Office of Regulation Review (ORR) Submission regarding the Attorney General's Discussion Paper on "Privacy protection in the private sector"

The Office of Regulation Review (ORR) — located within the Industry (Productivity) Commission — provides advice on the Commonwealth Government's regulation review policy: it reviews new regulations; and monitors the progress and participates in programs for the reform of existing regulations. The ORR also advises Cabinet on regulatory proposals affecting business, liaises with departments and agencies in the development of regulations, and comments publicly on regulatory issues.

The proposal to extend the scope of privacy protection would affect a very wide range of businesses. Because the direct marketing industry would be particularly affected, this submission focuses on that industry. However, the general points made have broader application.

This submission by the ORR addresses three matters:

- the importance of using a Regulation Impact Statement (RIS) to justify regulations that impact upon the direct marketing industry;
- avoiding unnecessary regulatory overlap on the direct marketing industry; and
- ensuring that regulations which impact upon business are created after adequate consultation with stakeholders.

1 The importance of using RISs to justify regulations that impact upon the direct marketing industry

RIS type guidelines are currently being used by the Commonwealth government to promote regulation review through a variety of processes:

- the terms of reference for all legislative reviews under the Competition Principles Agreement must include the principal elements of a RIS;
- all Cabinet submissions involving new or amended business legislation must be accompanied by either a RIS in the form of an attachment or a statement that a waiver has been given by the ORR;
- whilst the guidelines for preparing RISs have to date applied only when agencies seek Cabinet approval for new or amended regulations, it is anticipated that their essential elements will apply more broadly in the future. The *Legislative Instruments Bill 1996* provides for similar tests — to be certified by the ORR — which agencies would have to apply to a wide range of legislation including subordinate regulation; and
- under the *Principles and Guidelines for National Standard Setting and Regulatory Action*, adopted by the Council of Australian Governments in

April 1995, Ministerial Councils and National Standard Setting Bodies must now prepare a RIS for new standards.

RISs improve decision-making by regulators

The use of RISs in the above processes is designed to improve the quality of existing and new regulations, by ensuring that consistent and rigorous regulation making and review processes are implemented by institutions making regulations.

RIS guidelines ensure that before a proposed regulation is adopted, the problem to be addressed is properly specified, and that its impact and associated costs and benefits are considered. In addition, it provides a framework within which to explore alternative methods of achieving the objective for which the regulation was designed.

Changes to the Privacy Act will need a RIS attached.

The proposed changes to the *Privacy Act 1988* are likely to require a submission to Cabinet to amend the primary legislation. The Cabinet Handbook requires that such proposals — which impact upon business — be referred "at the earliest opportunity to the ORR", and must be accompanied by a RIS. To assist this process, and to improve decision-making, the ORR believes this review should adopt the RIS framework from the outset.

A copy of the Commonwealth's RIS guidelines (attached) will assist the Attorney General's Department in adopting a RIS framework for its proposal to extend Information Protection Principles (IPPs) to the private sector. The ORR — consistent with its role in regulation review and reform — is willing to provide assistance and advice in preparing this RIS.

The costs and benefits of amending the Privacy Act

The RIS approach includes assessing the costs and benefits of amending the *Privacy Act* as well as examining the efficacy of alternative regulatory and non-regulatory methods of achieving the desired privacy outcome. For example, the current proposal will impose costs upon businesses and consumers. Costs to business could include:

- an increase in the regulatory compliance burden on business; and
- a decrease in revenue from restrictions on business (ie. direct marketing activities etc).

The costs to consumers could include:

- less information about products; and
- less choice from fewer products being marketed.

These costs should be balanced against the benefits which enhanced privacy protection may provide to the community.

Alternatives to amending the Privacy Act

Possible alternatives to extending the application of the *Privacy Act* to direct marketers could include:

- *using existing laws* — such as the *Trade Practices Act 1974* and the various *Fair Trading Acts* in each state to extend privacy regulation to the private sector;
- *negative licensing methods* — whereby direct marketers are free to solicit and disseminate information, but if they fail to exercise due diligence, they will then be required to comply with minimum licence requirements, which may embody the IPPs;
- *self regulation and enforced self regulation* — which enables the direct marketing industry to develop its own Codes of Practice. Under the current proposal, power to issue Codes resides with the Privacy Commissioner;
- *information strategies* — to alert consumers to the potential implications of divulging information to direct marketers; and
- *the viability of using "opt out" principles* as opposed to the "opt in" principles in IPPs 10 and 11.

The ability of regulatory and non regulatory mechanisms to mitigate particular market failures is further discussed in the ORR's Annual Report, *Regulation and Its Review 1994–95*, pp. 11-28 (copy enclosed).

2 Avoiding unnecessary regulatory overlap on the direct marketing industry

To achieve an optimal regulatory environment for the direct marketing industry, it is important to avoid unnecessary regulatory overlap. There appears to be scope for unnecessary duplication in regulations designed to protect privacy.

For example, direct marketers are regulated by the *Trade Practices Act 1974* and the *Fair Trading Acts* in each state. In addition, the ORR notes that the Australian Competition and Consumer Commission (ACCC) is proposing a "voluntary" Code on distance selling. As many direct marketers also engage in distance selling, there is a potential for regulatory overlap between the Discussion Paper's co-regulatory approach of combining IPPs and Codes of Practice issued by the Privacy Commissioner, and the ACCC's voluntary Code.

3 Regulations which impact on business should be formed after consultation with stakeholders

Independent oversight is necessary to ensure adequate consultation occurs in the development of Codes of Practice.

The Discussion Paper outlines consultation procedures which the Privacy Commissioner must follow in developing Codes of Practice. However, there

appears to be no provision for independent oversight to ensure compliance with these procedures. The ORR considers that independent oversight is necessary to ensure that the Commissioner engages in the appropriate level of consultation when developing Codes.

Furthermore, the ORR notes that in "urgent" cases, stakeholders need not be consulted prior to a Code being issued. This proposal should clearly state the circumstances in which an urgent need for a Code of Practice may arise, rather than leaving it to the discretion of the Privacy Commissioner.

Alternatively, these issues could be resolved —in part — by explicit reference to the provisions of the Legislative Instruments Bill 1996. As Codes of Practice will be of a legislative character, having a significant impact upon business (ie. direct marketers), they are likely to come under the auspices of Part 3 of the Bill. Once the Bill is proclaimed, their formulation will require the preparation of a "legislative instruments proposal" and consultation with stakeholders.

Guidelines should be subject to a RIS analysis before promulgation

While Codes of Practice will need to comply with the Legislative Instruments Bill, "guidelines" issued by the Privacy Commissioner are likely to be exempt from Part 3 requirements, as they will not be of a legislative character.

Although the guidelines will not be mandatory, the extensive powers of the Commissioner to investigate compliance with them and the ensuing costs to businesses, will mean that they are not strictly voluntary. Indeed, the guidelines may become quasi regulations.

The Small Business Deregulation Task Force's report to the Prime Minister defines quasi regulations as:

> ...rules or instruments for which there is a reasonable expectation of compliance but which do not have the full force of law.[1]

According to Recommendation 57 of that report:

> ...proposals to introduce quasi-regulations [should] be subject to cost benefit analysis, for instance in the form of a regulation impact statement, and there be independent review processes built into quasi regulations to ensure they remain effective and efficient.

At present, only the Commissioner is able to issue guidelines, and consultation with industry does not necessarily have to occur. Furthermore, the Discussion Paper makes no provision for the review of guidelines in the future.

The Government is currently considering the recommendations of the Task Force. Nevertheless, the ORR considers that if guidelines are to be made for particular issues — such as telemarketing and optical surveillance — affected industry participants should be consulted, and alternative ways of achieving the goals of the guidelines ought to be explored. In particular, industry self-regulation should be considered where relevant, in line with Recommendation 61 of the Taskforce that:

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1 *Time for Business*, Report of the Small Business Deregulation Task Force, November, 1996.

> ...[g]overnments should consider industry self-regulation as one of the first regulatory options...

The introduction of the above processes will improve the quality of privacy regulations. They will help remove unnecessary regulatory burdens upon business, and will allow the costs of proposed guidelines to be judged against the benefits of improved privacy which they might provide.