IFSA, which in its submission indicated that writing, reviewing, and due diligence costs will be incurred in producing both the 'short form' and standard PDS.

The Property Council has been and remains of the view that a single PDS regime delivering shorter and more investor friendly disclosure documents should be the ultimate aim of any reform process seeking to give effect to better and more simple outcomes for both industry and investors.

However, significant efficiencies could be gained if 'short form' PDSs could merely reference information for investors in the same fashion as prospectuses.

Pre-prospectus publicity

There are very tight restrictions on the advertising and publicity that is allowed in relation to an offer of securities requiring a prospectus, prior to the lodgement of the prospectus.

Issuers are not permitted to publicise an upcoming offer except by making a statement that a prospectus will be made available and that anyone who wishes to acquire the relevant securities will need to complete the accompanying application form.

The restrictions on advertising and publicity in relation to an offer of a financial product before a PDS is available are more practical, as products can generally be advertised, and upcoming offers publicised, as long as there is an accompanying statement that the financial product can only be acquired pursuant to a lodged PDS, and that applicants should consider the PDS in making their investment decision.

Again, it is hard to see what the underlying rational is for the distinction and how this distinction should apply to an offer involving stapled securities.

Time for disclosure — offer v issue

Disclosure requirements in the case of securities are required to be satisfied at the time at which the securities are offered for sale.

In contrast, the disclosure requirements for financial products are required to be satisfied at both the time of offer and the time of issue of the financial product.

This difference can give rise to an anomalous situation where an instrument is convertible into a stapled security.

On conversion of a convertible instrument, it may be the issuer's decision whether a new stapled security is issued or whether the convertible instrument is instead redeemed.

On conversion, the issue of the share element of the stapled security does not require a prospectus because the prospectus disclosure requirements were satisfied at the time that the original convertible instrument was offered and there is no subsequent offer at the time of conversion.

However, the issue of the unit element of the stapled security on conversion does require a PDS to be issued even though there is no subsequent offer of a unit at the time of conversion.

ASIC has granted specific relief in the past for this situation so that a PDS was not required for the issue of the unit on conversion, but a more general policy change is needed.

3.5.2 Unitholder Purchase Plans

At present, the maximum amount that can be raised from an investor under a Unitholder Purchase Plan (UPP) is $5,000, which is an insufficient amount.

This form of capital-raising is cost-effective as issuers are exempted from the prospectus and product disclosure requirements, while small investors are able to top up their holdings.

The Property Council recommends that the limit should immediately be increased to $10,000 and then reviewed on a regular basis through a process of consultation with interested parties on the appropriate amount.

3.5.3 Beneficial Owner Register

The Property Council notes that IFSA has called for an amendment to Section 672D A(9) of the Corporations Act to extend the 2 day reporting period to 30 days for beneficial owners.

The Property Council supports that proposal, and suggests that more formal processes should be established to allow the review of regulatory proposals that have a broad industry impact.

3.5.4 Managed Investment Tax Review

The Property Council supports calls for a Managed Investment Tax Review.

The Government should review the application of the Income Tax Assessment Act to the managed investment industry and develop a simplified and self-contained taxation system for managed investment products. The reforms should be revenue neutral.

3.5.5 Recommendations

20. The Government should review policies concerning prospectuses and product disclosure statements, particularly in relation to property investment schemes, in relation to the following:

    a. property investment schemes should not be treated differently from companies in relation to compliance requirements when raising capital;

    b. differences in content requirements for prospectuses and product disclosure statements should be resolved;

    c. incorporation by reference of material previously registered with ASIC into a PDS should be allowable;

    d. the pre-prospectus publicity requirements should be aligned with those that apply to the product disclosure regime; and

    e. to avoid the need for specific relief into the future, the time for disclosure regime relating to product disclosure statements should be amended so as to bring it into line with that which applies to securities.

21. The limit for Unitholder Purchase Plans should immediately be increased to $10,000 and processes put into place to review this amount on an ongoing basis.

22. Section 672D A(9) of the Corporations Act should be amended to extend the 2 day reporting period to 30 days for beneficial owners.

23. Formal arrangements should be developed and implemented for consultation and review of policy and regulatory proposals having a broad industry impact.

24. The Government should undertake a review of taxes on managed investments and develop a simplified and self-contained taxation system for managed investment products.

3.6 Accounting Standards

There have been many examples of late where the Australian Accounting Standards Board's regulation of accounting standards has been misaligned with the views and practices of industry.

3.6.1 AASB 132

One of the most notable examples was the Board's treatment of Accounting Standard AASB 132. This Standard came about as a result of the AASB's first harmonisation goal, which is to increase the comparability of financial reports prepared in different countries.

AASB 132 has artificially recast equity as debt on the slim rationale that, by law, Australian trusts have fixed lives (usually 80 years), which makes them 'puttable' instruments.

This has essentially ensured that Australia's property trusts are now considered to have a net asset value of zero – in other words, they have been deemed by bureaucratic hypothesising to be worthless.

The Board's current view on AASB 132 means that Australia's property trusts receive a different accounting treatment to similar real estate investment trusts operating in other countries.

In order to avoid such instant devaluations in the future, the Australian Accounting Standards Board should be required to develop a harmonisation impact statement on all new standards to ensure they actually meet the goals of the internationalisation project.

In other words, it should be beholden upon the AASB to demonstrate that any new proposed standard will genuinely improve Australia's competitiveness in the capital markets arena before the Board is allowed to proceed.

3.6.2 AASB 1046

AASB 1046 requires the disclosure of the remuneration of the directors and executives of a responsible entity in the statutory accounts of the trust or other scheme managed by the entity.

This represents a significant change to remuneration reporting for executives and directors of responsible entities and one which reflects a lack of understanding of the sector.

The Accounting Standards Board is pursuing AASB 1046 on the basis that it promotes transparency in terms of cost of governance.

However, the cost of corporate governance is represented by the fee paid to the responsible entity, not the remuneration of executives and directors employed by the responsible entity.

Unless a company has no business other than as the responsible entity of a single trust or other managed investment scheme, the

disclosure of directors' and executives' remuneration will not meet the AASB's stated aim of providing information as to the cost of corporate governance of a trust or other scheme.

3.6.3 Future Australian Adoption and Implementation of the International Financial Reporting Standards

Australian accounting standards apply more broadly than do their European counterparts.

Contrary to claims by the Board, the new standards apply to listed and unlisted entities, whereas International Financial Reporting Standards apply only to listed entities.

Thus, the AASB needs to undertake a thorough cost-benefit analysis of proposed changes before they become part of Australian law.

The practice of preparing and releasing two sets of books, in both the listed and unlisted sectors will continue to cause investor confusion, particularly given that under AASB 132 the net assets of funds will be zero.

Furthermore, in the unlisted sector the implied unit price in a set of financial statements will be different to the actual transaction price. Yet, superannuation funds will continue to account for their own members' funds as equity, so there is no consistency in the AASB position.

3.6.3 Recommendations

25. The Australian Accounting Standards Board must:

    c. conduct a harmonisation impact statement on all new standards to ensure they actually meet the goals of the internationalisation project; and

    d. ensure that the operation of each accounting standard will genuinely improve Australia's competitiveness in international markets and not place Australian business at a disadvantage.

26. Section 285 of the Corporations Act should be amended only to require the disclosure of executive remuneration in managed investment schemes that has been directly incurred by the scheme.

27. The AASB should be brought into line so that industry consultation and support are needed before any policy is recommended to the Parliament. A thorough cost-benefit analysis of proposed changes should also be undertaken.

Appendix 1 Case Studies

A1.1 Disability Access to Premises Regulations

In January, 2004, the Australian Building Codes Board released a number of proposed amendments to the Building Code of Australia (the 'Premises Standard') designed to improve access to the built environment for people with disabilities.

These were met with significant opposition from industry groups, as it was believed that the Board had given scant consideration to the cost and difficulty of delivering these changes, in the interests of pandering to a vocal minority.

In general, industry respondents were highly critical of both the proposed amendment and accompanying regulatory impact statement, particularly in relation to the consultants' estimations of both costs and benefits:

- Costs were understated, because:
    - case studies were incorrectly carried out and underestimated the quantity of access features required by the proposed regulation;
    - the impacts of the proposals were downplayed by some of the steering committee members (notably the Human Rights and Equal Opportunity Commission and, to a lesser extent the Australian Building Codes Board), but their assertions were never independently verified; and
    - the consultants were poorly informed about the property industry – at one point they claimed that 'additional building area [can be] added [in a new development] to offset [lost rentable area] using impacts of the Premises Standard and yield an outcome in which a given "target" of lettable space is provided'. This is a very naïve view, as it would be a rare council indeed that would approve exemptions to set floorspace ratios merely for access purposes.
- Benefits were overstated, because:
    - the consultants assumed there would be a significant increase in employment as a result of buildings being made accessible, even though international experience suggested that employment levels were more likely to drop; and
    - a methodology known as 'willingness to pay' was used to assess benefits, even though this has been discredited overseas and was criticised by the consultants themselves.

Asking people in theory what they would be willing to pay for access out of altruism or if they became disabled is very different from actually asking them to put their hands into their pockets.

The differences in the assessments of costs and benefits were significant:

- the regulatory impact statement argued that costs would be around $26 billion for $13 billion worth of benefits;
- in comparison, the Property Council's own assessment was that the amendments would cost around $60 billion for only $6.3 billion worth of benefits.

In assessing the feedback from the public consultation period, the Australian Building Codes Board, rather than taking into account the legitimate concerns of industry, responded defensively. This suggested a significant lack of objectivity in dealing with criticism.

The Property Council's assessment of the likely costs drew significant fire from the Board, which believed the figures to be over-inflated.

Yet, instead of seeking feedback as to how we came to our results, the Board chose to commission more consultants to undertake a peer review. As this subsequent review relied on the same case studies and the same assumptions, and did not do any in depth analysis, it unsurprisingly came up with the same results.

However, as the case studies and assumptions were central to our disagreement with the regulatory impact statement, it was clear that the Board was reluctant to accept that the analysis, and the regulations themselves, could actually be flawed.

The Minister for Industry and the Attorney-General have since raised similar concerns to those raised by industry, and as a result the Premises Standard has still not been approved.

A1.2 Energy Efficiency Regulations

The upcoming energy efficiency changes to the Building Code of Australia underwent a similar experience.

Back in 1999 industry and government agreed that there needed to be regulations introduced to remove poor practice in energy usage, which would be balanced with incentives to encourage better performance in the property sector.

The Australian Building Codes Board was given the responsibility for developing these regulations.

However, rather than removing poor practice, the proposed changes instead set a very high level of efficiency – far higher than average practice – with no sign of complementary incentives.

As well as raising concerns about the provisions, industry associations such as the Property Council and Master Builders Australia raised a number of concerns about the regulatory impact statement:

- Rather than assessing the different policy alternatives objectively, as required by COAG, the consultants dismissed them without any real investigation, because:
    - It was assumed that industry had not made any advancements in this area and government influence as a major tenant was not considered effective;
    - Information and education programmes, and labelling options, were only considered to "complement" direct regulation; and
    - Incentive measures, such as taxes and subsidies were not even considered as alternatives, because "these are major policy issues for the highest level of government and would not be decided separately in relation to the energy efficiency of non-residential buildings".
- At the same time, no contemporary assessment was made of the performance of the industry in relation to energy efficiency – the statistics used to justify change were published in 1999 and were thus significantly out of date. As the consultants gave no consideration to advancements in energy efficiency witnessed in the industry over the last ten years, market failure was never demonstrated.
- The true costs, and the ensuing benefits, of the proposals were never properly assessed:
    - Limited sources were used for information on costs, and these were merely extrapolated throughout the country. For example, costs for air-conditioning were sourced from a single supplier based in the ACT, which is not a representative market;
    - The consultants assumed that the majority of property owners also occupied their buildings, which is rarely the

case, and that owners would hold a property for the long-term;

- This led to the assumption that payback periods of between 4 and 13 years would be perfectly acceptable to industry – these are substantially longer than current business practice and therefore don't constitute reasonable assessment;
- Similarly, concerns about barriers such as split incentives, where the property owner pays for energy efficiency but the tenant benefits, were never adequately addressed; and
- Other costs, such as for maintenance, installation, and consultancy fees, appear to have been largely overlooked.

- The impacts on existing buildings were also poorly considered:
  - The assumption was made that the impacts of the regulations would mainly be felt with new buildings;
  - However, building regulations also affect existing structures during renovation, and the impacts on these were often overlooked in the discussions about the impacts; and
  - Claims that local government would be "pragmatic" when applying the regulations to existing buildings showed an alarming lack of knowledge about how local authorities currently apply planning rules and building regulations.

Again, rather than representing a rigorous assessment of the implications, the consultants appeared to gloss over industry concerns with a view to justifying the proposed changes.

These amendments were pushed strongly by Federal, state, and territory regulators and few changes to the provisions were countenanced. They were opposed by industry and criticised by the Productivity Commission.

It is interesting to note, therefore, that only recently the Ministers for Industry, the Environment, and Forestry, announced that the provisions for housing would not proceed due to concerns about the assessment of costs and benefits.

This again raises questions about the efficacy of the current approach to regulatory impact statements.

Appendix 2 Property Law Reform

A2.1 Uniformity of Property Laws and Procedures

The Property Council of Australia and the Property Law Reform Alliance believe that the time is right for the comprehensive reform of Australia's property laws.

We believe that the eight different systems are contributing to greater inefficiency and prevent leading practices from being adopted nationally.

Inefficiencies can be found in a range of areas, including:

- Titling;
- Conveyancing;
- The treatment of easements and covenants;
- Stamp duty charges and processes;
- Registration;
- Mortgages and financial procedures;
- Leasing;
- Powers of attorney;
- Professional standards, including the licensing of real estate agents and property managers; and
- Documentation.

Any organisation operating in more than one state or territory must currently abide by a variety of different requirements, which affects the timing of property deals and necessitates the use of a range of legal representatives.

Therefore, a move towards uniformity of property laws and procedures:

- would enable states and territories to introduce leading practice reforms to ensure the most efficient, rigorous, and fair system is in place for property transactions;

- would make it easier for individuals, companies, and professionals to move and operate in different jurisdictions; and

- would place property investment on a level playing field with other asset classes.

Some interest has been shown by Registrars of Title in each state and territory in moving towards a more nationally consistent approach to property law. With the support and encouragement of the Australian Government, this could become reality much sooner than ever expected.

A2.2 Electronic Conveyancing

At present there is work being undertaken to introduce electronic conveyancing into the property transaction process.

This represents an ideal opportunity to reform existing systems and streamline the process of exchanging land between individuals or corporations.

However, unless care is taken to pursue this in a consistent fashion nation-wide, it will further reinforce the differences and inefficiencies extant in current systems.

The Property Council and the Property Law Reform Alliance believe that the introduction of electronic conveyancing will deliver significant benefits, including:

- an efficient and cost-effective means of undertaking property transactions;
- reduced holding, opportunity, and administration costs due to faster processing times; and
- incidental reforms to the process of lodging and settling property transactions.

As business transactions are increasingly being made nationally and internationally, it is essential that Australia move to a more consistent set of property laws.

Electronic conveyancing is a golden opportunity to facilitate this process, and any systems should aim to be consistent with those in other jurisdictions.

An electronic system must be more efficient and more cost effective for the public than the system it replaces. It should not be pursued with the intention of adding to the administrative responsibilities of accredited users or transferring cost or risk away from government.

Ultimately, an electronic system should be able to do everything currently done by the paper based system.

Users of the system should be able to be accredited nationally, without the need for additional training or accreditation requirements.

A2.3 The Property Law Reform Alliance

The Property Law Reform Alliance ('the Alliance') is a coalition of legal and industry associations committed to bring about uniformity and the reform of property law and procedures in Australia.

The purpose of such a goal is to ensure efficiency and cost-effectiveness for all stakeholders in property law transactions.

The Alliance aims to achieve this outcome both through discussions with government representatives and the development of a model Real Property Act, which will outline leading practice regulation and processes for possible adoption by States and Territories.

While the Alliance has no government members, we aim to work closely with regulators to deliver more effective and appropriate property laws and procedures.

Members of the Alliance include:

- Australian Finance Conference,
- Australian Institute of Conveyancers,
- Australian Institute of Quantity Surveyors,
- Australian Property Institute,
- Australian Property Law Group of the Law Council of Australia,
- Australian Spatial Information Business Association,
- Law Society of ACT,
- Law Society of NSW,
- Law Society of SA,
- Master Builders Australia,
- Mortgage Industry Association of Australia,
- Property Council of Australia (including the Shopping Centre Council of Australia),
- Real Estate Institute of Australia,
- RICS Oceania, and
- Urban Development Institute of Australia.

Appendix 3 About Us

A3.1 The Property Council of Australia

The Property Council of Australia is the peak industry association for the property industry.

Our mission is to champion the interests of the property sector.

Our membership comprises the leading institutional investors, developers, financiers, owners and managers of investment property in Australia and is responsible for the lion's share of property investment in Australia.

In addition, the Property Council's members include all the major construction, professional, and trade services suppliers working within the property sector.

We therefore have a very strong and personal concern about the use and abuse of regulation as it applies to the property industry.

A3.2 Contacts

Taskforce members are encouraged to contact the following Property Council staff, should they require further information.

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