20 March 2012

By email: RIAreview@finance.gov.au

Secretariat
Review of Regulatory Impact Assessment
Minter Ellison Building
25 National Circuit
FORREST ACT 2603

Dear Sir or Madam

Review of the Regulatory Impact Assessment process

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Government's review of the Regulatory Impact Assessment Process.

In summary, this submission argues that the RIA process needs to provide significantly more guidance for agencies to assess less tangible consumer detriment and the benefits of regulation, and so produce regulation which is more likely to be efficient and effective. Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

We also operate MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

Assessing consumer benefits and costs through the RIA process

The purpose of regulation is ultimately to create or increase benefit for the community. In our understanding, the purpose of the RIA process is to measure that likely benefit and weigh it

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against the costs that regulation will create on business, governments and the community more broadly (including, for example on consumers).

This purpose is discussed in Principle 2 of the OECD's *Guiding Principles for Regulatory Quality and Performance* which refers to the need to assess and review the impact of proposed and existing regulations "to ensure they meet their objectives efficiently and effectively". Principle 2 requires that impact should be reviewed "from the point of view of those affected, rather than of the regulator" and the need to "minimise the aggregate regulatory burden... while also taking account of the benefits of regulation".

The Australian Government's Best Practice Regulation Handbook (**the Handbook**) reflects Principle 2 by requiring agencies to consider the benefits of proposed regulation as well as the costs,[1] and requiring consideration of impact on consumers as well as business.[2] The Handbook is also explicit that all impacts, not only those that are easily quantified, need to be assessed.[3]

We approve of these aims. However, we are concerned that the RIA process tends to focus more heavily on the costs regulation will create for business than on the less tangible benefits that regulation will provide or the cost to consumers or other sectors of the status quo. This is because the benefits of regulation (or the detriment to consumers of retaining the status quo) are very difficult to quantify, but costs to business are quantified relatively easily. In our experience this means that consumer benefits and costs are much less likely to be properly assessed through the RIA process and thereby carry less persuasive weight than costs.

The outcome of this detriment focus is that the RIA process is less able to judge if proposed regulation will do what it is designed to do—that is, create a particular benefit. It also brings the serious risk that where a range of regulatory options are available the system is likely to prefer solutions that impose lesser costs on business with insufficient focus (or capacity to judge) the likely effectiveness of the full range of options. It is only by counting the range of costs and benefits that true assessment can be made of whether net benefit arises.

A generally recognised example of this problem is the product disclosure regime in financial services introduced under CLERP6. The disclosure option whilst significantly less costly to business than other regulatory options considered, largely failed to meet its objectives in improving consumer decision making, thus imposing costs with little to no benefit on the part of the targets of the regulation.

It is relatively easy for businesses to assess and monetise what additional paper burden or hours of labour will result from new regulation. However assessing the benefits of the change (for example, improved competition, better trader conduct) or the detriment of maintaining the status quo (poor products and services, diffuse and relatively small financial losses, time lost and frustration caused by disputes) is highly complex.

Even apparently clear measures of consumer detriment like the number of consumer complaints made are not always a useful guide. In 2006, Consumer Affairs Victoria (**CAV**) reported that

[1] Paragraph 3.48.
[2] Paragraphs 3.37-3.39
[3] Paragraph 3.55.

approximately 4 per cent of revealed consumer detriment is reported to it and smaller percentages are reported to other agencies, such as ombudsman.[4] There are many reasons for this, but the chief cause is that people are unaware of their rights and protections under the law. Even if they are aware of their rights, they do not know where to go for help or that free or affordable help even exists.

The difference in the number of complaints before and after regulation is implemented can also fail to give a good indication of whether regulation is working. For instance, a licensing regime such as that imposed on credit providers by the *National Consumer Credit Protection Act 2009* (Cth) would be expected to improve trader conduct, thereby reducing consumer disputes and the number of complaints. However, the NCCP Act licensing regime has increased complaints to external dispute resolution schemes, by requiring all licensees to be a member of a scheme and to inform consumers of how to complain. In our view, the value of the Handbook is limited because that it fails to explain why measuring consumer detriment is complex or provide measurement tools for agencies to use.

Advice provided by the handbook is also lacking in its discussion of the effects regulation may have on competition. The 'Competition Assessment' on page 43 of the Handbook includes:

> If the answer to any of the questions below is 'yes', then this indicates that an option may restrict competition.
>
> - Would the regulatory proposal restrict or reduce the number and range of businesses in an industry? Would it, for example:
>   - change the ability of businesses to provide a good or service?
>   - change the requirement for a licence, permit or authorisation process as a condition of operation?
>   - affect the ability of some types of firms to participate in public procurement?
>   - significantly alter costs of entry to, or exit from, an industry?
>   - change geographic barriers for businesses?
>
> - Would the regulatory proposal restrict or reduce the ability of businesses to compete? Would it, for example:
>   - control or substantially influence the price at which a good or service is sold?
>   - alter the ability of businesses to advertise or market their products?
>   - set significantly different standards for product/service quality?
>   - significantly alter the competitiveness of some industry sectors?

To assist agencies to properly assess the impact of regulations, the Handbook needs to complement this discussion by noting that these restrictions on competition may actually be desirable in some circumstances. For example:

- limiting market entry may be desirable if it prevents entry by firms who do not have capacity to meet legal and ethical responsibilities, or firms that have been engaging in conduct which is misleading or otherwise harmful to consumers. Restricting entry to these

[4] Consumer Affairs Victoria, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, October 2006, available at: http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/cav_report_consumer_detriment_10.pdf.

firms will actually benefit competition, as they will not be diverting business from responsible traders;

- limiting the ability of businesses to provide goods and services will be desirable where it has the effect of restricting sale of products which are harmful;
- increasing the prices of goods or services (perhaps because of added costs of licensing or monitoring) will be beneficial if regulation reduces consumer detriment and the likelihood of disputes.

The Handbook would also benefit from acknowledgment of, and questions, directed to illuminate, the role the demand side (i.e. consumers) play in the competitiveness of a particular market. For example, questions could usefully be directed to assess whether a regulatory proposal:

- enhances or inhibits a consumers ability to switch providers if dissatisfied;
- enhances or focuses information available in the marketplace;
- enhances consumer confidence and thereby market participation;
- promotes informed choice.

OECD Consumer Policy Toolkit

We recommend that the Handbook should be amended to include more guidance on assessing the less tangible aspects of consumer detriment and the benefits of regulation. We suggest this kind of guidance could be based on the OECD's Consumer Policy Toolkit[5] and Treasury's companion to the toolkit.[6]

Parts of the toolkit which may be of use include:

- a checklist of possible sources of consumer problems including misconduct by firms, information issues, behavioural issues (such as cognitive biases) and regulatory failures;[7]
- a discussion of types of financial and non financial consumer detriment;[8]
- tips on detecting signs of possible consumer detriment;[9]
- what can make a consumer disadvantaged or vulnerable, and designing policy responses to the needs of those consumers;[10]
- dealing with costs and benefits that are difficult to value.[11]

Some alternative measures of consumer benefits

Consumer detriment surveys

As noted above, CAV has undertaken research that assesses the various costs that can be incurred by consumers in the marketplace. CAV's report, *Consumer detriment in Victoria: A survey of its nature, costs and implications*, sets out some approaches to measuring consumer

[5] The toolkit can be accessed here:
http://www.oecd.org/document/34/0,3746,en_2649_34267_44074466_1_1_1_1,00.html
[6] *Consumer Policy in Australia: A Companion to the OECD Consumer Policy Toolkit*
http://www.consumerlaw.gov.au/content/consumer_policy/downloads/Companion_to_OECD_Toolkit.pdf
[7] Page 116, box 5.1.
[8] Pages 54-55. This is also discussed in the Treasury's companion document at pages 20-21.
[9] Page 57.
[10] Pages 55-56.
[11] Page 122.

detriment that are useful for developing a broader methodology for assessing the impact of regulatory change.

CAV defines "consumer detriment" with reference to the range of effects on consumers when goods and services do not meet their expectations. A broad range of effects, both financial and emotional, tangible and less tangible are considered.[12] CAV used the following definition:

> Consumer detriment (to the individual consumer and/or society as a whole) can constitute: satisfaction (utility) less than was reasonably expected when a purchase was made, whether revealed or not; and dissatisfaction due to the inability to make desired purchases, because of missing markets, non-credible claims and/ or physical disadvantage.[13]

A survey was done to measure the level of consumer detriment in the preceding 12 months. The survey estimated that the total cost of consumer detriment in Victoria in the 12 months to March 2006 was $3.15 billion, corresponding to approximately 1.5 per cent of gross state product. Estimates were based on the costs of repairing and replacing items; the costs of following up problems and resolving them; and the costs of personal time in resolving problems.

CAV also assessed how problems in markets can affect consumers emotionally by causing annoyance, frustration, stress and disappointment.[14] The research found that these kinds of costs contribute to consumer detriment. As these are more difficult to measure using traditional empirical models than costs which can be measured in terms of financial indicators, they have traditionally been excluded from analyses of market intervention. However, given consumer benefit is the end goal of competitive markets and such exclusions are inappropriate.

The Australian Government, through the Australian Consumer Survey 2011, has begun to develop a similar survey which might be used to measure benefits and detriment.

Consumer Impact Statements

We see victim-impact statements in the criminal law and environmental impact-statements in the environment protection context. Similarly, consumer-impact statements could be developed as an extra tool to measure the costs and benefits of regulations. The contents of these would need to be explored more fully; however the following list indicates the types of issues that they would need to cover to assess the costs and benefits to consumers of regulatory change:

- How will the regulation affect the prices of goods and services in the market?
- How will access to services, and the choices available to consumers, be affected?
- Will the regulation impose any additional switching costs on consumer?
- How will the regulation affect disadvantaged and vulnerable consumers? What structures are proposed to protect these consumers?
- How will the legislation affect consumers' ability to follow up problems and resolve them?

[12] Consumer Affairs Victoria. 2006. *Consumer detriment in Victoria: A survey of its nature, costs and implications*. Research paper no. 10, p.iii.
[13] As above, p.iv.
[14] As above, p.1.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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