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Regulation Taskforce
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Dear Sirs

Regulation Taskforce - Reducing the Regulatory Burden of Business

The Australian Institute of Company Directors (AICD) is the principal professional body representing directors in Australia. Our members are directors of a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, and government and semi-government bodies.

We are pleased to be able to respond to your call for submissions on practical options for alleviating the compliance burden on business from government regulation. We have been required to respond to the Taskforce within a very short timeframe. This has been disappointing and has precluded us from developing a more comprehensive response. However, we have endeavoured to consult with our members as broadly as possible and enclose our submission for your consideration. We hope that we will have additional opportunities to input into the Taskforce's work.

We look forward to receiving the Taskforce's report and working with the Government toward the crucial objective of reducing the regulatory burden on business. Please contact me on (02) 8248 6600 if you have any queries.

Yours faithfully

Ralph Evans
Chief Executive Officer

CC – Catherine Walter AM, Chair, Business Regulation Advisory Group

1. Introduction

The cost to business in Australia of regulation is immense. Some figures on the actual costs are set out in Business Council of Australia's (BCA) *Business Regulation Action Plan* dated May 2005, which are referred to in the Taskforce Issues Paper. The AICD accepts the need for business regulation but shares the concern of BCA about inappropriate and over-regulation.

Over the years there have been a number of enquiries established to review government regulation and 'red tape'. Many of these have made useful recommendations. For example, the report entitled *Grey-Letter Law: the Report of the Commonwealth of Interdepartmental Committee on Quasi-regulation* of December 1997 concluded in paragraph 4.4 that in order to design successful quasi-regulation, government officials needed to adopt a number of strategies including:

- understanding the industry;
- setting appropriate requirements;
- creating ownership and commitment;
- obtaining adequate resources for administration;
- minimising costs to industry and consumers;
- monitoring and reviewing the arrangements; and
- establishing a mechanism for complaints handling and dispute resolution.

These are admirable objectives, but disappointingly, they have not been fully embraced by government since that time.

Following on from the call for submissions on 25 October 2005, the AICD has endeavoured to consult with its members in order to identify compliance burdens which adversely affect AICD members. Given the time available to respond, our ability to do so in a broad and meaningful way has been impeded. Nevertheless, we have sought to identify a range of issues which we discuss below.

2. Issues to be considered in this submission

This submission is broken into four sections:

- **Inconsistency of Laws** - A major burden for corporations carrying on business in multiple states is the inconsistent regulatory burden placed on them by different State laws. (refer 2.1)
- **Soft Regulation** - Not all regulation is in written form. Much of it derives from the conduct and attitude of regulators and in many cases, the 'red tape' problems deriving from soft regulation have more impact than those deriving from the actual regulations themselves. (refer 2.2)

- **Attitude to Regulation -** We explore the attitudes of governments and government officials to regulation and to consider whether different approaches might lead to more efficient outcomes for business. (refer 2.3)

- **Possible Reforms –**We identify a range of possible reforms which would reduce the regulatory burden on business. (refer 2.4)

2.1 Inconsistency of Laws

One of the biggest impediments to the smooth and efficient operation of business in Australia are the conflicting State (and sometimes Commonwealth) laws. The problems arise in nearly every field of endeavour, but probably the areas with the greatest impact are:

- occupational health and safety;

- transport;

- tax;

- mining;

- environmental; and

- hazardous goods.

It is almost impossible to assess the overall financial burden on multi-jurisdictional businesses of having to comply with different laws in each State. In some areas we have seen attempts at uniformity such as in corporations law, credit codes, professional services legislation and transport laws.

Some of these attempts at national reform have been more successful than others. For example, the recent attempt to achieve national transport laws has broken down into a quagmire of competing State interests such that the National Transport Commission has effectively abandoned its promotion of uniform or nationally consistent legislation in favour of a regime which now caters to regional differences.

The AICD urges the Commonwealth to:

- use its constitutional powers wherever possible to achieve uniformity of laws affecting business;

- to the extent to which it is not constitutionally able to do so, to lead the States in trying to achieve such an outcome; and

- use whatever other means as are at its disposal (such as through Ministerial forums, or allocation of taxes, in a way similar to that employed in relation to National Competition Policy) to encourage the States to step into line.

The AICD believes that the benefits to our economy of achieving uniformity of laws will far outweigh any disadvantages to the States.

In advocating this approach, we observe that the differences between the State laws are not necessarily all matters of policy. In many cases, the problems derive from different drafting styles and histories. We discuss this in more detail below. For present purposes, one of the areas which is in most urgent need of reform is the differing State approaches to drafting legislation. Even if policy differences were retained, great benefits could be achieved by all the States adopting a common approach to drafting legislation, especially boilerplate type clauses.

An area of particular concern to the AICD is the inconsistent Commonwealth and State laws which impose personal liability on company directors and officers. This has been the subject of detailed consideration by the Corporations and Markets Advisory Committee (CAMAC) in its paper entitled *Personal Liability for Corporate Fault* dated May 2005. In that paper CAMAC reviews Commonwealth, State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading statues. The CAMAC paper commences as follows:

> *This paper discusses the circumstances in which directors and corporate managers may be personally liable for corporate misconduct in consequence of the positions they hold or the functions they perform in their corporations. This derivative form of liability arises without the need to establish that these persons either breached the law through their own misconduct or were accessories to the misconduct of their corporation.*

Submissions made by the AICD to CAMAC in response to this paper emphasised the concern which AICD has about the vastly different approaches taken by governments across Australia in laws imposing personal liability on company directors and officers. Numerous different formulations of the derivative liability laws can be found within each State and the Commonwealth and across the States. The provisions are highly inconsistent and impose personal liability in a variety of different ways. In some cases liability is imposed absolutely where a corporation breaches a statue (that is to say the normal onus of proof is reversed with a director or officer having to establish his or her innocence) through to situations where the director or officer must have actively been involved in the commission of the offence by the corporation before liability arises.

CAMAC has put forward three draft templates for national laws imposing personal liability on directors and officers and sought public comment. AICD argue strongly for these laws to be made uniform. AICD commends the CAMAC paper to the Taskforce and urges the Commonwealth to support CAMAC's work to achieve uniformity of these laws. AICD's submission on this issue dated 12 August 2005 is available on our website @ www.companydirectors.com.au

2.2 Soft Regulation

One of the major areas of concern to the AICD's membership arises from conduct of regulators, as opposed to the regulations themselves. Broadly the issues of concern include the following:

- regulators being slow and unresponsive in dealing with matters;

- regulators imposing layers of 'red tape' requirements over and above the actual legislative or regulatory requirements;

- overlapping jurisdictions between regulators;

- political pressures being brought to bear on regulators;

- State regulators bringing pressure to bear on Commonwealth regulators and vice versa; and

- a general culture of 'regulation' rather than seeking to understand and resolve a problem.

A recent example of overlapping jurisdiction between regulators is the recent move by APRA to oversight the governance of prudentially-regulated institutions. APRA's proposed approach to prudential regulation is to mandate a governance framework similar to that found in the ASX Corporate Governance Principles, which are not mandatory and only require reporting on an 'if not, why not' basis. In the AICD's view, industry regulation should not be duplicated and new regulation should always be considered in the context of existing regulation, such as the Corporations Act, the ASIC Act and the ASX Corporate Governance Principles. The APRA proposals will create a disproportionate regulatory impact on those APRA-regulated entities that are already regulated by the ASX and ASIC, without any persuasive evidence that the ASX and ASIC regulations are inappropriate or ineffective. AICD's submissions on this issue dated 18 May 2005 and 29 June 2005 are available on our website @ www.companydirectors.com.au.

At the beginning of this submission, we quoted from the 1997 report of the Commonwealth Interdepartmental Committee on Quasi-regulation. The conclusions of that Committee, in recommending certain strategies for government officials are still applicable today, eight years later. There is a clear need for regulators to understand the nature of the business of those whom they are regulating. This can no doubt be achieved in many ways, for example through consultation, better training and the establishment of joint working parties. Regulators need to be aware of the cost impact of their actions on business and therefore on consumers. Efficient mechanisms for handling complaints and dispute resolution also need to be established to ensure that concerns of business are adequately and promptly dealt with. AICD's submission to ASIC on related issues dated 12 August 2005 is available on our website @ www.companydirectors.com.au

2.3 Attitude to Regulation

AICD members believe that, before introducing new laws affecting business, the government's history of consultation with business has been poor. Indeed, this very Taskforce has allowed less than one month for submissions on a very complex and widespread problem. There is considerable evidence of poor consultation in the past. The AICD strongly urges the government to allow widespread consultation on matters affecting business. For example, amendments to the *Corporations Act* have historically allowed very short consultation periods for organisations such as AICD to respond. In the case of CLERP 9, the reforms were widespread and complex.

A variety of other concerns we have on this issue include the following:

- **Avoid Knee-jerk Policy Responses** - The current attitude of government officials appears to be that where a high profile matter arises, such as HIH, the government automatically seeks to introduce new laws without giving proper consideration to whether existing laws are adequate and whether they are properly enforced. We urge the government to undertake a practice of careful and mature consideration and consultation before automatically adopting new laws.

  In the case of the *Corporations Act*, existing laws may well have been adequate to address wrongdoing arising in the HIH case where two directors of HIH have already been convicted of offences and gaoled and a number of senior officers are currently being tried for offences under the pre-CLERP 9 *Corporations Act*. It is possible that many of the CLERP 9 amendments were simply not required at all. Knee-jerk reaction to every major corporate event which decrees that new legislation is required must be avoided.

- **Adopt Plain English Drafting** - Laws need to be drafted in plain English. While attempts to do this are made from time to time, a uniform national approach to drafting needs to be encouraged to reduce ambiguity.

- **Ensure Uniform Drafting** - We have already alluded to the problem of different drafting styles and approaches throughout the States. The problem is simply not just one of style, but also one of substance. There are many provisions which appear regularly in statutes. Each State and the Commonwealth has its own way of drafting statutes which it jealously guards. There is no reason why a common approach to drafting legislation across the Commonwealth and all States could not be adopted.

  We urge the Taskforce to give serious consideration to recommending the establishment of an independent drafting office which has responsibility for drafting all laws (Commonwealth, State and Territory) in a uniform way across the country. In this way, we can reduce the impact of differing State laws, even if different State policies continue to apply.

- **Insert Sunset Clauses** - Often regulations pass their use-by date without any action being taken to remove them from the statute books. To address this problem, we recommend that all future regulations have a sunset date by which time they must either be renewed or come to an end.

- **Avoid Frequent Law Reform** - Another criticism our members have made is the process of institutionalised corporate law reform. For nearly 20 years we have had the Corporate Law Simplification Program followed by the Corporate Law Economic Reform Program. While both of the programs lead to some good corporate law outcomes, the interests of Australian business and the Australian community are not necessarily served by having frequent corporate law amendments.

2.4 Possible reforms

The AICD urges that the following reforms be undertaken:

- **Ensure Uniform Business Laws** - The Commonwealth taking a leadership role in seeking the co-operation of the States in achieving uniform business laws. Where the Commonwealth can achieve this on its own, it should do so and to the extent to which it is not constitutionally able to do so, it should use every power at its disposal to encourage the States to step into line.

- **Establish National Independent Drafting Agency** - A key aspect of achieving uniformity across State and Commonwealth laws is to centralise the drafting of laws in one national independent drafting agency. Doing this will at least overcome the numerous drafting and stylistic difference between the different jurisdictions.

- **Adopt Consistent Derivative Liability Provisions** - The Commonwealth should do everything within its power to bring about reform of derivative liability provisions in Commonwealth and State statutes in a manner consistent with CAMAC's Discussion Paper on the subject dated May 2005.

- **Soft Regulation** - The AICD urges the Commonwealth to address a range of soft regulation issues, including:

  - encouraging regulators to understand business better;

  - achieving greater consultation between regulators and business;

  - encouraging regulators to consider the cost to business of their actions;

  - encouraging co-operation between regulators and business in a range of fields; and

  - encouraging regulators to conform to the conclusions found in clause 4.4 of the Report of the Commonwealth Interdepartmental Committee on Quasi-regulation.

- **Reform the Regulatory Reform Process** - The whole process for regulatory reform should be reconsidered. AICD and the BCA made a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs on this issue in September 1992. A copy of that submission can be made available on request. By way of example:

  - on each occasion before a new regulation is adopted, existing laws should be examined to see if they already cover the field adequately;

  - a reasonable period, for example three months, should be allowed for public consultation;

- perhaps in some cases, a representative business body could be offered the opportunity to prepare a first draft of new regulations;

- the use of sunset clauses should be encouraged or alternatively the process in some overseas jurisdictions where a new regulation can only be introduced at the expense of an old one being repealed.

- **Establish Authority to Oversee new Regulations** - To manage the implementation of the reform process, consideration should be given to the establishment of a new independent authority which oversees how other government departments introduce new regulations.

- **Single Commencement Date for New Laws** - Perhaps some consideration can also be given to other minor measures which might assist business with the adoption of new regulations, for example having a single annual commencement date for new business laws so that businesses are not constantly having to change their systems to accommodate new laws throughout the year.

2.5 Specific Issues

We have also prepared and attach as Annexure 'A' to our submission a range of specific areas where we believe that 'red tape' impedes the smooth and economic operation of business which the Taskforce may wish to consider.

3. Conclusion

The AICD supports the work of the Taskforce and believes that there is considerable ‘red tape’ or over regulation which is impeding the efficient conduct of business in Australia.

However, we do note that numerous previous government enquiries into regulation have failed to stop the continual tide of new regulation or to put in place procedures which will ensure that any adverse impacts on business are minimised.

Further, the very short period allowed for consultation seems to be further evidence of one of the problems we have identified, namely very poor consultation with business prior to introduction of new regulation.

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ANNEXURE A

- Overlap between ASX and APRA's corporate governance requirements for listed financial services companies.

- The need for companies to have both ACNs and ABNs.

- The keeping of separate company and business name registers.

- The complex web of rules governing the issue of shares to employees, including tax laws, ASIC policy and ASX requirements.

- Many ASIC forms are unnecessarily complex (especially Form 603, Substantial Shareholders and Form 484, Change to Company Directors).

- The provisions of the *Corporations Act* in relation to share buy-backs, related parties and financial assistance which require the giving of notice to ASIC before the holding of a meeting are time consuming and often unnecessary, especially in the case of a group company.

- *Corporations Act* section 251A(3) - In 1998 the section wording was amended so that a company must ensure that minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed. The requirement is simply an additional administrative step that adds no value to the process of passing or recording a written resolution and is acknowledged not to have any practical benefit.

- Different State based Payroll Tax Regimes - The different rules in each State/Territory for levying payroll tax on employee wages should be made uniform. Businesses that operate nationally have to contend with eight different regimes and components of remuneration paid in one State may be treated differently in another State.

- Promoter Penalties - Under this proposal, individuals who promote tax schemes will be exposed to a penalty of at least $550,000. Although the policy was initially thought to have been formulated in the context of consumer protection it has now developed into a policy of business regulation. The proposed legislation (Exposure Draft Bill "Framework to Deter Promotion of Tax Exploitation Schemes" released on 10 August 2005) is not confined to retail investment products but extends to business-to-business transactions. The range of individuals potentially exposed to penalty is not only those involved in marketing the transaction but could extend to anyone in an organisation involved in the development or approval of the transaction, including directors. To mitigate this risk there will be an incentive to seek rulings from the ATO which will be time consuming, expensive and will delay business transactions.

- Occupational Health & Safety - Under Occupational Health and Safety (OHS) law, directors and managers face significant personal liability. If a corporation breaches an OHS law, its directors and managers are presumed to have personally breached the Act as well. However, the prosecution is not required to produce evidence that the directors or managers were involved in a breach of the law or that they were actually involved in the breach of the law. Directors and managers can be exposed to substantial fines of up to $82,500, or imprisonment of up to 5 years. Penalties of up to $1.65 million or 5 years in prison can be applied in respect of a conviction for industrial manslaughter.

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