REGULATORY IMPACT ANALYSIS: BENCHMARKING

SUBMISSION BY CONSTRUCTION MATERIALS PROCESSORS ASSOCIATION (CMPA)

14 MAY 2012

Contents

Executive Summary

This submission by the Construction Material Processors Association (CMPA) is provided to the study by the Productivity Commission of benchmarking the process of Regulatory Impact Analysis in Australia. The following is a summary of the key points in the submission in response to questions posed in the Commission's Issues Paper.

The CMPA has seen no evidence of the quality of regulation improving

Despite repeated, evidenced-based calls by the Association for legislative reform of unsustainably costly controls in Victoria of the restrictions contained in the *Extractive Industries Development Act* 1995, they were continued with the passing of replacement legislation in 2009.

Since its inception in 2000 the Association cannot point to any element of regulation over the industry that has been improved, reduced or influenced by the RIS process. Typically the RIS provides an argument for greater regulation rather than coming from a position where regulation is the intervention, and therefore needs to be justified.

The scope of RIA process should be directed to the development of policy at the broadest level rather than being confined to subordinate legislation

All policy development requires a rigorous assessment. 'Policy' must include all actions taken by Governments that impact on the economy. This includes proposals for major capital investments, adoption of Codes of Practice, mandatory guidelines, legislative and regulatory proposals and other instruments. The RIA process should apply to local government as well as State and Federal Government.

Exemptions should not be a feature of policy development. Clearly the process of policy development will be more or less involved depending on the type of policy being developed. A policy with clear objectives and established norms will be relatively straightforward compared with a policy that is not complex and breaks new ground.

The costs of the RIS process should not be considered as separate from policy or regulation-making costs

RIS costs are a legitimate cost of the policy development process – if the analysis is performed appropriately. If undertaken properly the RIA process will lead to better policy, with less overall unintended costs to the business community and in government administration. The costs of the RIA process will therefore be minute when compared to the overall cost savings.

Government agency heads should be held personally accountable for policy developments and required to publicly explain the rationale used when the RIA assessment process is not undertaken

The incentive-based approach used effectively in the occupational health and safety legislation across the country should be adopted for all policy development (which includes development of legislation and regulation).

The more guidelines and parameters applied to the RIA process and when it should be adopted, the more the analysis will be considered an administrative element of the process rather than a central part of policy development. Any policy should be developed with the analysis inherent in the RIA.

The CMPA has seen no evidence that the RIA process has been effectively integrated into policy development

Integration may have occurred in the process of regulation making however, this is too late in the process to be of any real value.

Only with the commitment of Governments and Parliaments to balance social and environmental objectives with the ability of the economy to pay (through a competitive business sector) will effective outcomes in policy development be achieved. Clearly, regulatory gate-keeping arrangements have failed and in themselves, act to legitimise their inadequacies while imposing additional costs.

The argument for a lack of skills in Government agencies responsible for regulatory administration is difficult to accept especially when the same agencies obviously employ policy development staff

The Association considers a strict regime of incentive-based employment conditions must be in place to ensure policy development skills are in place and utilised.

As a general method of operation Government agencies should recruit individuals for policy development positions that have the requisite experience and skills needed for balanced policy development – these include the necessary expertise for the preparation of RIA. This cultural change simply needs a commitment by Government agencies to a more competitive economy. This commitment will naturally lead to an ethos that minimises government intervention in economic development.

The most prevalent weakness in RIS' reviewed by the Association is a general lack of identification of the costs associated with options for regulatory intervention

A far greater emphasis must be given to researching and assessing the impact costs of proposed regulation and other options on industry and the general community.

A corresponding weakness of the RIA process is the lack of quantification of the benefits of the options. Typically, benefits are expressed in only qualitative terms and are exaggerated. For example, new requirements for cultural heritage management plans (CHMP) required in Aboriginal heritage legislation were estimated in the relevant RIS to cost $20,462 each. In practice, the costs of preparing these plans range from $25,000 for a desktop plan to in excess of $300,000 for a comprehensive plan prepared by a consultant for a small operation. These costs do not include the proponent's time or the holding costs of stalling the project. The quality of the RIS and the oversight arrangements were clearly incompetent in this case.

The draft Model Work Health and Safety Regulations Mining and associated Draft Code of Practice for the Work Health and Safety Management Systems in Mining are a recent example where the national RIS process has failed

The draft Regulations and Code were promulgated for comment without the required RIS and the draft Model Regulations had been given in-principle endorsement by the Ministerial Council without assessment of the costs and benefits and impacts for industry.

In its submission on this matter the Association argued this was *blind policy development* that had *no regard for the drivers of the economy – business and industry*.

The Premier of Victoria recently released a supplementary report of the impact of the proposed national work health and safety laws in Victoria which revealed that Victorian businesses would face additional costs of more than $3.4billion over the next five years which would 'impact severely on the productivity of the State's small businesses'. These costs were to be expended without the corresponding value of benefits.

Clearly the current arrangements for independent scrutiny of compliance with RIA processes are inadequate

In most cases performance monitoring of the RIA processes in each jurisdiction involves a Government agency (eg Federal Office of Regulation Reform) overlooking the work of another Government agency. This is only partial 'independence'.

A more independent model, such as a Policy & Regulatory Advisory Council or board comprising representatives from business and industry, relevant consumer groups and relevant Government agencies should be adopted to advise on the performance of the RIA process in each jurisdiction.

The P&R Council would report to the relevant Ministerial Council annually on the performance of the RIA process. The Council would audit selected policy instruments/RIS' and advise on the adequacy of the process and rigour of its analysis. Where policy instruments/RIS' are found to be inadequate the relevant Minister would be advised with a recommendation to amend the instrument accordingly.

This approach should be developed for the broad scope of policy development including for legislative and regulatory instruments. The model should be used for both national and State/Territory jurisdictions so that savings can be achieved by dismantling the range of existing oversight bodies with the creation of one body.

Because of the conflict of interests that exist with regulators responsible for the preparation of the RIS, development of the content of the RIS could be split. That is, the Government regulating bodies proposing regulation should be charged with clearly identifying the problem and the social, economic or environmental objective. It could then be left for another arm of Government (maybe an economic development or treasury agency) to undertake the optioneering and cost benefit analysis. The two parts of the RIS can then be bought together and reviewed by the proposed P&R Council.

Consultation documents should be precise, targeted and not be issued unless they include some evidence of cost assessment

Often it appears the 'consultation' process is undertaken to merely 'tick the box' rather than used to gather informed input**.** Where cost information is being elicited, estimations of costings should be available of Government administration and enforcement while indicative estimations of potential industry costs can be made – certainly within categories of costs such as application and renewal of approval costs and record keeping.

Open-ended consultative documents that seek unsubstantiated wish lists from the community are of little value – most people want the best but when faced with the question about willingness to pay, will quickly reach a compromise solution they are prepared to pay for. Wish list documents also raise unrealistic expectations that, when not achieved result in aggrieved citizens. They can also ignite frivolous or vexatious submissions of complaint which have the potential to misguide or delay the process.

1. The Construction Material Processors Association (CMPA)

1.1 Introduction

The CMPA is an industry association representing a broad spectrum of those involved in construction material processing businesses engaged in the extracting, processing or otherwise working in hard rock, gravel, sand, masonry, clay, lime, soil, gypsum or recycling; industry consultants, industry suppliers and any industry worker. The Association was formed 12 years ago in response to burgeoning Government demands on the industry and a need to provide a single coherent voice to stand up to unjustified imposts.

The CMPA's membership is primarily small to medium sized businesses.

Extractive industries provide the raw materials for building and construction, vital to the State's development. The industry operates quarries that produce a range of hard rock, clay, sand and gravel products.

According to the statistics compiled by the Department of Primary Industries (DPI) as at 30 June 2010 there were 869 work authorities granted under the *Mineral Resources (Sustainable Development) Act* 2009 (MRD Act) in Victoria. Total production from these work authorities was approximately 46 million tonnes in that year (2009-10). The extraction is divided into hard rock and soft rock (70% sand and gravel). For the year ended 30 June 2010, 33 million tonnes (61% of the total extraction) of hard rock had been sold with 20 million tonnes of soft rock being sold (38% of the total). This mix of extraction type has remained relatively static over the last 10 years.

This submission is in response to the Issues Paper (March 2012), *Benchmarking Study of the Efficiency and Quality of Commonwealth, State and Territory and Council of Australian Governments Regulatory Impact Analysis Processes* being conducted by the Federal Productivity Commission. The submission draws on the experience of the Association's members dealing with the imposts of Government regulation over more than a decade of operations. These experiences are illustrated by the case studies, findings and recommendations of the Association's landmark report, *An Unsustainable Future (AUF)* which was submitted to the Victorian Government to help guide its deliberations in reviewing the industry's legislative controls. The report was also submitted to the Victorian Parliament's Environment and Natural Resources Committee for its *Inquiry into the Environmental Effects Statement Process in Victoria* in May 2010[1].

[1] A copy of the report, *An Unsustainable Future*, can be found at: http://www.parliament.vic.gov.au/images/stories/committees/enrc/environmental_effects/submissions/CMPA_Attachment_1.pdf

A follow-up report prepared by the Association, *In search of balanced regulation*, was submitted to the Victorian Parliament's Economic Development and Infrastructure Committee for its *Inquiry into Greenfields Mineral Exploration and Project Development in Victoria*.

The submission responds to key questions raised in the Issues Paper.

1.2 Regulatory Impact Analysis

The RIS process requires all proposals for new regulatory instruments to provide:

- A clear description of the problem(s) to be resolved. This should show the extent of the problem and quantify the scope and provide supporting data.
- A clear set of objective(s).
- Identification of viable options or alternative methods to achieve the objective.
- An assessment of the costs and benefits of each of the Options considered. This assessment will reveal the Option that best achieves the objectives at the least costs to the community including the business community. This should be the preferred Option.

The analysis must consider how the Options and in particular the preferred Option impacts on competition in the market. RISs prepared at the State/Territory level should consider how the objectives are dealt with in other jurisdictions and whether any mechanisms are in place at the national level that will impact on the consideration of how best to resolve the identified problems. The RIS is released for public consultation so that the options and the assessment of their costs and benefits can be tested for their rigour, accuracy and scope.

The dollar values used in the *AUF* report are in 2009 S's and have been retained unless specifically updated. In these cases an indication is provided.

2. Is there evidence that the quality of regulation is improving?

The extractive industry in Victoria is regulated by a range of legislative instruments but as an industry, it is specifically controlled by the *Mineral Resources (Sustainable Development) Act 2009* (MRSD Act). This legislation repealed the *Extractive Industries Development Act* 1995, (EID Act) and bought the industry under the same legislative cover as the mining sector.

The EID Act had replaced earlier extractive industry legislation that had been in place since the 1960's. The essential regulatory instrument, the Work Authority, the equivalent of a licence to operate, has been in place since the original legislation.

In response to increasing regulatory costs and barriers to entry and innovation, early in 2009 the CMPA undertook a detailed analysis of the costs of the Work Authority process. This was contained in a report, An *Unsustainable Future* (*AUF*). It was hoped this information would provide data for the Government's intended review of the EID Act.

The analysis, contained in the *AUF* report, identified for the first time the length of time and costs associated with the process prescribed in the EID Act. From the nine case studies examined it was found that:

- The time taken to obtain approval for a Work Authority (to enter the industry or amend an existing authority) ranged from 2-5 $^{3/4}$ years; and
- The costs of the approval process ranged from $10,000 to $5.1m for each application.

The Association's follow-up report, *In search of balanced regulation,* highlighted how the regulatory interventions contained in legislation covering the industry were choking investment and stifling new developments. For example, it was shown that:

- Native vegetation regulation has sterilised land from extractive operations pushing operations further away from the demand points and encouraging interstate and overseas sourcing of product;
- The costs of cultural heritage management plans (CHMP) had risen from an initial estimate of $4,000 -$8,000 to $25,000 for a desktop plan and up to $300,000 for a full consultant's plan for a small operation. These costs do not include the proponent's time nor the holding costs of stalling the project ;
- The bond system set up to protect the Government against unfunded rehabilitation of abandoned extractive sites, tied up $515.8m of the industry's funds over 11 years while the Government had the need to use only $18,000 (0.003%) of these funds on rehabilitation over the same period.

A summary of the findings and recommendations of the *In search of balanced regulation* report is contained in Appendix 1.

All these additional regulatory burdens impact on the cost of production and therefore on the unit cost per tonne of product. In addition, these costs create a barrier to entry for new entrants and as a result they centralise production in established firms. They also apply particular pressures on small operations that do not have the scale economies to effectively cope with them. Small businesses are an essential component of the industry structure as they keep competition alive and drive down costs.

In spite of the industry's clear call for legislative reform the MRSD Act continued the restrictions contained in the EID Act, notwithstanding the new Act was heralded as a major reform by the Government and the regulator.

Is their evidence of the quality of regulation improving? The CMPA has seen none!

In the 12 years since its inception the Association has reviewed many RIS's prepared on various regulatory controls over the industry. In that time the Association cannot point to any element of regulation over the industry that has been improved, reduced or influenced by the RIS process. Typically the RIS provides an argument for greater regulation rather than coming from a position where regulation is the intervention, and therefore needs to be justified. Arguably, this is founded in the contemporary Australian culture that has diminished personal responsibility to the extent that regulation is now seemed necessary for what was once common sense. Unfortunately this fosters a litigious culture, which uses resources in a non-productive way and as a consequence erodes economic potential.

The regulation of 'common sense' that diminishes personal liability not only incites litigation it adds to the cost of administering and enforcing regulation. To arrest this downward spiral everyone musty share responsibility.

3. What is the appropriate scope of RIA requirements?

Regulations supporting the *Mineral Resources (Sustainable Development) Act 2009* were introduced in 2009. A RIS was promulgated at the time to *'fulfil the requirements of the Subordinate Legislation Act 1994 and to facilitate public consultation on the proposed Mineral Resources (Sustainable Development) (Extractive Industries) Regulations 2009*.' As a telling acknowledgment of its inadequacy, the RIS, noting that it was constrained by various Government decisions, stated:

> *Certain constraints apply to this RIS. Changes to legislation have been already passed by Parliament and the legislation, in certain instances, specifically requires Regulations to detail legal requirements and processes in relation to extractive industries. Government decisions have also been made and actioned regarding the review of royalties and fees. Consequently, the options considered in this RIS are constrained by the following:*
>
> - *The Government has determined that royalty rates for extractive industries will not be altered at this time. Royalties are being considered in a broader review of the MRSDA which is currently underway. This RIS will not consider changes to royalties, even though it is a feasible option.*
> - *The Government has determined that fees for extractive industries will not be altered at this time. The issue of fees and cost recovery will be considered as part of the MRSDA review. This RIS will not consider full cost recovery at this time, even though it is a feasible option.*
> - *Section 77G (3) (a) of the MRSDA will require all applicants to include information, as prescribed in the Regulations, in work plans. Regulations are required to detail the information that must be provided.*
> - *Section 77G (3) (c) of the MRSDA will require that all work plan applications include a community engagement plan prepared in accordance with the Regulations and any guidelines issued by the Minister. Regulations are required to detail the information that must be provided. Community engagement plan requirements will apply to all new work authority applications after 1 January 2010. For existing work authorities, a community engagement plan need only be submitted where any variation of a work plan or work authority affects the community.*
> - *Section 77KA of the MRSDA will require all quarries to provide reports to DPI in relation to 'reportable events' as prescribed in the Regulations. Regulations are required to detail the events that must be reported.*
> - *Under section 77KB of the MRSDA, new requirements will apply to any quarry that is declared to have geotechnical or hydro geological factors within the quarry that pose a risk to public safety, the environment or infrastructure.*

- *Declared quarries must include the prescribed quarry stability requirements and processes in the quarry's work plan within 60 days of declaration. No quarries will be declared initially and quarries will only be declared in exceptional circumstances*[2].

The constraints set out in the RIS reveal serious flaws in the scope of the RIA process and how it is not considered part of the policy development phase but merely a necessary hurdle in the process to introduce regulations. In fact, the RIS in this case was used as a vehicle to promulgate the new Regulations. This education process was inaccurately referred to as 'consultation' – an all too common ploy by bureaucracies when implementing change.

Another illustration where the scope of the RIA process is too restricted is where non-regulatory instruments are used to introduce additional mandatory requirements. Box 1 provides an example of a non-regulatory instrument that imposes significant costs for industry. The offsetting requirements were introduced by way of a policy determination between two Government agencies without an accompanying RIS as part of the regulation of native vegetation. Offsetting refers to the requirement to purchase 5 hectares of land to offset against the use of one hectare of native vegetation land.

For the RIA process to be of any real value it must be directed to the development of policy at the broadest level rather than being confined to subordinate legislation. All policy development requires a rigorous assessment process. 'Policy' must include all actions taken by Governments that impact on the economy. This will include proposals for major capital investments, Codes of Practice, mandatory guidelines, legislative and regulatory proposals and other instruments.

The scope of RIA is currently limited to State and Federal Governments. There is a lack of regulatory impact analysis undertaken for local government interventions such as by-laws and other policy instruments. Development controls, for example, allow councils to intervene in the market by requiring an extensive range of conditions on approvals; each imposing costs on the proponent. These costs represent barriers to entry and, in turn act to undermine investment and competition. **The RIA process should apply to local government as well as State and Federal government**.

Exemptions are a means to avert the usual governance arrangements. They are in place to ensure unnecessary administration is avoided. However, **exemptions should not be a feature of policy development**. The process of policy development is more or less complex depending on the type of policy being developed. A policy with clear objectives and established norms will be relatively straightforward compared with a policy that is complex and breaks new ground. Therefore exemptions should not apply.

[2] http://www.dpi.vic.gov.au/earth-resources/about-earth-resources/legislation-and-regulation/regulations/mineral-resources-regulations-2009/executive-summary

Box 1

Native Vegetation Controls - Offsetting

Victoria's Native Vegetation Management – A Framework for Action (the Framework) 'establishes the strategic direction for the protection, enhancement and revegetation of native vegetation across the State'. Under Planning Scheme Amendment 52.17, the extractive industry was initially exempted from the application of the Framework because it was recognised the industry has a minimal environmental footprint. However, following establishment of a Memorandum of Understanding (MOU) in 2007 between the Department of Primary Industries (DPI) and Department of Sustainability and Environment (DSE) the industry became part of the Work Authority and Work Plan approvals process under the EID Act. This was done without a RIS or with industry consultation.

The Framework adopts a principle that there should be a net gain in the extent/quality of native vegetation throughout the State, whereby there is: *A reversal, across the whole landscape, of the long-term decline in the extent and quality of native vegetation, leading to a Net Gain* [3] One of the measures adopted to ameliorate negative effects on the environment and ecology is the concept of ***offsetting***. This requires that as a rule of thumb for compensating like with like, for every one hectare of native vegetation removed 5 hectares must be provided and secured in perpetuity. Potential offset sites require a habitat hectare assessment to determine if they can generate the required habitat hectares.

The experience of the extractive industry is that offsetting is increasingly being applied by regulators requiring work authority holders and proponents to purchase land (referred to as an offset site) to militate against perceived impacts.

In its report on native vegetation the VCEC estimated the average cost of purchasing 'habitat hectares' is $100,000 per habitat hectare. The VCEC also noted:
Overwhelmingly, however, participants considered that the rules for calculating offsets impose excessive administrative and compliance costs, and time delays on Victorian businesses[4].
Notwithstanding that the practice of offsetting imposes significant costs to industry it was not subject to the RIA process.

Another insidious outcome of this practice is that there is no brake on the spiralling costs. Government agencies themselves (eg VicRoads) must also purchase land as offsets when they purchase land for road-making purposes. Because they are less conscious of costs they often accept higher values for offset land and by so doing raise the overall benchmark of offset land. The value of offset land can be ridiculously high compared with some land, eg regional farm land, which may be valued at $2500 per hectare.

3 http://www.dse.vic.gov.au/DSE/nrenlwm.nsf/LinkView/99ADB544789FE7D4CA2571270014671E49A37B2E66E4FD5E4A256DEA00250A3B

4 Victorian Competition and Efficiency Commission, A Sustainable Future for Victoria, Getting Environmental Regulation Right, Draft Final Report, March 2009, pages 148-155.
http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/EnvironmentInquiryDraftReport-FullReportVer2/$File/Environment%20Inquiry%20Draft%20Report%20-%20Full%20Report%20Ver2.pdf

4. How can the cost effectiveness of RIA be improved?

The Issues Paper discusses the apparently high costs associated with the RIA process and seeks comments on how cost effectiveness can be improved.

The Association considers the costs of the RIS process should not be separated from the policy or regulation-making costs. They are intricate and legitimate costs of the process – if performed appropriately. Where the RIA is used as a superficial or administrative part of the process the concern about cost is understandable. But as has been argued above, the analysis should not be just part of the process, but be central to development of the policy or regulation. If undertaken properly the RIA process will lead to better policy, with less overall unintended costs to business, the general community and in government administration. The costs therefore of the RIA process will be relatively small compared to these overall benefits.

Improvements to the RIA process should commence with Government agency heads being held personally responsible for proposals for policy development. This would provide an incentive to formulate better proposals and ultimately involve better decisions. The occupational health and safety legislation across the country is testament to this incentive-based approach. The same approach must be adopted for policy development (which, as argued, includes development of legislation and regulation). The agency head must be required to publicly explain the rationale used when the assessment is not undertaken.

The Association believes over-engineering the RIA process adds to costs. For example, the more guidelines and parameters that are applied to the RIA process and when it should be adopted, the more potential for the analysis to be considered an administrative element of the process rather than a central part of policy development. Any policy should be developed with the analysis inherent in the RIA.

5. What evidence is there that RIA has been effectively integrated into policy-making processes?

As has been argued so far in this submission the CMPA has seen no evidence that the RIA process has been effectively integrated into policy development. On the contrary it appears the process has been subsumed into the process of regulation making. This is too late in the process to be of any value. The discussion in section 3 of this submission illustrates this point.

Government interference is often a key problem in the RIA process. So often Ministers seem to decide on a particular policy without the appropriate development process having been followed and the bureaucracy is left to devise necessary justification (although it would not surprise the Association if the more shrewd Government regulatory advisers provide Ministers with sufficient information about a particular matter to entice the Minister into deciding on a policy).

The announcement of social, environmental or even economic policy is newsworthy and Ministers, with the best of intentions, get caught up in the frenzy of doorstop grabs, competition for relevance in the media and of course, the short term tenure of their appointments (ie 3-4 year electoral life). Faced with these constraints it is hardly surprising that a Minister who lacks commitment to the rigours of effective policy development will from time to time succumb to instantaneous policy development to achieve short-term personal outcomes.

Governments and their respective Parliaments need a strong commitment to balancing social and environmental objectives with the ability of the economy to pay (through a competitive business sector). This is best achieved through a rigorous assessment process in policy development underpinning these objectives.

6. Do agencies responsible for preparing RISs generally have the necessary skills and expertise?

Typically agencies the Association deals with have the preparation of RIS' undertaken by contractors because it is contended either the agency does not have the necessary skills or does not have appropriate resources available to undertake the work. The argument for a lack of skills is difficult to accept especially when the same agencies clearly employ policy development staff.

As a standard operating procedure the Association considers Government agencies should recruit individuals for policy development positions who possess the requisite experience and skills needed for policy development – these include the necessary expertise for the preparation of RIA. These employees should be free from any particular bias or prejudice and be able to undertake policy development in a dispassionate way. As argued previously, the Association considers a strict regime of incentive-based employment conditions must be in place to ensure these skills are in place and utilised.

The cultural change that is necessary to improve the RIA process simply needs a commitment by Government agencies to a more competitive economy. This commitment will naturally lead to an ethos that minimises unnecessary government intervention in the economy.

The contracting out of the RIS preparation has obvious flaws. Often, the contract is to prepare a RIS for a particular set of Regulations. Often the Regulations will have been drafted or approval given to draft. This clearly imposes a requirement on the contractor to justify the regulations NOT to make a rigorous assessment of the means to resolve identified problems. This diminishes the skills required of the contractor to a mix of literary and quasi legal skills – not policy development or analysis.

The Association is aware of other, more concerning flaws in the system. For example, recently a contractor, having consulted the industry in the development of a RIS provided estimates of the cost impacts of proposed regulations in a draft RIS to its client Government agency. The estimated cost impacts were quite substantial and the agency saw this as being detrimental to the overall proposal. The contractor's estimates were subsequently replaced in the RIS with other data of an unknown source. Again, this illustrates a misguided objective in the development of policy.

7. What are common weaknesses in RIS analysis and how can they be improved?

The most prevalent weakness in RIS' reviewed by the Association is a general lack of identification of the costs associated with options for regulatory intervention. A far greater emphasis must be given to researching these costs. A corresponding weakness is the lack of quantification of the benefits of the options. Benefits are most often estimated in qualitative terms and these are typically exaggerated.

In terms of poor estimations of costs Box 2 discusses the (then) new Aboriginal heritage regulatory requirements for cultural heritage management plans (CHMP). This shows that the cost of preparing these plans before the new requirements were introduced was between $5,000 and $6,000 whereas in practice they now range from $88,000 to $300,000 with an average cost of $92,500! These actual costs identified by the Association's members who have had the plans prepared are in stark contrast to the wildly under-estimated costs contained in the RIS of $20,462[5]. The RIS stated:

> *Based on the standards proposed in the Regulations, the cost of preparing cultural heritage management plans will increase. In particular, as discussed at Appendix C, there will be costs involved in changes to the assessment, and in developing dispute resolution procedures. In total, it is expected that the cost of management plans will increase by $5889 on average per plan, to* ***$20 462****.*

These costs do not account for the substantial delays caused by the process. The average time for completion and approval of the CHMP is 9.5 months[6].

Clearly, the RIS's estimations were inadequate and the quality of the RIS and the independent oversight arrangements for the RIA process were clearly incompetent in this case.

The Association's assessment of the costs were corroborated by a recent report prepared for the Department for Planning and Community Development as part of the review of the *Aboriginal Heritage Act* 2006, *Socioeconomic impacts of the Aboriginal Heritage Act 2006* (12 April 2012) which found that while the Act has produced benefits, 'a more targeted system of heritage assessments has meant that CHMPs in particular are more likely to find Aboriginal cultural heritage, and therefore be subject to more complex assessments.

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[5] Regulatory Impact Statement, April 2007, Aboriginal Affairs Victoria http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/AboriginalHeritageRegulations2007RIS/$File/Aboriginal%20Heritage%20Regulations%202007%20RIS.pdf

[6] From a survey of membership April 2012.

A blind survey of cultural heritage advisors found that CHMPs are more costly than originally anticipated and this is likely due in part to the significant number of complex CHMP prepared (82 per cent)'[7]. The Association considers the CHMP should be simplified and available in a standardised template format.

Box 2

Lack of detailed costings in RIA

Another area where regulatory creep has developed is in response to cultural heritage considerations. Although compliance with regulatory controls in this area has been required for many years by virtue of the Federal *Aboriginal and Torres Strait Islander Heritage Protection Act* 1964, and the State *Aboriginal Relics Preservation Act* 1972, new, more stringent State legislation, the *Aboriginal Heritage Act* 2006 (AH Act) came into effect on 28 May 2007.

The AH Act changed requirements for permits or consents, and management of Aboriginal cultural heritage. Under the Act, the State has sole responsibility for its Aboriginal cultural heritage, whereas previously it was a combination of State and Federal legislation. The ultimate responsibility for issuing permission to disturb Aboriginal archaeological sites is the Minister for Aboriginal Affairs. Controls are no longer based on a Memorandum of Understanding and/or an archaeological report, but now through a 'Cultural Heritage Management Plan' (CHMP) required by the AH Act.

These requirements are far more demanding, time-consuming to obtain, and difficult to predict the result of. The regulatory apparatus is still relatively young and therefore both regulators and regulated parties are unsure of the potential depth and scope of the regulatory requirements. This study has already indicated that the new requirements have added considerable costs for land use proponents (refer Case Study No. 9) where costs of compliance for the same site altered from $5,600 under the former legislation and $40,000 under the AH Act within only two years.

A recent similar "desktop" study involving a sand deposit has cost $88,000 and is unfinished. It cannot be known how these regulatory controls will develop in the near future. Experience can only assure us that controls will be more stringent and costly rather than less so – the raison d'être for regulators. There are other examples in the extractive industry of a full CHMP and associated investigations for a small operation costing in excess of $300,000.

From *AUF* study, page 43.

The Victorian Minister for Aboriginal Affairs recently released an Issues and Options Paper as part of the review of the Act. The Paper seeks the views of interested parties on policy matters and on various aspects of the Act's provisions and administration.

[7] http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0005/98888/Socioeconomic-Report-reduced-size.pdf, page 5.

Views are not sought within a framework but are open to opinion and unsubstantiated proposals. Of fundamental importance, views are not sought within a framework of cost limitation. In fairness, the Paper notes that 'stakeholders said cultural heritage management plans are too costly and take too long to prepare'[8] however, notwithstanding these concerns the Paper offers no substantial strategy for cost reductions.

By not seeking views within a framework the review is open to the desires of particular groups without the countervailing argument about costs. This again illustrates an inadequate and one-sided approach to policy development that will inevitably result in greater regulatory costs not fewer.

Other areas of weakness in RIS preparation identified by the Association are as follows:

- The estimation of costs is often limited to a few relatively innocuous costs while the more difficult to assess costs, which may be more substantial, are left unaccounted for. This illustrates poor or slovenly analysis. A recent example illustrates this point. The Victorian Department of Primary Industries (DPI) introduced a new mandatory requirement for a 'community engagement program'. The DPI estimated the costs associated with industry producing a plan at a very modest $5,000. While this may have covered the simple completion of the template form the assessment failed to recognise the full extent of the requirement. When these costs are included the Association estimated compliance costs of between $40,000 and $130,000 prior to the site being granted a new Work Authority or varying an existing one and between $8,000 and $28,000 to maintain ongoing consultations.

- There is a paucity of detail of the problem that is being dealt with. Without clearly setting out the problem and its scope the policy responses can only be best guesses. So often the response reflects the 'sledge hammer to crack a nut' approach.

- Policy developers must recognise that the required level of analysis takes considerable time and needs substantial input from the industry and community affected by the policy. It is unrealistic to require this detailed data to be provided in a response to a RIS within a 4-6 week consultation period.

- Industry's responses and data are not always attributed. The Association considers that where costs have been provided by industry they should be acknowledged in the RIS. Equally, where industry has indicated concerns with any aspect of the Options considered or the analysis these concerns should also be reported in the RIS.

[8] http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0003/98175/DPCD-Options-Paper-Aboriginal-heritage-Act-web.pdf, pages 9 and 10.

8. Does national regulation RIS include an appropriate level of detail on specific impacts in individual states and territories?

The draft Model Work Health and Safety Regulations Mining and associated Draft Code of Practice for the Work Health and Safety Management Systems in Mining are a recent illustration of how the RIS process works in national regulation.

The draft Regulations and the Code were promulgated for comment without the required RIS. A RIS was, however, subsequently released but it failed to address the issues raised by industry and others. The CMPA provided a submission to SafeWork Australia in September 2011 and a summary of the main points is contained in Box 3.

The Association was, and remains very concerned with the expected additional costs of compliance the new regulations will impose – and all without corresponding beneficial outcomes. Notably also, the response highlighted the Association's concern that the draft Model Regulations had been given in-principle endorsement by the Ministerial Council without assessment of the costs and benefits and impacts for industry. The Association considered that this was *blind policy development* that had *no regard for the drivers of the economy – business and industry*.

Consistent with the Association's concerns the Premier of Victoria recently released a supplementary report of the impact of the proposed national work health and safety laws in Victoria. The assessment reveals that Victorian businesses would face additional costs of more than $3.4billion over the next five years which would 'impact severely on the productivity of the State's small businesses[9]'.

[9] http://www.premier.vic.gov.au/images/stories/documents/mediareleases/2012/120412_Baillieu_Rich_Phillips_-_Proposed_Commonwealth_OHS_laws_to_hit_Victorian_businesses_hard.pdf

Box 3

DRAFT MODEL WORK HEALTH AND SAFETY REGULATIONS & CODE OF PRACTICE: SUMMARY OF ESSENTIAL POINTS RAISED BY CMPA

Workplace health and safety is of fundamental importance to extractive operations. The fact that many of the CMPA's members operate family-owned businesses means that safety of all people working in their quarries is of particular importance.

The extractive industry in Victoria is characterised by a large number of small, family-owned and operated businesses, a large number of medium-sized businesses and a very small number of large businesses.

Harmonisation is a useful initiative for the Australian economy but the benefits accrue mainly to businesses that operate across State borders not for most small to medium sized extractive operations. Only a very small proportion of businesses operate across borders therefore the costs of harmonisation impact disproportionately on these businesses.

No new regulatory imposts should be introduced unless it can be demonstrably shown that workplace safety is deteriorating. Supporting this position, the CMPA recommends that any harmonisation be undertaken on the principle that it will not impose any additional regulatory requirements on businesses in the country.

It is of considerable concern that the draft Model Regulations have been given in-principle endorsement by the Ministerial Council without assessment of the costs and benefits and impacts for industry. This is blind policy development and has no regard for the drivers of the economy – business and industry.

The proposed Model Regulations apply a one-size-fits-all approach to mining and extractive sectors resulting in management systems not being proportional to the risks in the workplace. The regulation of these two industries should be separate.

The draft Model Regulations lack coherence and duplicate existing industry-specific regulations over the extractive industry in Victoria. For these controls the industry should therefore be exempt from the Model Regulations.

The planned introduction of the Model Regulations of 1 January 2012 is unworkable. Introduction should be undertaken with Federally-funded education of the new arrangements, a Code of Practice for small quarries, along with funding for the costs of compliance with any new requirements. The CMPA is prepared to assist with the development of the education system and Code and in assessing the compliance costs.

Many of the new regulatory requirements, such as the WHS management system, the Principal Mining Hazard Management Plan, emergency management regulations and the mine survey plans, would impose unwarranted cost impositions for small and medium extractive businesses for no apparent benefit.

9. To what extent is there independent scrutiny and performance monitoring of RIA processes?

Clearly, from the foregoing discussions and illustrations it can be well argued that due to the poor record of the RIA process the current arrangements for scrutiny of compliance with RIA processes can be considered inadequate. In most cases they involve a Government agency (eg Federal Office of Regulation Reform) overlooking the work of another Government agency. This is only partial 'independence'. **A more independent model for scrutiny and monitoring performance of the RIA process would involve a clearer separation of the regulator from overseeing body**. In other areas of Government and business interaction Ministers have advisory councils or boards comprising representatives from business and industry, relevant consumer groups and relevant Government agencies. This model could be developed for policy development generally or at least for development of legislative and regulatory instruments.

A Policy and Regulatory Council should be established as an independent body to advise on the performance of the policy development and RIA process. The P&R Council would report to the relevant Federal Minister or Ministerial Council annually on the performance of the RIA process. The Council would audit selected policy instruments/RIS' and advise on the adequacy of the process and rigour of its analysis. Where policy instruments/RIS' are found to be inadequate the relevant Minister would be advised with a recommendation to amend the instrument accordingly.

The model should be given strict performance indicators, public disclosure of its activities and be subject to independent review and scrutiny after 5 years. The review should be publicly available and reported back to the Council. This will then tie back accountability of the proposal to the agency head as referred to earlier.

Representation should also be for defined terms with half the body's representatives being new members. It is expected in order to obtain commitment the arrangements would need to be COAG endorsed and be part of its *Seamless Economy* initiative.

The model should be used for both national and State/Territory jurisdictions so that savings can be achieved by dismantling the range of existing oversight bodies with the creation of one body.

Because of the conflict of interests that exist with regulators responsible for the preparation of the RIS, development of the content of the RIS could be split. That is, the regulators or other Government body proposing regulation should be charged with clearly identifying the problem and the social, economic or environmental objective.

It should then be left for another arm of Government (maybe an economic development or treasury agency) to undertake the optioneering and cost benefit analysis. The two parts of the RIS can then be bought together and considered by the proposed Council.

The RIA process should be free from political interference. This is more to do with policy development than anything else. Ministers must be required to only make policy decisions after full policy development has been done. The need to separate political interference from running government businesses has been done to some extent in telecommunications, electricity, gas and water where independent bodies have been set up to oversee the industries. It is not suggested that other bodies be created but the benefit of isolating these sectors from political influence has clearly be an objective in these sectors and the principles should apply elsewhere.

10. How effective are consultation processes?

Often it appears the 'consultation' process is undertaken to merely 'tick the box' rather than to gather informed input. This is a dilemma for industry as it on the one hand cannot afford to invest time or resources in responding to the issue while on the other hand it cannot afford to not respond. As indicated earlier, often the consultation process is a 'defacto' education process for the new regulations rather than seeking meaningful input from industry. In this sense it is used to prepare industry for change.

Consultation documents should be precise, targeted and not be issued unless they include some evidence of costs assessment. Where cost information is being elicited, estimations of costings should be available of Government administration and enforcement and indicative estimations of potential industry costs can be made – certainly within categories of costs such as application and renewal of approval costs and record keeping. Benefits must also be quantified – it is insufficient to articulate in general terms the potential benefits of a proposal.

Open-ended consultative documents that seek unsubstantiated wish lists from the community are of little value – most people want the best but when faced with the question about willingness to pay, will quickly reach a compromise solution they are prepared to pay for. Wish list documents also raise unrealistic expectations that, when not achieved result in aggrieved citizens. They can also ignite frivolous or vexatious submissions of complaint which have the potential to misguide or delay the policy development or approval process.

SUMMARY OF SUBMISSION BY CMPA,
IN SEARCH OF BALANCED REGULATION
TO
ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE, PARLIAMENT OF VICTORIA

The following is a summary of the essential points and opportunities presented in the submission.

Victoria's mineral endowment

- The process of 'offsetting' used in native vegetation regulation is increasingly being applied by regulators requiring work authority holders and proponents to purchase land to militate against perceived but not actual impacts.
- The Government's intention to dedicate additional land as reserves to provide land for offsetting is only a band-aid solution to the problem of sterilisation of land by native vegetation legislation.
- The initial costs of developing a cultural heritage management plan (CHMP) were estimated by the DPI to be $4-8,000 for a desktop study. Two years in later in 2009 the average desktop study was $25,000 although these costs are increasing. The average cost of a complex study was $120,000. Examples exist in the industry of a CHMP and associated investigations costing in excess of $300,000.
- The unpredictable and inexact nature of the assessment process for a CHMP makes the purchase (or lease) of land for extractive operations a black hole for a proponent's risk capital that can quickly exhaust investment interest.
- The value of the underground resource must be taken into account when considering the value of native vegetation. This will bring about some balance in regulating native vegetation and offset some of the spiralling costs.
- By sterilising land from extractive operations the search for resources extends further from the point of demand. The CMPA considers there is a strong case for extractive industries to again be exempted from the native vegetation controls.
- The regulatory demands of the native vegetation legislation impose risks for landowners. Victoria's land tenure legislation must transparently acknowledge this share of rights. The corresponding devaluation of land will have ramifications for the whole community, not least of which will be for the Government. Once devaluation occurs, any costs associated with native vegetation including access to the land, should be compensable by the landowner from the beneficiary of the legislation. Compensation should be set at the highest value use of the land.
- A more strategic approach is required to the regulation of extractive operations in native vegetation. For example, while extensive new infrastructure projects have been planned by governments they fail to consider the requirements for extractive product for these projects.
- Half the quarries in the Urban Growth Initiative (UGI) are nearing the end of their productive lives. There will be little opportunity for them to extend their operations in adjacent areas because of development and other regulatory controls and this will force these operations to close and, where possible, re-locate in outer areas. The footprint of extractive operations is hardly recognisable when compared with housing development. Funding regulatory costs for the development industry can be spread over the many allotment purchasers whereas the costs for the extractive industry apply to the Work Authority holder only.

The regulatory environment

- The legislative entry process to the industry, the Work Authority approval process, is beset with duplication and complexity.
- A 'standard' Work Authority application takes just over 2 years *to be approved,* more contentious proposals involving VCAT appeals, almost 4 years, while a proposal that requires an EES can take $5^{3/4}$ years.
- The costs of the approval process range from $10,000 to $1.15 million including for a planning permit approval, with higher costs ranging from $1.9 to $5.1million where an EES approval is required. These costs are expended with no guarantee the application will be successful!
- A 1992 Victorian Parliamentary Committee report estimated the cost of developing a Work Authority at about $100,000 (2011 $'s). Over 19 years these costs have increased by a factor of three!
- Costs of the appeal process range up to $558,000.

Fees, charges and royalties

- Extractive operations incur higher council rates to encourage rehabilitation and must also pay for rehabilitation through the Work Authority process and rehabilitation bonds. This shows WA holders are paying twice for rehabilitation.
- Because a bank guarantee is regarded by a bank as a debt of the business it reduces the Work Authority holder's future access to credit. With recent spiralling bond levels it may bring about the early failure of the business.
- Relinquishment of a Work Authority without completion of full rehabilitation is rare and over the last 20 years only 5 operations had their bond 'called in'.
- The Government spent $18,000 of bond funds in rehabilitating the five sites over the last 20 years. However, in only the last 11 years there has been in aggregate $515.8 million tied up in bonds or on average $46.9 million pa.
- Despite outstanding performance in rehabilitating extractive sites, over the 11 years to 2010 the value of rehabilitation bonds in the extractive industry increased by 217% while the overall inflation rate was 47%.
- Five bond reviews conducted around 2010 have seen increases from $12,000 to $235,000 (1,858%), $95,000 to $1,200,000 (1,162%), $80,000 to $380,000 (375%), $140,000 to $810,000 (479%) and $480,000 to $2,900,000 (504%).
- There appears no justification for the presently used bond system. The industry is being severely punished with this high-cost instrument despite having achieved an extraordinarily good rehabilitation record and leaving a very small environmental footprint.
- The review process is unpredictable and favours big extractive businesses.
- Bond levels are inconsistently and inequitably applied.
- More targeted inspections would minimise any 'risk' to Government of un-rehabilitated sites.
- The payment of a bond should be payable when evidence of a risk is shown and this can only occur when the Work Authority commences productive operation.

National and international perceptions of Victoria's prospectivity and regulatory environment

- Increasing regulatory burdens and associated costs when not applied retrospectively assign competitive advantages to existing industry participants over new, potentially greenfield operations.
- Where mobile crushing plants involve similar risks to small extractive operations they should bear the same regulatory burdens.
- Where councils have their own quarry and receive an application for a new extractive operation in their area, the council should refer the application to an independent body for assessment because of the conflict of interest.
- The extended time and costs associated with the approval process and the unknown additional costs of regulatory compliance make investment in the industry highly questionable.
- Over the 11 years 2000-2010 proposals for new extractive operations declined by 42% and applications had declined by 73 per cent, despite increasing levels of demand.

- Of the 303 new Work Authorities granted between 2000 and 2011, only 19 (6%) were for significant operations (those with rehabilitation bond greater than $50,000). Over the last 4 years since the new legislative arrangements have been in place twenty eight (28) Work Authorities have been granted but significantly, only one (1) Work Authority has been approved for a major greenfield site.
- The decreasing level of proposals and applications is illustrative of a growing falling off of interest in investing in the industry **once the sovereign risk is understood**.
- The lack of development will lead to a decrease in supply and competition in the market place. This will cause an increase in the cost of construction materials, leading to an increase in building and infrastructure costs and a subsequent decrease in housing affordability. A future material supply shortage could give rise to price increases of 35% and above.

Success and failure of projects in Victoria's mining development pipeline

- Uncertain regulatory obligations lead investors to look to alternate locations interstate to set up business ventures.
- An attitude of anti-business development is patently evident among many State and local government regulatory agencies.
- Councils appear to be unsure of their role in the work authority process and because of this uncertainty take an overly conservative approach

Opportunities to increase the net benefits from Victoria's minerals and energy earth resources, and to potentially provide for self-sufficiency in low cost energy and extractive materials, consistent with the principle of economic efficiency

(1) Native vegetation legislation can be streamlined and improved without impacting on regulatory objectives by:

- Introducing mandatory timeframes for certain milestone decisions including Ministerial decisions;
- Implementing the recommendations of VCEC's environmental regulation inquiry concerning the mining and extractive industries:
- Requiring referral agencies to be accountable. Regulators must be able to publicly defend their decisions;
- Empowering the existing Earth Resources Development Division to expedite decisions and ensure time frames in the Work Authority/Work Plan approval process are met;
- Applying an environmental value to extracted material;
- Exempting small extractive industries from the more restrictive elements of native vegetation controls;
- Allowing any costs associated with native vegetation including access to the land, to be compensable by the landowner from the beneficiary of the legislation. Compensation should be set at the highest value use of the land.
- Recognising that the footprint of extractive operations with its attendant rehabilitation activities is miniscule (0.05% of the State's land mass) when compared with the long-term landscape changing effects of other land uses including housing development. Regulatory controls should reflect this impact.

(2) Cultural heritage legislation can be streamlined and improved without impacting on regulatory objectives by introducing compensation clauses in the legislation so that a landowner can be compensated for monies spent in complying with the legislation merely to be able to conduct business for which the land was purchased. In these cases compensation should be set at the highest value use of the land.

Consideration of the costs and benefits of greenfields mineral exploration (economic, social and environmental), and whether there are opportunities to improve the management of potential conflicts between exploration and other land uses

- The Work Authority approvals process must be simplified and more targeted. This can be achieved without eroding regulatory objectives.
- The Work Authority/Work Plan approval process should be centrally managed by the DPI.
- The administration of the Mineral Resources (Sustainability Development) Act should aim at achieving performance-based outcomes that lower the costs and reduce the time of approvals for proponents.
- Regulatory creep should not be accepted as the status quo and new regulations must only be introduced once an existing and equivalent cost requirement is eliminated.
- A cost benefit analysis of new legislation should be conducted 5 years after implementation. If the legislation does not provide a net benefit, changes must be made to ensure this is achieved.
- Regulators must accept the premise that keeping land in a safe and stable form is the responsibility of both the Work Authority holder and the land owner or land manager who draws a financial advantage from the operation.
- Regulatory bodies should make decisions based on evidence according to the triple bottom line of social-environmental-economic values without undue political pressure.
- DPI should focus on its role to improve approval outcomes.
- No new regulations should be introduced unless and until appropriate resources are devoted to administer the regulation effectively.
- The VCAT system should be streamlined and modernised. For example, objectors in the VCAT process should provide substantiation of their claims, VCAT and Ministerial decisions should be based on relevant public information and the VCAT should provide a low cost mechanism for all parties, VCAT should take account of all the material already provided by proponents and relevant pre-existing studies rather than requiring consultants to present at the hearing; and an appeal mechanism for proponents should be introduced in the EES process