



14 May 2012

By email: ria.benchmarking@pc.gov.au

RIA Benchmarking Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Sir or Madam

Issues Paper: Regulatory Impact Analysis - Benchmarking

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Productivity Commission's Issues Paper *Regulatory Impact Analysis: Benchmarking (the issues paper)*.

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 impact through the RIA process

Measuring benefits and costs

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

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

This purpose is reflected in RIA processes across Australia, which require impacts of proposed regulation to be assessed and that Regulatory Impact Statements demonstrate that the recommended option generate either a net benefit to the community or the greatest net benefit of all options considered.¹

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 on the cost to affected groups of retaining the status quo. This is because the benefits of regulation (or the detriment 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. This point is made well in the discussion of costs and benefits in the issues paper. For example, Box 1² identifies seven studies which have estimated the costs of regulation to business or governments in dollar terms, but only one which estimates benefits.

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.

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 approximately 4 per cent of revealed consumer detriment is reported to it and smaller percentages are reported to other agencies, such as ombudsman.³ 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.

¹ Issues paper, p 30.

² Issues paper, p 10.

³ 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](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/cav_report_consumer_detriment_10.pdf).

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 many RIA processes is limited because that it fails to explain why measuring consumer detriment is complex or provide measurement tools for agencies to use.

Quantitative evidence

At least part of the reason for the detriment focus by RIA is the apparent reliance on quantitative evidence. We agree that regulation should be based on robust evidence of a regulatory deficit and quantitative evidence will often be the best indicator of the extent of a problem. However, an unswerving demand for quantitative evidence can prevent an RIA properly assessing the extent of a problem, particularly if quantitative data is by nature more available to one side of the debate than the other.

Consumer Action has recently had discussions with Commonwealth officials on a reform for which a RIS is currently being developed. During previous consultations, Consumer Action and other organisations provided a number of case studies to demonstrate the consumer detriment that could be addressed by further regulation. We were told by officials that case studies were insufficient evidence because the Office of Best Practice Regulation (**OBPR**) need 'numbers'—that is, quantitative evidence of the benefits or costs to consumers of different options. While we understand why OPBR would want quantitative data, the reality is that consumer advocates (and all not-for-profit service providers) will necessarily be focused on providing advice and support to consumers and do not have the resources or opportunity to produce this kind of data (which may require, for example, comprehensive consumer surveys). Conversely, it is relatively easy for businesses to assess and monetise what additional paper burden or hours of labour will result from new regulation. Business associations will usually also have more resources available to conduct research if it does not already exist.

It appears to us to be rigid and bureaucratic to discount first hand evidence like case studies and instead require quantitative data that is difficult to provide. It is also an unbalanced approach—where regulatory change is opposed by industry (as it often is) favouring quantitative evidence may give greater weight to the industry evidence, limiting the robustness of the RIA and ultimately the effectiveness of the regulation. We believe the RIA process would be considerably improved by allowing officials to make best use of all evidence that is available rather than requiring them to favour some forms of evidence over others.

OECD Consumer Policy Toolkit

We recommend that Australian RIA processes should include 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 Toolkit⁴ and Treasury's companion to the toolkit.⁵

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;⁶
- a discussion of types of financial and non financial consumer detriment;⁷
- tips on detecting signs of possible consumer detriment;⁸
- what can make a consumer disadvantaged or vulnerable, and designing policy responses to the needs of those consumers;⁹
- dealing with costs and benefits that are difficult to value.¹⁰

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 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.¹¹ 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.¹²

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.

⁴ The toolkit can be accessed here:

http://www.oecd.org/document/34/0,3746,en_2649_34267_44074466_1_1_1_1,00.html

⁵ *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

⁶ Page 116, box 5.1.

⁷ Pages 54-55. This is also discussed in the Treasury's companion document at pages 20-21.

⁸ Page 57.

⁹ Pages 55-56.

¹⁰ Page 122.

¹¹ Consumer Affairs Victoria. 2006. *Consumer detriment in Victoria: A survey of its nature, costs and implications*. Research paper no. 10, p.iii.

¹² As above, p.iv.

CAV also assessed how problems in markets can affect consumers emotionally by causing annoyance, frustration, stress and disappointment.¹³ 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?

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

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Director, Policy and Campaigns



David Leermakers
Senior Policy Officer

¹³ As above, p.1.