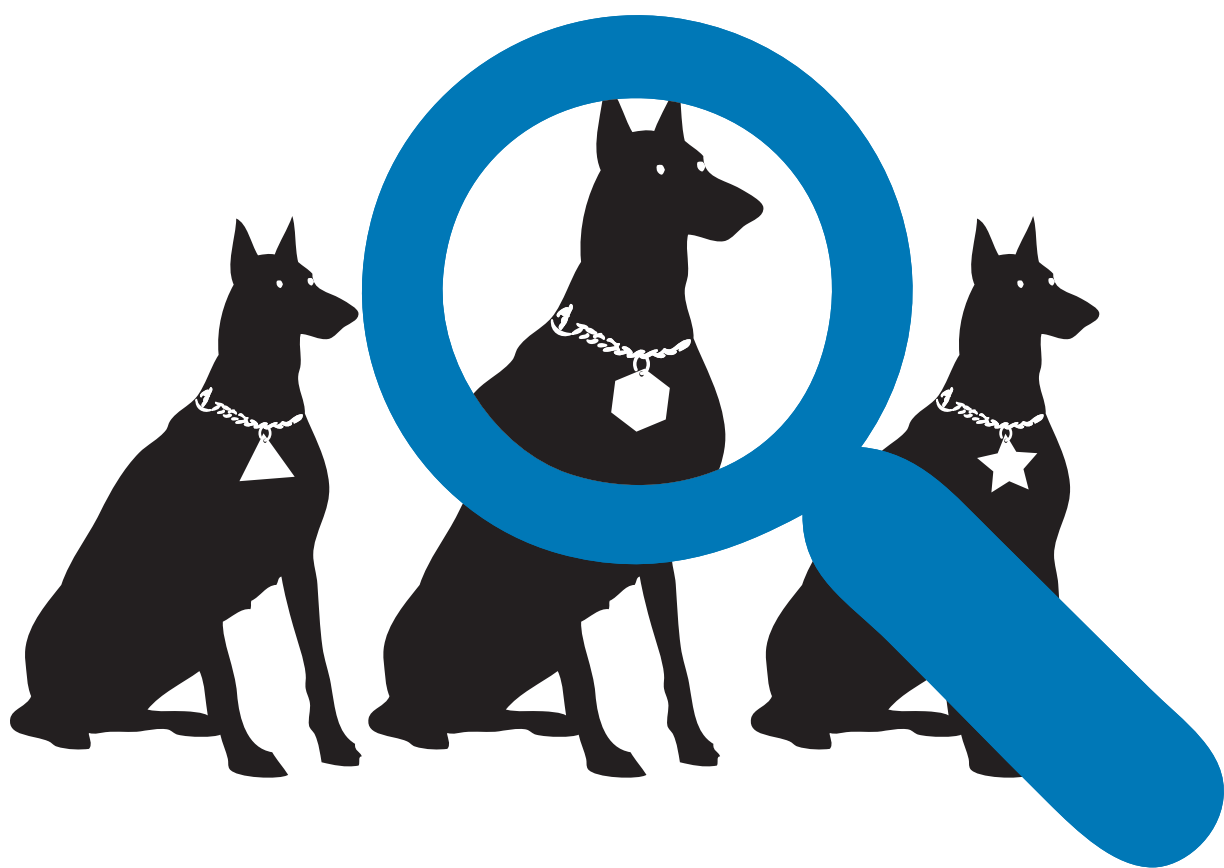


Regulator Watch

The Enforcement Performance of Australian Consumer Protection Regulators

A Report by Gordon Renouf, Teena Balgi
and the Consumer Action Law Centre

March 2013



"Regulator Watch":

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Consumer Action Law Centre**

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The Consumer Action Law Centre is an independent, not-for-profit consumer casework and policy organisation based in Melbourne, Australia.

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Executive Summary

Consumer protection laws exist for the benefit of consumers, but they only achieve their purpose where the vast majority of businesses comply with the law. Consumer protection regulators have been established by government with a mandate to ensure that this outcome is achieved. Enforcement of consumer protection law is a key responsibility of regulators and a key way in which they achieve their purpose.

Consumers can, at least in principle, use the legal system to enforce their rights against businesses that have breached consumer protection laws. However the financial and other barriers to consumers doing so in practice are significant. Individual consumers often lack resources to take legal action, meaning that misconduct can go unremedied. While consumer legal services, such as Consumer Action Law Centre, provide resources to assist with individual enforcement against businesses, demand for such services outstrips supply.

Non-compliance with consumer laws may also contribute to anti-competitive outcomes—some businesses may comply with the law, but others will not in the knowledge that the risk of being found in breach is low. Robust enforcement by consumer regulators can protect individual consumers as well as contribute to fairness within markets.

Further, consumer protection law often needs to be tested before the courts to determine its meaning and extent. This is a key role for consumer regulators. Sometimes law reform is argued for in circumstances where the existing law has not been fully tested. The majority of individual complaints against businesses are settled without any legal finding being made and thus do not have any wider impact on market misconduct.

For laws to be fully tested, consumer regulators need to take enforcement action, including in matters where the outcome may not be certain.

As such a regulatory scheme with well-designed rules will be ineffective in addressing industry or market-wide problems if it can only be enforced by individual consumers taking legal action against individual breaches of the law.

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Enforcement by regulators is thus an essential part of an effective consumer protection framework. In its 2008 *Review of Australia's Consumer Policy Framework*, the Productivity Commission recognised that not only are regulators essential, but also that regulators

should be visibly accountable for their performance.¹ It recommended that consumer regulators be required to report publicly on their enforcement strategies and initiatives. It also made recommendations for a range of improvements to the enforcement powers available to regulators. The Commission's work led to significant reforms, in particular the nationally uniform Australian Consumer Law, which came into force on 1 January 2011. Both the Australian Consumer Law² and new national consumer credit laws³ include improved powers for consumer regulators to monitor compliance and enforce the law.

This report was conceived in response to the absence of a public mechanism to compare whether, and if so, how much, enforcement work is being done by our various consumer protection regulators. We are concerned that in the absence of such a mechanism it is not possible to know whether regulators have performed well in applying their enforcement powers effectively in the interests of consumers. We note previous work by Consumers' Federation of Australia and CHOICE in this area.

¹ Productivity Commission (2008), *Review of Australia's Consumer Policy Framework*, Inquiry Report No. 45, page 252-255.

² The Australian Consumer Law is a cooperative reform of the Australian Government and the States and Territories and was a key recommendation of the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework. The Australian Consumer Law is Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and is applied as a law of each state and territory through facilitating legislation. It applies from 1 January 2011.

³ The *National Consumer Credit Protection Act 2009* (Cth) was enacted following agreement between the Australian Government and States and Territories that the Australian Government would assume responsibility for regulating all consumer credit products.

Our hope is that this report will stimulate a debate that will contribute to improved regulator accountability for compliance with and enforcement of consumer laws, and ultimately thereby, more effective enforcement.

ES.1 Overview of report

This report attempts to assess the extent to which regulators are delivering adequate consumer protection enforcement. We reviewed the performance of two national and eight State and Territory consumer protection regulators based on published information over the past six years, primarily the annual reports published by each regulator.

The report provides detailed information about how much consumer protection enforcement work has been done by each agency, and also considers how well each agency reports on the work they do.

Assessing the effectiveness of Australia's consumer protection regulators' enforcement work is made problematic by the inconsistencies, lacuna and unhelpful approaches that riddle the reporting of enforcement work.

While absolute conclusions cannot be drawn regarding performance, not least because of the data limitations caused by inadequate reporting, the available evidence suggests that regulators' enforcement performance has rarely been strong during those six years and far too often it is getting worse: for several regulators the amount of

enforcement work undertaken has declined over the period examined.

Of equal concern is many regulators' poor accountability for their work. It is very difficult for taxpayers to know whether they are getting value for money from their investment in consumer protection regulators. The way in which regulators

report their performance is far short of the standard required to enable governments and the public to hold them accountable for their use of public funds. Current reporting is not in sufficient detail to assess performance, and sometimes does not include key information, nor is it comparable across agencies. From time to time agencies have reduced rather than increased the range or precision of their reporting. Urgent attention is required to improve the transparency and accountability of consumer protection agencies in relation to their enforcement work.

It is important to say that where we are critical of reporting standards, we do not seek to be critical of the individuals involved in generating the reports. We recognise that there may be a range of factors that contribute to the current state of reporting including the absence of a common

...the available evidence suggests that regulators' enforcement performance has rarely been strong during those six years and far too often it is getting worse: for several regulators the amount of enforcement work undertaken has declined over the period examined.

framework for reporting, lack of resources, and changes to reporting methodologies that have not considered the impact on comparability and accountability

Rather, we hope that the information set out in this report will help agencies and the governments to whom they are accountable understand that if consumer protection agencies are to demonstrate that they can meet expectations in relation to compliance with consumer protection law, they need to:

- Increase the amount of high priority enforcement work that they undertake;
- Improve their reporting of enforcement activities and outcomes; and
- Improve their enforcement policies and culture.

Whilst the overall findings in this first report are concerning, in each area there are examples of regulators that have performed well. These approaches offer an excellent starting point for regulators seeking to make improvements of the kind recommended above.

ES.2 Findings

Reporting

With two exceptions, regulators do not report on their work well. Regulators have not reported consistently over time

and do not report consistently in relation to other similar regulators (Section 3).

The information currently published makes it very difficult to assess whether or not regulators are doing a good job, whether they are improving or getting worse, and how well they are doing compared to their peers. (3.1)

Current reporting is not sufficiently *comprehensive*, with regulators rarely reporting against all enforcement powers, types of wrongdoing or industries. With few exceptions it is not *timely or frequent* enough. And reported information is not *comparable* between jurisdictions and often not fully comparable across time. (3.3).

There are however some good practices and some signs of improvement. ACCC and NSW OFT have for a number of years made enforcement data available quarterly and on a reasonably timely basis. ASIC has recently commenced six monthly reporting.

It is encouraging to see the degree to which the new ASIC approach to enforcement has improved their reporting. From middle of the pack ASIC has leap-frogged to the clear leader in enforcement reporting in terms of clarity and comprehensiveness of the information published and its increased frequency (Section 3.3).

On the other hand we are very disappointed at the quality of reporting by Queensland, the ACT or the Northern Territory. Their reporting is scant to say the least, with

almost no useful information being published (Section 3.3). It is also concerning that CAV has reduced the information available in its latest (2011/12) report. While South Australia reporting is somewhat more comprehensive than Queensland and the Territories there are long delays between the end of the year reported on and publication. The 2010/2011 report was published eight months after the end of the relevant year and the 2011/12 report was still not published five months after the end of the relevant year.

One of our two key primary recommendations relates to significantly improved reporting of enforcement work. If regulators published all the information that we believe is necessary it would be possible to:

- identify the quantity and nature of enforcement for each regulator
- identify trends in enforcement by each regulator across time
- compare the total number of enforcement actions (ideally weighted by type) to the total number of consumer complaints;
- determine the rate of enforcement actions having regard to the population of the State or Territory; and
- draw some detailed comparative conclusions as between regulators.

Enforcement work undertaken

In terms of the actual amount of reported enforcement work undertaken (the prosecutions, civil actions, enforceable undertakings obtained, substantiation notices issued and infringement notices issued that agencies actually report) the results are disturbing.

We considered the trend in overall enforcement work for each regulator, and the comparative rate of *prosecutions* per capita for the State and Territory regulators.

Enforcement trends

The ACT, Queensland and NT agencies report so little enforcement action that they have necessarily received the lowest possible ranking on that criterion - 'falling'.

Consumer Affairs Victoria enforcement results are trending down consistently and very substantially over the past six years, from a high base.

Excluding home building matters, the number of prosecutions undertaken by the NSW OFT is trending down while penalty notice numbers have bounced around. The low number of civil actions and enforceable undertakings and the increase in disciplinary actions do not offset that decline. If one includes the large number of home building matters the downward trend is more marked.

WA's enforcement work was steady for 5 years. It has trended down markedly in the 2011/12 year which (as for other state based regulators) may be explained by the transfer of jurisdiction for some areas of consumer protection to the Commonwealth (for example consumer credit) and the repeal of some other industry specific consumer protection laws. WA did not publish penalty notice data for 2011/12.

After a dip in the first two years covered in our data, ASIC's enforcement work has been steady overall for the past 4 years. SA and Tasmania have also been steady (broadly interpreted).

Litigation commenced by the ACCC is trending up over the past six years, after a significant decline in the preceding years (the ACCC is the only regulator where we have compiled data for more than 6 years, thanks to an earlier exercise undertaken by the Consumers' Federation of Australia). This is offset by a marked decline in enforceable undertakings obtained. Given litigation is generally a harder option for a regulator and often but not always produces better results, an overall assessment of 'trending up' is fair.

Comparable rates of enforcement action

As regulators do not report consistently against their enforcement powers, and in some cases had varying powers, we compared the rate of *prosecutions* per capita in each State and Territory. Of the five states that report

adequately on their rate of prosecutions for breaches of consumer protection laws, WA and Tasmania have a higher than average rate of prosecutions per capita, NSW and SA have a lower than average rate of prosecutions and Victoria has a much lower average rate of prosecutions.

Enforcement culture and practice

The report also considers a number of specific enforcement cultural and practice issues, including:

- the challenges for regulators in supporting low-income and vulnerable consumers to act as witnesses in enforcement proceedings;
- that strategic use of media and publicity can support enforcement work resulting in effective market outcomes;
- that lack of feedback to consumers and consumer organisations about the progress of investigations can inhibit further complaints being made;
- that there is misunderstanding about the impact of the model litigant policy for regulators.

ES.3 Recommendations

Primary recommendations

Recommendation 1: Increase the quantity of enforcement work

There is room for all consumer protection regulators to increase the amount of enforcement work that they undertake. There is significant need for an increase in activity on the part of Qld, NT, ACT, NSW and Vic and possibly WA. In doing so they should consider the following:

- Regulators should ensure that they are undertaking enforcement action in a strategic way designed to achieve particular articulated outcomes in the marketplace
- Increasing enforcement work is not just about increasing the total number of enforcement actions, but, subject to the demands of the articulated strategy, regulators should increase actions across the regulatory pyramid and in particular ensure that there are sufficient actions at the 'pointy end' of the pyramid to have a real deterrent effect on businesses that may otherwise fail to comply.
- Increasing enforcement action includes taking on litigation where it is necessary to test the law. Governments and the community have an interest in the law being tested to ensure that it meets policy

objectives. If it is demonstrated to be adequate this avoids the need for debate and inquiry on the imposition of further regulation.

- To facilitate an increase in enforcement work regulators should have regard to the issues of regulatory agency culture set out in Section 5 of this report.
- To actually deliver the required increase in enforcement work regulators need to consider the barriers that they are currently facing in doing so and work to overcome them, whether they relate to internal culture, lack of necessary skills, fear of media criticism, lack of resources allocated to enforcement or other matters.

Recommendation 2: Report better on enforcement work

With the exception of ASIC and the ACCC, who should seek to maintain current high standards, all consumer protection regulators should significantly improve the way they report on their enforcement work to the community, so that consumers and businesses can be sure that they are performing a good job. This is particularly critical for ACT, NT, Qld, SA and Tas. In particular:

- comprehensive;
- frequent and timely;
- consistent; and

- accessible.

Regulators should use a consistent and as far as possible standard set of reporting indicators to enhance the ability of the community to compare regulatory performance across jurisdictions.

All regulators should report on litigation commenced. Litigation commenced rather than litigation resolved is a more useful and up-to-date indicator of how proactive a regulator has been in any given year.

Regulators should clearly separate reporting on their consumer protection enforcement from any other jurisdictions that they are also responsible for. Regulators should report the number of each of the main types of enforcement action per agreed amount of population (for example per 100,000 adults).

Regulators should quantify and report on their budget allocation and the staffing resources allocated to enforcement

Regulators should report in a timely fashion. Ideally regulators would provide period and year to date reports on their web site or at least report each 6 months as ASIC has now started to do. In any event regulators should report within 3-4 months of the end of the relevant period.

Further Recommendations

Recommendation 3: Vulnerable and disadvantaged consumers as witnesses

That government, regulators and consumer organisations work with courts and policy makers to ensure that the interests of vulnerable and disadvantaged consumers benefit from CP enforcement including:

- Regulators should develop processes to better support witnesses noting the suggestions at Section 5 of this report.
- Regulators should work with Courts, policy makers and consumer organisations to explore the use of alternative forms of evidence to prove breaches of the law and/or losses incurred by consumers as a result of those breaches including tendency or coincidence evidence and appropriately robust survey evidence.

Recommendation 4: Use of the media

Regulators should make systemic use of the media to increase the deterrence value of their enforcement actions and to gain maximum educative value from enforcement outcomes.

Government, regulators and consumer organisations should educate the media about the role of regulators and

enforcement, including challenging the media's understanding that regulators must always win in court.

Recommendation 5: Reporting to consumer organisations

Regulators should set up improved systems to regularly and routinely report to consumer organisations on outcomes of complaints made by or through those organisations.

Recommendation 6: Model litigant policy

Regulators and the governments to which they are accountable should ensure that the model litigant policy does not interfere with regulators' ability to use their enforcement powers to protect consumers and where appropriate to test the law.

ES.4 Acknowledgements

Gordon Renouf coordinated the production of the report which also has substantial contributions from Teena Balgi, Gerard Brody and Catriona Lowe. It is based on primary research by Teena Balgi. Vira Munaf provided assistance with editing and additional research.

The project was overseen by CALC Co-CEO Catriona Lowe and Director of Policy Gerard Brody.

ES.5 List of Acronyms

ACCC	Australian Competition & Consumer Commission
ACT ORS	ACT Office of Regulatory Services
ASIC	Australian Securities & Investment Commission
CAV	Consumer Affairs Victoria
NSW OFT	NSW Office of Fair Trading
NT CA	NT Consumer Affairs
Qld OFT	Queensland Office of Fair Trading
SA CBS	SA Consumer and Business Services
TAS CAFT	TAS Consumer Affairs and Fair Trading
WA CPD	WA Consumer Protection Division

1. Introduction

1.1 Project aims and methodology

Consumer protection laws exist for the benefit of consumers, but they only achieve their aim where the vast majority of businesses comply with the law. Consumer protection regulators have been established by government with a mandate to ensure that this outcome is achieved.

Parliament has provided each regulator with legal authority to undertake enforcement action against traders who breach consumer protection laws⁴. Regulators have been given a wide range of powers including to: gain information; obtain compensation for consumers; and seek court sanctions against non-compliant traders.

But how effective are Australian consumer protection regulators in their enforcement role? In particular do they make sufficient use of their enforcement powers to maximise compliance?

Much has been written about the theory of regulation generally and frameworks for enforcement more specifically⁵. The specific focus of this report is an attempt

⁴ The particular enforcement powers available are described at Section 1.5 below.

⁵ See, e.g., I Ayres and J Braithwaite (1992) *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Oxford); M K Sparrow (2000). *The Regulatory*

to measure the actual enforcement work undertaken, plot trends and draw some conclusions regarding effectiveness.

We reviewed the information published by ten key regulators about their consumer protection enforcement work over past five or six⁶ years (eleven years in the case of the ACCC). We considered the type and amount of enforcement undertaken and any other information provided by regulators about their enforcement work.

The overall aim of the project is to improve the effectiveness of consumer regulators' enforcement work. Improvements may be needed in relation to one or more of the following dimensions of their work:⁷

- the amount of enforcement work;
- the targeting of enforcement work;
- reporting of enforcement activities and outcomes;
- and enforcement policies and culture.

Craft: Controlling Risks, Solving Problems, and Managing Compliance (Brookings Institution Press, Washington, D.C.).

⁶ The report is based on information available at 30 November 2012. Several agencies had not published their 2012 Annual report or equivalent by that date, nor any other usable data on their performance in 2011/12 in which case we were not able to include information about that agency for that year.

⁷ See K Halliday, T Lozano and G Renouf (2008) *Good Practice in Consumer Protection Enforcement: A Review of 12 Consumer Protection Regulators* (Choice, Sydney) p 17. The Choice Report evaluated regulator enforcement performance in eight broad areas of which outcomes, transparency and policy were three which generally correspond to the three listed here. The CHOICE criteria are set out at Section 2, Table 1, below.

Consumer Action plans to regularly revisit the question of the performance of consumer protection regulators. This is likely to include publication of updated reports similar to this one, together with reports on agency progress in implementing recommendations.

Governments have recognised that it is a ‘current imperative’ that consumer protection regulators achieve and measure results.⁸ The Council of Australian Governments (COAG) has agreed that “enforcement and administration arrangements will be reviewed by COAG within seven years of the commencement of the Australian Consumer Law [on 1 January 2011].”⁹

Existing research suggests that not all Australians are aware of consumer regulators, and only about 50% of consumers would contact a consumer regulator with a consumer problem.¹⁰ We hope that Australian consumers become more confident that Australian consumer protection regulators are achieving results and measuring and reporting on that achievement somewhat sooner than 31 December 2017.

⁸ C Noone, *Implementation of the Australian Consumer Law: the Successes, the Challenges and the Future* presented to 9th Annual University of South Australia Competition and Consumer Workshop, 14-15 October 2011, available at: <http://www.unisa.edu.au/crma/docs/CCW%202011/Paper%20and%20Commentaries/Day1session2.pdf>

⁹ Council of Australian Governments (2009), Intergovernmental Agreement for the Australian Consumer Law.

¹⁰ Australian Government (2011), *Australian Consumer Survey* (Australian Government, Canberra), pages viii-ix.

1.2 Scope and Structure of this Report

The report is divided into the following sections:

- Introduction
- Good practice in consumer protection enforcement
- Reporting of enforcement activities by consumer regulators
- Level of enforcement work by consumer regulators
- The enforcement culture and policies of consumer regulators
- Enforcement scorecards for each consumer regulator
- Recommendations

Regulators covered

The report considers the enforcement performance of the following ten regulators:

- Australian Competition & Consumer Commission (**ACCC**);
- ACT Office of Regulatory Services (**ACT ORS**);
- Australian Securities & Investment Commission (**ASIC**);
- Consumer Affairs Victoria (**CAV**);

- NSW Office of Fair Trading (**NSW OFT**);
- NT Consumer Affairs (**NT CA**);
- Queensland Office of Fair Trading (**Qld OFT**);
- SA Consumer and Business Services (**SA CBS**);
- TAS Consumer Affairs and Fair Trading (**TAS CAFT**);
and
- Consumer Protection WA (Division of Department of Commerce) (**WA CPD**).

There are a large number of regulators with some responsibility for consumer protection either generally or in a particular industry or area of concern. Other regulators that undertake important consumer protection work include the Australian Communications and Media Authority, the Therapeutic Goods Association, Food Standards Australia New Zealand and state based health authorities and energy regulators. The Australian Energy Regulator commenced its role as an enforcer of consumer protection law in July 2012, outside the time period under consideration in this report.

The group of regulators subject of this report are those with responsibility under the Australian Consumer Law. We hope that future reports may be able to encompass a broader range of regulators, however, we recognise that the challenge of consistent and comparable reporting will be greater the larger the number of regulators involved.

1.3 “Consumer protection” enforcement

The report seeks to examine enforcement work with a consumer protection focus. It is not always simple to decide what constitutes consumer protection work. Many laws that are generally thought of as not being “consumer protection law” ultimately exist for the benefit of consumers (competition law for example). There is also a considerable amount of industry-specific legislation, particularly occupational licensing¹¹, that has mixed consumer protection and other objectives, and some of the agencies included in the report have responsibility for enforcing laws that have mixed purposes—for example protecting workers' interests or the interests of small businesses as well as consumers. Agencies don't always separately publish their enforcement statistics against each area of responsibility.

Decisions to count particular work as ‘consumer protection’ enforcement have been made based on the information available, including the agencies’ own characterisations of the work.

The report lists the principal consumer protection legislation administered by each agency (in the case of all agencies but ASIC this includes the Australian Consumer Law and its predecessor Fair Trading Acts and Part V of the *Trade Practices Act 1974* (Cth)). It does not cover the

¹¹ Work is currently underway to transfer much of this to a national licensing scheme. For more information, see: <http://nola.gov.au/>.

competition work of the ACCC nor the markets supervision and corporate governance work of ASIC.¹²

State based agencies were until 1 January 2011 charged with enforcing the various state-based Fair Trading Acts and also a number of other laws that have consumer protection as a main or subsidiary purpose. States varied as to whether or not they regulated a particular area; where they did these laws varied considerably in scope, content and sometimes purpose.¹³ Where it seems that an Act enforced by a State regulator mainly relates (or related) to a purpose other than consumer protection enforcement work taken under it has not been counted in the tables in this report even where it may be considered to also serve a consumer protection purpose—retirement villages legislation is one example (mixed housing and consumer protection purpose).

One of the consequences of this variation is that, even if agencies did report in similar ways (which they generally don't—see Section 4), it would be difficult to compare the overall performance of State regulators. Therefore, this report focuses on the trend for individual agencies rather than attempting to compare them.

¹² That is, other than ASIC's work in the protection of consumers in relation to financial services and credit.

¹³ The variation in occupational licensing regulation between states is one example: Productivity Commission, *Review of Australia's Consumer Policy Framework* (Report 45, 2008) p 489.

Since 1 January 2011, the ACCC and the State and Territory consumer protection regulators have been jointly responsible for enforcing the Australian Consumer Law under a scheme known as ‘one law, many regulators.’ This development affects the information provided in relation to the 2010/2011 year for nine agencies, and the information provided for 2011/12 where agencies had reported by our cut off date. While there remain some pieces of consumer protection legislation in force in some States/Territories but not others, next time Consumer Action undertakes a review of consumer protection enforcement work it should be easier to compare the enforcement work of those agencies given that the core of their legislative powers will be identical.

1.4 Methodology

As noted above this report focuses on the amount of enforcement work done by the ten chosen consumer protection regulators and how well they report on that work.

In Section 6 we present a Scorecard for each regulator based on our assessment of the following three factors.

- how well each regulator reports on its enforcement work based on a judgment on the adequacy of the agency’s reporting in relation to criteria specified in Section 6.1 below;

- whether the regulator has been increasing or decreasing the overall amount of enforcement work based on the trend in the amount of prosecutions, civil actions, enforceable undertakings and other enforcement work undertaken; and
- for State and Territory regulators, their comparative rate of prosecutions per capita, that is the relative number of prosecutions per 100,000 of population where that data can be calculated.

The data used to determine a score against each of these factors is not necessarily the data that we would ideally use. For example ideally one would consider more than the rate of prosecutions when comparing regulators. Unfortunately we have to work with the data that is published by regulators and make allowances for the inconsistencies and incompleteness in reporting.

The detail of how enforcement actions were counted and hence how they may vary from data published by agencies is set out for each agency in Appendix A.

A principal finding of this report is that generally regulators do not report on their work well, nor do they report consistently over time or in relation to other similar regulators. The report includes recommendations on how regulators could improve reporting.

Poor reporting makes it quite difficult to assess the amount of enforcement done overall and or to compare work done

by one regulator in one year with the same agency in a different year or with other similar agencies in the same year. There are a number of ways in which the data collected in this report could mislead as a result. These include differences in categorisation of work, differences in scope, failure to distinguish consumer protection work from non consumer protection work due to the varying scope of responsibility given to each agency by government, errors at the agency level, errors in our interpretation of agencies' inconsistent reporting and so on. The result is an admittedly approximate assessment of the relative amount of work done across agencies and over time.

Aside from the acknowledged problems in obtaining comparable data, there are a number of possible objections to our methodology including those based on:

- the limitations of assessment using indicators alone, and
- a concern that our approach measures outputs rather than outcomes.

There is academic discussion¹⁴ of the possible problematic consequences of relying on indicators in the governance of public organisations. While we acknowledge this work, we are confident that the publication of indicators about

¹⁴ K Davis, B Kingsbury, S Merry, Indicators as Technology of Global Governance IILJ Working Paper 2010/2 Rev (revised August 2011), Global Administrative Law Series <http://www.iilj.org/publications/documents/2011.8.IndicatorsasaTechnologyofGlobalGovernance.pdf>

enforcement activity can engender a useful discussion about the performance and accountability of consumer regulators. There is no suggestion that indicators such as the ones we have emphasised should be the ends of the assessment of agency performance.

This report has focused on the number and trend of enforcement actions undertaken by consumer regulators. Ideally measurement of the effectiveness of enforcement work would have regard to outcomes – that is reductions in consumer detriment flowing from regulator action – not just outputs. Some regulators have attempted to implement outcome measures but these have not been generally considered successful including by the agencies themselves.

It is however clear that without outputs we won't get outcomes. Provided we have confidence that the regulators are undertaking good risk assessments then more enforcement work rather than less is very likely to be associated with better outcomes. In the absence of reliable outcome measures consumers and the public rely on outputs to understand what has happened and to have some reassurance that they are less likely than otherwise to face unfair market conditions.

Potential measures of consumer detriment include reported levels of consumer satisfaction or reported rates of consumer complaint. While these sources are very useful to understand consumers' experience and stay in

touch with emerging trends, they are less likely to form the basis for valid comparative tools¹⁵. Both will vary as a result of a wide range of other factors including for example broader economic conditions.

This project does not attempt to judge relative amounts of consumer detriment in each jurisdiction (which, even if there were a valid method, would be difficult and costly¹⁶). As noted earlier, our hope is that publishing information about the amount and reporting of enforcement work by regulators will further discussion and debate about these issues.

¹⁵ The increasing importance of credence claims, and the role of behavioural biases are two reasons to think that reported satisfaction/complaints may distort the level and nature of detriment. See respectively Consumer Affairs Victoria 2006 *Consumer detriment in Victoria: a survey of its nature, costs and implications* p iii <http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/consumer-detriment-in-victoria-a-survey-of-its-nature-costs-and-implications-2006.pdf> accessed 24 January 2012 and D Kahneman 2011 *Thinking Fast and Slow*.

¹⁶ Measuring detriment could well be beneficial but it is notoriously difficult to do and is rarely done or done well even by agencies with relevant expertise and mission such as the Office of Best Practice Regulation and the Productivity Commission. See also the Consumer Affairs Victoria 2006 previous footnote.

1.5 Legal basis of regulators' enforcement powers

The Australia Consumer Law

The Australian Consumer Law¹⁷ (**ACL**) commenced on 1 January 2011. It provides for a “one law, multiple regulators” model of consumer regulation in Australia.

As a law of each jurisdiction, the ACL is enforced by the courts and tribunals of each jurisdiction and is subject to the specific rules that apply. The ACL sets out the enforcement powers for consumer regulators—the Australian Competition and Consumer Commission (**ACCC**) and each state and territory fair trading regulator (collectively ‘the ACL regulators’). Each jurisdiction may also have additional legislation that sets out powers of their regulator in relation to particular issues/industries (e.g. tenancy, the motor vehicle industry and the home building industry).

The ACL provides all ACL regulators with the power to issue:

- enforceable undertakings;
- substantiation notices; and
- public warning notices.

¹⁷ Schedule 2 to the *Consumer and Competition Act 2010* (Cth).

The ACL provides the ACCC but not the other regulators with the power to issue infringement notices.¹⁸

ACL regulators can also commence court action seeking the following:

- criminal conviction
- pecuniary penalties
- injunctions
- compensation for injured persons
- non-party redress
- adverse publicity orders
- disqualification orders
- declarations

The ASIC Act now includes broadly similar substantive provisions and remedies in relation to financial services including consumer credit.

¹⁸ Because the infringement notice regime provided for in the second ACL Bill fundamentally differs from regimes which already exist in State and Territory (where non-payment is usually court-enforceable), the Commonwealth infringement notice scheme is formally outside the ACL. Individual States and Territories may create their own infringement notice regimes.

The National Consumer Credit Protection Act

The *National Consumer Credit Protection Act 2009* (Cth) came into force on 1 July 2010. The National Credit Code (**NCC**), which is a schedule to the *National Consumer Credit Protection Act 2009*, replaced the Uniform Consumer Credit Code. The Act provides for federal regulation of consumer credit providers. The Australian Securities and Investment Commission (**ASIC**) is the responsible regulator. ASIC has subsumed the consumer credit regulatory functions of state and territory regulators.

1.6 Which regulator?

As the ACL applies a “one law, multiple regulators” model the issue of which regulator can and/or will act in a matter is a pertinent one. While each regulator is independent, has its own enabling legislation and exercises its powers and functions accordingly, regulators have agreed to work collaboratively. The ACCC, ASIC, all state and territory regulators, the New Zealand Commerce Commission and New Zealand Ministry of Consumer Affairs have entered into Memoranda of Understanding to achieve this.¹⁹

The MOU sets a framework for communication, cooperation and coordination between the regulators. It sets out broad agreements including one around encouraging cooperation in enforcement activities. It

¹⁹ A copy of the memoranda of understanding is available at: http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_mou.pdf

encourages the sharing of complaint and investigative information, subject to statutory and privacy obligations. The MOU also states that each regulator will appoint a Liaison Contact Officer for the purpose of day-to-day liaison under the MOU.

The *ACL Compliance and Enforcement Policy* states that ACL regulators have put in place systems to create a national approach to compliance and enforcement. They agree to:

- have regard to this compliance and enforcement document
- regularly consult and communicate about priorities, markets, compliance and enforcement
- general principles for handling and managing complaints and market intelligence under the ACL
- general principles for compliance and enforcement action to bring about trader compliance for serious breaches of the ACL.

The ACL Policy further states that:

- the ACCC and ASIC have national responsibilities and can act in all state and territories
- each state and territory regulator can act in its own jurisdiction, as defined by its own legislation

- circumstances will vary between jurisdictions and ACL regulators will have varying priorities relevant to their jurisdiction.

The ACL policy flags the idea that ACL regulators may take different compliance and enforcement actions. This may reflect co-ordination between regulators to take action in a particular jurisdiction, or reflect a particular priority in a specific jurisdiction.

The ACCC website and the ACL policy refer to the following arrangements:

- All ACL regulators participate in CAANZ (Consumers Affairs Australia New Zealand), which has arrangements aimed at enhancing consistency, co-ordination and co-operation amongst the ACL regulators. It has agreed to produce an annual report on compliance and enforcement of the ACL.
- the Australian Consumer Law Intelligence Network Knowledge (ACLink), which is a secure extranet that allows Australian Consumer Law regulators to share intelligence and information about complaints and investigations and discuss topics of interest.²⁰

With the Treasury and ASIC, the Australian Consumer Law regulators have established a series of committees to

²⁰ There does not appear to be a positive requirement for regulators to share information via ACLink.

facilitate a co-operative approach to compliance and dispute resolution, product safety, education and information, and policy and research.

2. Good practice in Consumer Protection Enforcement in Australia

2.1 Existing Models for Enforcement and Regulatory Practice

There is no definitive statement of good practice in enforcement in consumer protection in Australian or overseas English language literature. In 2008 CHOICE published *Good Practice in Consumer Protection Enforcement*.²¹ CHOICE's literature review noted that, while there is extensive literature and debate about good practice regulation²², this largely relates to the quantity and quality of regulation and very little considers its enforcement. CHOICE summarised the available literature and proposed a Good Practice Model with eight statements of good practice. A summary of the CHOICE model is reproduced at Table 1.

We are not aware of subsequent work that proposes an alternative model or a specific critique of CHOICE's model.

²¹ K Halliday, T Lozano and G Renouf (2008) *Good Practice in Consumer Protection Enforcement: A Review of 12 Consumer Protection Regulators* (Choice, Sydney) p 17.

²² See for example the work of Richard Macrory, John Braithwaite, Malcolm Sparrow, Philip Hampton and Christine Parker.

Table 1: Overview of the CHOICE Good Practice Model

Overview of the Good Practice Model		
CAPACITY	Power	The regulatory agency should have statutory enforcement options that: 1. have a sufficient range (including criminal prosecutions, civil proceedings and administrative actions), 2. provide flexibility, 3. are adequate in scope, and 4. provide appropriate remedies.
	Policy	The regulatory agency should publish an enforcement policy that focuses on minimising the risk of consumers suffering non-trivial harm. The published policy should set out: 1. the purpose of the policy, 2. the regulator's jurisdiction and available enforcement options, 3. the regulator's compliance and enforcement strategy, 4. the principles and approaches underlying the policy, 5. the process of prioritisation of enforcement matters, and 6. how the regulator uses its discretion.
	Resources	The regulatory agency should allocate adequate resources to consumer protection enforcement. It should have a designated unit for enforcement and compliance.
EFFECTIVENESS	Monitoring	The regulatory agency should use a range of mechanisms to monitor business compliance. It should use the information collected in planning and implementing its enforcement operations. It should also monitor its own performance, including reflecting on whether its enforcement activities are effective in building compliance through behaviour change.
	Targeting	The regulatory agency should apply its consumer protection enforcement resources to areas of high consumer risk. It should select the type of enforcement option most likely to deter unlawful behaviour, taking into account the likely extent of potential impact on consumers, that is, ensuring the enforcement action is proportional to the risk and level of harm. The regulatory agency should periodically review the success and impact of its targeting.
	Enforcement Outcomes	The regulatory agency should obtain a sufficient number of enforcement outcomes in areas of high risk to consumers. It should deter breaches of consumer protection laws through enforcement actions most likely to promote compliance.
ACCOUNTABILITY	Transparency	The regulatory agency should provide comprehensive information on its enforcement decision making process and publish its enforcement outcomes in a manner that facilitates comparative analysis.
	Consultation	The regulatory agency should: 1. adequately resource its consultative processes, 2. have a range of different consumer consultation strategies, including a formal consultative structure, 3. have a wide range of consultation targets, and 4. be genuine and responsive to input from the consultation process.

Source: CHOICE, *Good Practice in Consumer Protection Enforcement*, page 17.

In 2011 the Victorian Environmental Protection Agency published the report of an extensive Compliance and Enforcement Review conducted in 2010 by Krpan.²³ The review was commissioned in light of findings by the Victorian Ombudsman and Auditor-General that the EPA's regulatory approach was inadequate. The review proposed eight principles to guide the EPA's compliance and enforcement work. These principles are reproduced at Table 2.

The two models cover much common ground (see Table 3). Both the CHOICE and Krpan principles focus on the effectiveness and the accountability of enforcement agencies. In particular they each require *results* ('enforcement outcomes' for CHOICE, 'effectiveness' for Krpan), *transparency*, and *engagement* with stakeholders ('consultation' for CHOICE, 'inclusive' for Krpan).

The CHOICE principles—directed at government as much as individual regulators—additionally focus on the *capacity* of regulators to do their job by being given sufficient resources and legislative power, matters not relevant to Krpan's work. On the other hand Krpan directs attention to *proportionality* and the need for an *authoritative* regulator, matters not covered in the CHOICE approach.

²³ S Krpan (2011), Compliance and Enforcement Review: Overview of key themes and recommendations for EPA Victoria (EPA Victoria, Carlton).

Table 2: Eight Principles for the EPA's Regulatory Role

Transforming EPA into a modern regulator

EPA's Chairman and CEO redefined the organisation's objectives in early 2010, stating that their intention was to transform EPA into a 'modern regulator'. The Review is an important part of that transformation.

The Review proposes eight principles by which EPA should undertake its regulatory role. The principles provide a benchmark against which the community can judge EPA's performance. They also provide a basis for EPA to measure its own effectiveness as a regulator. The principles and their regulatory impact are:

Targeted: Compliance and enforcement activities will be targeted at preventing the most serious harm.

Proportionate: Regulatory measures will be proportional to the problem they seek to address.

Transparent: Regulation will be developed and enforced transparently, to promote the sharing of information and learnings. Enforcement actions will be public, to build the credibility of EPA's regulatory approach and processes.

Consistent: Enforcement should be consistent and predictable. EPA aims to ensure that similar circumstances, breaches and incidents lead to similar enforcement outcomes.

Accountable: To ensure accountability, compliance of duty-holders, enforcement decisions and the conduct of authorised officers will be explained and open to public scrutiny.

Inclusive: EPA will engage with community, business and government to promote environmental laws, set standards and provide opportunities to participate in compliance and enforcement.

Authoritative: EPA will be authoritative by setting clear standards, clarifying and interpreting the law and providing authoritative guidance and support on what is required to comply.

EPA will be prepared to be judged on whether individuals and business understand the law and their obligations.

EPA will also be an authoritative source of information on the state of the environment, level of compliance with the laws it regulates, key risks and new and emerging issues.

Effective: Enforcement will seek to prevent environmental harm and impacts to public health, and improve the environment. Enforcement action will be timely, to minimise environmental impacts and enhance the effectiveness of any deterrence.

Source: S Krpan, Compliance and Enforcement Review: Overview of key themes and recommendations for EPA Victoria, page 3.

Table 3: Comparison of Enforcement Models

Area	CHOICE Model	Krpan principles
Effective	Enforcement Outcomes	Effective
	Targeting	Targeted
	Monitoring (i.e. of levels of compliance in the market)	
Accountability	Transparency ²⁴	Transparency
	Consultation	Inclusive
Capacity	Powers	
	Resources	
	Policy (regulator should publish an enforcement policy)	Some correspondence with 'Accountable'
Other		Proportionate
		Authoritative
		Consistent

Source: CHOICE, page 17; Krpan, page 3.

²⁴ The reference to transparency by Choice is to both information about a regulator's decision-making processes and to publishing information on the outcomes achieved (p17). Krpan's summary requires a transparent regulator to 'enforce regulation transparently', to promote the sharing of information, and to ensure enforcement actions are public to build agency credibility (p3). These approaches are distinct but overlapping, and distinct again from the ACCC's focus on the transparency of individual decisions made as part of enforcement which are subject to public scrutiny and that of the Commonwealth Ombudsman and the courts: ACCC (2012) *Compliance and Enforcement Policy* p3.

A well-known approach to regulatory practice generally is the "regulatory pyramid" that depicts a hierarchy of sanctions and interventions available to a regulator, including enforcement. Less formal and coercive measures, such as education and self-regulation, appear at the base of the pyramid, with more interventionist strategies and punitive sanctions, such as criminal prosecutions and removal of licence to operate, at the peak of the pyramid. Ayres and Braithwaite who developed this approach assert that regulators are best able to secure compliance when they act as “benign big guns” and rarely invoke the most severe sanctions.²⁵

Figure 1: The Regulatory & Compliance Pyramid



Source: Ayres and Braithwaite (1992).

²⁵ Ayres I and Braithwaite J (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York

2.2 A Brief Comment on the Models

Not all aspects of the above models can be accepted without contention. For example, it could be argued that too great a focus on targeting problems that impact on a large number of consumers could lead to an approach that is insufficiently focused on giving early signals to developing markets that may head off problems down the track (Krpan c.f. Choice) c.f. Box 1: Responding to Compliance Risks with a Campaign Approach).

Similarly, given finite resources, too great a focus on consistency might inhibit an approach that encourages test cases that may involve selecting a particular instance of conduct (Krpan) c.f. Box 4: Enforcement Agencies as Model Litigants).

In relation to the regulatory pyramid, there can be a tendency to approach the various tools in a linear way — i.e., use education and persuasion, and only if that doesn't work move to the next layer. This may not always be the most effective way to ensure compliance and enhance consumer protection (Braithwaite, Ayers c.f. Box 1: Responding to Compliance Risks with a Campaign Approach)

It is not the purpose of this report to make a detailed response to the models. Nor do we seek to suggest they are not useful. However, we do suggest that they are models that must be applied with discretion and nuance or

risk the very enforcement effectiveness they seek to achieve.

2.3 Application to this Report

The current report is most concerned with the *effectiveness* of a regulator's consumer protection work — whether it undertakes some, and if so, sufficient, enforcement actions of the right kind to promote compliance, and whether it achieves results for consumers that have been exploited or disadvantaged by non-compliance. In order to make judgments about this fundamental question, it is in addition necessary to be concerned with the *accountability* of regulators for the effectiveness of that work, and in particular the quality and appropriateness of their reporting on the outcomes that they have achieved, their published policies and their targeting strategies.

This report raises significant concerns about most regulators performance in these two key areas. We believe that until these two areas are addressed some of the other elements of the enforcement models described above such as targeting, proportionality and consistency should be viewed as subordinate. They only arise once the hurdle of preparedness to undertake enforcement work is met.

Box 1: Responding to Compliance Risks with a Campaign Approach

Regulators are generally confronted with the reality that they do not have enough resources to respond to each and every breach of consumer protection law. How regulators respond to this reality has a significant impact on effectiveness. One response is a form of paralysis where regulators, in their concern to be fair to all businesses, fail to take needed action. Alternatively, a regulator may take an approach that seeks to react to problems as arise—sometimes referred to as the "whack-a-mole" approach to enforcement.²⁶ This involves the regulator responding to a range of different issues as they arise, using whatever enforcement tool seems appropriate, without being particularly strategic about how to protect consumers by using enforcement to increase compliance.

The ACCC's response to misleading green claims is an example of an alternative and, this Report suggests, more strategic "campaign approach". The ACCC determined that there was a need to respond to concern about the widespread use of untested and possibly misleading 'green claims'. Rather than simply continue to respond to matters brought to its attention, the ACCC stated that it

²⁶ "Whack-a-mole" is a game wherein a player armed with a hammer seeks to hit on the head faux moles that poke their heads up at random through one of a number of holes on the game board.

intended to “ramp-up its green compliance activities with a combination of business and consumer educative initiatives and targeted enforcement action”.²⁷

The ACCC:

- made public statements about its concerns, including strongly worded warnings;²⁸
- produced a guide for business²⁹ and for consumers;³⁰
- raised issues with possibly non-compliant businesses and agreed an appropriate response;³¹
- undertook investigations into apparent non-compliance;
- obtained enforcement outcomes in response to some claims including administrative undertakings³²,

²⁷ ACCC Media Release—ACCC scrutinises 'green' marketing, 26 October 2007, available at: <http://www.accc.gov.au/content/index.phtml/itemId/802028/fromItemId/2332>

²⁸ ACCC, *In the world of marketing, it seems green is the new black*, 8 May 2008, available at: <http://www.productsafety.gov.au/content/index.phtml/itemId/975877>.

²⁹ ACCC, *Green Marketing and the Australian Consumer Law* (2008, republished 2011).

³⁰ ACCC, *Your consumer rights: environmental claims* (2011), available at: <http://www.accc.gov.au/content/item.phtml?itemId=808269&nodeId=06cf55664c677258de1abffd4e5641c9&fn=Your%20consumer%20rights,%20environmental%20claims.pdf>.

³¹ ACCC, *Media Release—Woolworths responds to 'green' claims concerns*, 18 March 2008, available at: <http://www.accc.gov.au/content/index.phtml/itemId/813595/fromItemId/632284>.

³² ACCC, *Media Release—EnergyAustralia clears air about green electricity claims*, 21 December 2007, available at: <http://www.accc.gov.au/content/index.phtml/itemId/806650/fromItemId/776481>.

- court enforceable undertakings³³ and court declarations that claims were misleading.³⁴

The ACCC approach to green claims has been recognised as having an impact on the market:

“The ACCC’s strong enforcement approach to misleading environmental claims appears to have had a positive impact on the accuracy and clarity of green marketing claims across the board. For example, the use of green marketing claims has changed significantly since 2003 when entire industries were making wide ranging and fairly blatant misleading representations about the environmental benefits of their products. Today, blatant examples of false or misleading environmental claims are much rarer and unlikely to be occurring on an industry wide basis.³⁵”

An approach of this sort is particularly important in emerging or rapidly changing markets. In such markets businesses will be experimenting with new business models and marketing strategies in an uncertain regulatory environment. The regulator could sit on its hands and see what happens or it could play a role in

³³ ACCC, *Media Release—ACCC ensures green cosmetic claims come clean*, 17 August 2006, available at: <http://www.accc.gov.au/content/index.phtml/itemId/758932/fromItemId/720536>.

³⁴ ACCC, *Media Release—Saab ‘Grrrrreen’ claims declared misleading by Federal Court*, 18 September 2008, available at: <http://www.accc.gov.au/content/index.phtml/itemId/843395/fromItemId/621575>.

³⁵ M Terceiro (2010), ‘When green wash won’t wash: Avoiding misleading environmental claims’ presented at the Environmental Defenders Office 25th National Conference.

shaping the market by sending early messages that particular types of conduct will not be tolerated.

The ACCC intervened early to 'set the tone' for green claims as problems emerged. One can contrast this success with regulators' failure to respond to early problems in the post deregulation telecommunications market. The result is a culture of non-compliance with which we are still dealing. Where a regulator fails to set the tone for a market, industry players are able to make arguments based on sunk costs,³⁶ consumer familiarity with harmful practices and/or 'they got away with it, so how can you challenge me'.

³⁶ Other things being equal, industry will often incur higher costs in changing a particular product design or distribution model where it has been in place for longer.

3. Reporting on enforcement activities by consumer regulators

In this section of the report we provide an overview of the information that is publicly available about the enforcement actions of consumer regulators and consider whether it is sufficient to:

- generally meet acceptable accountability and transparency requirements, and
- provide sufficient information to assess the level of enforcement work undertaken by agencies.

We also suggest an approach to reporting that would aid transparency.

3.1 The importance of transparency

Transparency about the work undertaken by consumer protection regulators and the decision-making processes that guide that work is essential for public confidence that regulators are doing an adequate job.

As is often remarked, it is important that businesses know what is expected of them, what actions will place them at risk of regulatory action and that all businesses in a market

are being treated fairly—regulator decision making should therefore be consistent with publically available criteria.

It's equally important however that the application of a fairness principle doesn't impede a regulator from achieving results for consumers. Fairness does *not* mean that a particular offender should not be the subject of enforcement action because a regulator has not taken similar action or could not take action against similar conduct by another market participant.

But transparency is important for reasons beyond businesses knowing what is expected of them. Transparency in general, and adequate reporting in particular, enable government and the public to understand the extent to which the money spent on a regulator is an effective investment in promoting consumer welfare.

Later in this section we set out in detail the information published by each of the ten regulators about their enforcement work over the recent years. With some exceptions the information currently published makes it very difficult to assess whether or not regulators are doing a good job and whether they are improving or getting worse. In all cases it is difficult to know how well regulators are doing compared to their peers.

3.2 Suggested reporting framework

We are not aware of any specific work done recommending the precise information a consumer

protection regulator should report, however our attempt to use existing information to evaluate the enforcement outcomes achieved by Australian consumer protection regulators has helped us formulate the following suggestions.

We recommend that regulators report information that is

- comprehensive,
- frequent and timely,
- consistent, and
- accessible.

Comprehensive

Regulators should make available all useful information. While a decent summary should be included in their Annual Report, there is no reason that more detailed information should not be made available on request or on their web site. We suggest that at a minimum reporting should include:

- A big picture overview of enforcement actions:
 - the total number of actions for each enforcement power granted to the regulator (e.g. prosecution, enforceable undertaking, substantiation notice etc),

- total number of actions for each of the main types of wrongdoing (for example misleading conduct, bait advertising, product safety etc),
 - total number of actions per regulated industry (e.g. builders, pawnbrokers, financial advisers), and
 - cross tabulations among these totals.
- Where reporting on litigation, the report should include the number of litigation matters commenced during the period.
- Reporting should also provide qualitative information about court cases (other than high volume minor or routine matters) and any other significant action (such as an enforceable undertaking with a medium or large business). This would include at least the type of action taken, section of law breached, size and type of the defendant and the amount of money involved.

Frequent and timely

Information should be released more frequently than annually and as close as possible to the time frame reported on. NSW OFT and the ACCC publish quarterly

bulletins of enforcement statistics.³⁷ ASIC recently commenced reporting on a six monthly basis.³⁸

Consistent

Information reported should be consistent

- *across jurisdictions:* Information between jurisdictions should be able to be compared, particularly for the joint enforcers of the ACL given the “One law, multiple regulators” model; and
- *across time periods:* Information should enable comparisons of the same regulator’s activities in different time periods.

Accessible

The information should be readily available to the public and easily accessible on websites. Information should include both detailed data and more easily digestible summaries.

In addition we encourage continued exploration of measures that assess the *impact* of the work of regulators

³⁷ The ACCC’s *Account* reports are published at <http://www.accc.gov.au/content/index.phtml/itemId/815557> and NSW OFT’s Enforcement action bulletin at http://www.fairtrading.nsw.gov.au/About_us/Data_and_statistics/Compliance_and_enforcement_data/Summary_of_compliance_and_enforcement_results.html. Both accessed 27 November 2012.

³⁸ See, eg, ASIC, *Report 299: ASIC Enforcement Accounts January-June 2012*, available at: <http://www.asic.gov.au/asic/asic.nsf/byheadline/12-222MR+ASIC+enforcement+report+-+January+to+June+2012?openDocument>.

on the protection of consumers. For example, as described below, the NSW, Queensland and WA regulators have separately tried to measure the “level of consumer confidence in the marketplace” through surveying consumers. Although this particular measure has proved to have limited utility, continued exploration of possible impact measures should be considered.

3.3 What is currently reported?

The current reporting practices for the ten consumer regulators covered in this report vary greatly. The regulators generally provide information in their annual reports and/or their websites, however the information is often difficult to find and sometimes difficult to understand, assess or compare.

No regulator reported the *comprehensive* data suggested above throughout the period covered by this report (up to the financial year ending 30 June 2012, as released by 30 November 2012).³⁹ Regulators rarely report against *all* of the enforcement powers granted to them, the type of wrongdoing that they have responded to or the industry involved. In reviewing the information published by regulators for this project we often found that a particular

³⁹ ASIC's six monthly enforcement reports were initiated in early 2012. The most recent at the time of the research was for the period January to June 2012 published in September 2012. This report goes a good way towards meeting the aspirations we have set for comprehensiveness: *ASIC enforcement outcomes: January to June 2012*: [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rep299-published-11-September%202012.pdf/\\$file/rep299-published-11-September%202012.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rep299-published-11-September%202012.pdf/$file/rep299-published-11-September%202012.pdf).

type of enforcement power was not reported on at all. It was difficult to ascertain whether or not this was because there were no actions of this kind taken. For all regulators, key details were often missing, for example the nature of the litigation or the section of the law breached. It was often difficult to ascertain whether the matter was a consumer protection matter or related to some other agency responsibility.

The following paragraphs indicate how regulators have reported.

Civil and criminal litigation: The ACCC, CAV, NSW OFT, WA DOC, SA CBS, TAS CAFT and ASIC provide information on litigation matters finalised, with all except the ACCC splitting them into criminal and civil matters.

Three of the regulators (ACCC, ASIC and CAV) now report on litigation or prosecutions *commenced*⁴⁰. Litigation finalised was a much more common measure. Litigation commenced is a more useful and up-to-date indicator of how proactive a regulator has been in any given year⁴¹.

Penalties and compensation: ACCC, CAV, NSW OFT, WA DOC and ASIC provide information about the amount

⁴⁰ ACCCount reports on litigation commenced by the ACCC. 2. ASIC reported on litigation commenced in its Annual reports since 2009/10, however curiously it does not include litigation commenced data in its new 6 monthly reports.. 3. CAV reported on actions commenced (though it is unclear what kind of actions) in at least the 2010/11 and 2011/12 Annual Reports.

⁴¹ See Recommendation 2 in Section 7 below.

of penalties and/or compensation flowing from their actions.

Enforceable undertakings: The ACCC, ASIC, and CAV provide information on enforceable undertakings. SA CBS published information on ‘assurances’. Other states either did not have that power prior to the introduction of the ACL, did not use it, or did not provide information about it.

Penalty/Infringement notices: The number of penalty/infringement notices is published by ACCC,⁴² the ACT ORS, CAV, NSW OFT and WA DOC. WA DOC information on infringement notices is however neither extensive nor well organised. CAV appears to have not published this information for 2011/12.

Disciplinary actions: Figures for disciplinary actions are published by ACCC, ASIC, the ACT ORS, NSW OFT, WA DOC, and SA CBS.

Details on more significant individual matters: ASIC, ACCC, NSW OFT, CAV and WA include discussions about particular individual consumer protection enforcement actions taken in their recent annual reports. Qld OFT and ACT ORS do not.

Timeliness: Only ACCC (quarterly), NSW (quarterly) and ASIC (six monthly) report more frequently than once a year, with ASIC having made its first 6 monthly report in

⁴² ACCC publishes the number of infringement notices paid in its Annual Reports.

March 2012. As noted above regulators rarely provide data on matters *commenced* as opposed to ‘completed’ or in some cases ‘pending’. Reporting on matters commenced is particularly important in relation to litigation where matters will frequently continue across two or more reporting periods. Reporting on ‘pending’ matters does, as ASIC notes, “provide ... a good indication of the number of matters that are being pursued by ... at any one time”. This is no doubt a useful piece of management information but it says nothing to stakeholders interested in knowing about the matters that have warranted enforcement action in the relevant period. ASIC and the ACCC both include information about matters commenced in their Annual Reporting.

ACCC

The ACCC 2011/12 Annual Report does not provide a comprehensive overview of the ACCC’s enforcement work. It does list the following:

- Undertakings accepted
- Infringement notices paid
- Litigation concluded
- Litigation continuing
- Public warnings
- Disqualification orders

The Annual Report is however supplemented by ACCCount, a quarterly bulletin published by the ACCC. ACCCount includes, amongst other things, detail of the litigation commenced and concluded in the period, as well as detail of undertakings entered in to. Extra information is available in the undertakings register, infringement notice register, product safety register and public warnings register on the ACCC website.

The 2011/12 Annual Report provides additional information about the enforcement work of the ACCC, including activity under the Australian Consumer Law. Statistics on infringement notices paid and the amounts paid, as well as the amount of court order pecuniary penalties is included. Statistical information about other ACL remedies is not provided.

ACCC statistics do not distinguish between criminal and civil litigation matters. Furthermore for most years, only information about litigation and undertakings is available.

ASIC

The Annual Report 2011/12 includes tables setting out enforcement outcomes and contains information about compliance action and significant cases. The ASIC website contains an enforceable undertakings register.

Prior to March 2012 the ASIC data was not particularly helpful. It was virtually impossible to ascertain what information related to each of its main regulatory functions.

Statistics did not distinguish between ASIC's role in regulation of the retail financial services industry and its roles in regulation of capital markets or administration of the companies register.

It is encouraging to see the degree to which the new ASIC approach to enforcement has improved their reporting.

CAV

The CAV Annual Report 2011/12 includes a high level statistical table for enforcement action as well as a separate table for compliance work.

Recent CAV Annual Reports include a lot less statistical data than earlier years. For the years 2006/07, 07/08 and 08/09 information was published in the Annual Report for prosecutions finalised, civil actions finalised, infringement notices, disciplinary actions, enforceable undertakings, public warnings, warning letters, and substantiation notices. These were shown for each relevant Act for which the agency is responsible. Information was also provided about the financial amounts involved in the penalties imposed as a result of prosecutions and the compensation for consumers ordered in the course of prosecutions and civil action. The reports also included the penalties involved in infringement notices but this figure was not broken down by Act and difficult to work out what part relates to consumer protection and what to other areas of responsibility.

The Annual Report for 2011/12 however provides significantly less information. It contains a list of prosecutions finalised, civil actions finalised, enforceable undertakings and actions commenced. It also contains the number of warning letters, and the amounts obtained in fines/consent orders and Court fund/VCAT penalties. The 2010/11 Annual Report contains the number of infringement notices, though this is not included in the 2011/12 Report. The CAV website includes “news updates” about all court actions, enforceable undertakings and public warnings. These updates include information about each individual case, the outcomes, penalties and usually the Act the action was brought under. As far as we could tell this information is not summarised and reported on the web site with the degree of detail available in past years.

Reporting also includes a general discussion of the CAV’s enforcement and compliance work including case studies.

NSW

The NSW OFT publishes an annual *Year in Review*. The NSW OFT also publishes quarterly enforcement statistics and its website provides information about recent enforcement actions including enforceable undertakings and public warnings.

Statistical information published includes prosecutions finalised, civil actions finalised, penalty notices, disciplinary actions, enforceable undertakings, public warnings,

warning letters, and substantiation notices (previously show cause notices). These are shown for each relevant Act for which the agency is responsible. Information is also provided about the financial amounts involved in the penalties imposed and penalty notices issued

The *Year in Review* also includes statistics on compliance actions, as well as details of some compliance programs and enforcement cases.

It appears that the NSW OFT only reports on successfully finalised prosecutions rather than all commenced.

QLD

The Qld OFT publishes almost no useful information about enforcement. The information available is either in their annual reports or the “Service Delivery Statement” which forms part of the annual State Budget Papers. Limited statistics have been published, and of those that are published it has been impossible to isolate any numerical data that relates specifically and exclusively to enforcement action.⁴³

⁴³ In February 2011 the Qld OFT moved from the Department of Employment, Economic Development and Innovation (DDEDI) to the Department of Justice and Attorney-General (DJAG). The relevant Annual Report for 2010/11 is the DJAG report. While it contains some examples of cases of enforcement and compliance, it contains no useful statistics.

The Qld OFT’s *Compliance and Enforcement Policy and Standards* stresses the importance of accurate data collection and states that the data collected is regularly reported to parliament and the public via the Agency Service Delivery Statement. The relevant information in the 2011/12 Agency Service Delivery Statement is contained in the DJAG section. The Agency Service Delivery Statement reports on fair trading activity in the same

WA

Until 2008/2009 the WA CPD published a *Year in Review*. It contained figures on infringement notices issued, prohibition notices issued, traders named, prosecutions, successful prosecutions, “orders to remedy” defects and matters referred to State Administrative Tribunal. It also included area specific data. It appears that *Year in Review* is no longer being published.

Since then enforcement information is only really available in the Annual Reports. The Annual Reports of the WA Department of Commerce (which is the Department which currently has responsibility for consumer protection) provide more limited information including:

- court activity, including prosecutions and disciplinary actions taken in the financial year;⁴⁴
- information about cases and compliance activity of the Division.

part of the report as liquor and gaming, as this is where it sits in the structure of the DJAG. A table with some statistical data is included under the heading of Liquor, Gaming and Fair Trading in the Agency Service Delivery Statement, and the relevant information from that table is shown in Section 4 of the report and Appendix A.

The *Compliance and Enforcement Policy and Standards* also states that compliance and enforcement data is entered into the Marketplace Accreditation and Compliance System, though this data was not available on the agency's website.

There is little information available on the Queensland OFT website on enforcement outcomes, particularly in relation to court actions. There is some information in relation to product safety, including lists of consumer alerts, product safety warnings and banned products. There is also apparently a register of enforceable undertakings which the public can access (but it is not accessible through the website).

⁴⁴ See Appendix 3 of the Annual Report.

Until recently there were a number of Statutory Boards set up for overview of a particular issue – Real Estate, Land Valuers, Settlement Agents, Motor Vehicle, Builders and Painters. They provided separate Annual Reports. From 2010/11 all of these Boards have disappeared and their work has been subsumed into WA DOC – either the Consumer Protection Division or Building Commission Division. The WA DOC Annual Report now covers them all.

The department responsible for WA's consumer protection work changed several times during the period under review and this created some patchiness in reporting. Collating data for WA DOC was made more difficult by the number of boards it previously administered. Some of the boards' Annual Reports were available together with the WA DOC Report, while others weren't. Collation was also made difficult by the fact that the Painters' Registration Board reported on a calendar year, while all other boards and the WA DOC generally reported on a financial year.

Statistical information is published in one of these sources for prosecutions finalised and pending, civil actions finalised and pending, and "proceedings in the State Administrative Tribunal". These are shown for each relevant Act for which the agency is responsible. Information is also provided about the outcomes, including financial penalties, imposed by the courts and the State Administrative Tribunal. There is patchy information available on infringement notices, prohibition notices,

traders named, orders to remedy defects and breaches, rectification notices, and warning letters.

ACT

There is very little reported on consumer enforcement activity by the ACT ORS. While there is a fair amount of information on the website regarding their enforcement framework and annual plan for 2011/2012, there is no information available on the ACT ORS website on enforcement statistics.

The only possible place to look for enforcement outcome activity on the ACT ORS website is on their 'Court Decisions' page under 'Publication', which provides an overview of cases in the ACT Civil and Administrative Tribunal (ACAT) relating to breaches of the *Agents Act 2003*, *Liquor Act 1975*, the *Liquor Act 2010* and the *Tobacco Act 1927*. However, for the purpose of this report, security, tobacco and liquor matters are not considered as consumer protection matters.

There is some information included in the Annual Reports on compliance and enforcement activity, though the reporting is neither comprehensive nor consistent.

The ACT ORS was responsible for the Fair Trading Act and Door-to-Door Trading Act prior to the commencement of the ACL. No enforcement actions are recorded against either. There are two Motor Vehicle Industry matters reported in the last 3 years.

NT

There is almost no statistical information available on enforcement actions taken by NT CA. The data in the table mainly relates to compliance and complaints related activity, rather than enforcement activity. The Annual Reports at times contain discussion of some of the enforcement actions taken.

SA

The SA CBS' reporting provides details of some enforcement actions (prosecutions, disciplinary court actions and 'assurances') by Act.

For some enforcement outcomes (warning letters) the SA CBS Annual Reports do not distinguish between consumer protection matters and other matters such as tenancy matters.

The 2010/11 Annual Report appears to have been published on 2 April 2012 some 8 months after the end of the relevant reporting period. This period of delay is not acceptable for a government agency accountable to the public.⁴⁵

⁴⁵ The Annual Report indicates that the SA CBS provided the report to the Minister on 28 October 2011 which is within the time frame set out in the Fair Trading Act. Under the Act the Minister has 14 sitting days to table it in parliament but it wasn't tabled in parliament until 27 March 2012, which was a few more days than the allowed 14 sitting days.

TAS

Tas CAFT reports on prosecution, warnings and until 2009/10 licensing action against each Act. There is no information about civil litigation or enforceable undertakings.

Box 2: Reporting to and Responding to consumer organisations

Consumer organisations play an important role in early identification of consumer issues in the marketplace, through complaints services, legal advice and assistance services, financial counselling, and market monitoring. The information provided by consumer organisations to regulators can help identify emerging issues and trends of consumer concern. However, consumer organisations often receive limited feedback about complaints, and regulatory action (if undertaken) can occur many years after a complaint is made.

The danger in this approach is that consumers and consumer organisations may have a reduced motivation to engage in the effort involved in making complaints. Further, in matters that proceed to investigation and may ultimately require evidence from complaining consumers, consumer organisations can help support a consumer

through the process and increase the likelihood they will 'stick' with the process. These efforts can be undermined by an inability to obtain some feedback as to progress of the matter.

One method to engage consumer organisations more in complaints is the 'super complaint' mechanism canvassed by the Productivity Commission in its report on consumer policy. This mechanism has been used in the UK since 2002.⁴⁶ Under the UK provision, a designated consumer body notifies the UK Office of Fair Trading and other relevant regulators about a consumer problem. The super complainant is required to set out its reasons why the problem is significantly harming consumers' interests. The regulator must then publish a reasoned response within 90 days. Super-complaints include details of market features harming consumer interests, documented facts and evidence, and are designed to provide consumer bodies with authority in ensuring consumer detriment is appropriately investigated. The process offers complaints to be "fast-tracked" so that issues raised by consumer bodies are given due consideration within a fixed time.

⁴⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, available at: <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>, page 218.

In 2011, the NSW Office of Fair Trading established a pilot 'super complaints' mechanism with CHOICE.⁴⁷ In 2012, CHOICE provided NSW OFT with a super complaint on electricity switching sites, and NSW OFT has responded.

While the super complaint process has not been adopted elsewhere in Australia, consumer regulators have taken steps to enhance the responses they provide to consumer bodies that have lodged complaints. For example, the ACCC has established a protocol within its Consumer Consultative Committee to report back to the committee on every complaint made by a member of the committee. The complaint remains open on the committee's register of complaints until it has been dealt with appropriately. The mechanism ensures members of the committee are kept informed about the progress and outcomes of complaints.

This mechanism has proved extremely useful in practice. We recommend it be emulated by other regulators.

⁴⁷ See Office of Fair Trading, available at: http://www.fairtrading.nsw.gov.au/About_us/Our_compliance_role/Our_compliance_priorities/Super_complaints.html

4. The extent of enforcement activity by consumer regulators

4.1 Introduction

The purpose of this section of the report is to outline how much enforcement work has been undertaken by consumer regulators in the recent past where that data is available, and to identify areas for improvement.

This section summarises for each regulator:

- The quantity and nature of enforcement over the past five, six years or, in the case of the ACCC, 11 years⁴⁸ as far as can be shown from the figures published by the agencies in their Annual Reports and on their web sites.
- Some observations of trends in the level of enforcement action to the extent possible given the state of the data.

⁴⁸ We publish eleven years of data for the ACCC for several reasons. First it is the leading consumer protection regulator. Second the work for this project builds on work undertaken by Consumers' Federation of Australia in 2008 and the data for the ACCC was available in that report (although we have checked it against the sources and made small alterations in the way matters are counted for consistency with this report.) Agencies have five or six years data according to whether or not their 2011/12 Annual Report had been published by 30 November 2012 (the date that public companies are required to report to ASIC).

Each regulator is then allocated one of five ratings: ‘falling’, ‘trending down’, ‘steady’, ‘trending up’ or ‘increasing’. The typical characteristics used to apply each rating are set out at 6.2 *Overall trends in enforcement outcomes* below.

Ideally this section would also include further information and analysis, however as noted in the previous section, reporting by the regulators is rarely adequate and those inadequacies militate against comprehensive analysis.

Collecting and collating data in a form that would allow comparison is a very difficult task given the inconsistencies in reporting between jurisdictions and between different years in the same jurisdiction, and in one case between differing reports published by the same government (Queensland) on the same activities. The failure of several jurisdictions to summarise data on enforcement actions that is otherwise presented only in narrative form is also very frustrating.

Research for this report compiled all the information from Annual Reports and other published sources available online that possibly related to consumer protection enforcement. Full details on the information collated, the particular interpretative difficulties faced and the decisions made about whether and how to include data from Annual Reports and other sources is set out in Appendix A.

This section of the report extracts data that relates to consumer protection enforcement as far as can be determined from the information sources. With the

exception of the Queensland and Northern Territory consumer protection regulators, data on compliance or complaint handling work has not been included in this section. The reason for inclusion in those two cases is to give some context to the paucity of data on enforcement published by those agencies.

If regulators published all the information that we believe is necessary it would be possible to additionally do the following:

- compare the total number of enforcement actions (ideally weighted by type) to the total number of consumer complaints;
- determine the rate of enforcement actions having regard to the population of the State or Territory; and
- draw some detailed comparative conclusions as between regulators.

Using the data that is available we have been able to compare the number of prosecutions for per capita for five States. This information is included in Section 6, Scorecard, below.

To give the analysis context and assist in interpretation, it would be useful to know the budgetary allocation to the regulator as a whole, and the amount applied to its enforcement functions in particular. A proxy measure might be to compare the number of staff allocated to consumer

protection functions in general and enforcement in particular. Neither measure is routinely available.

The section also notes, under the relevant State heading, the other measures of efficacy published by the Queensland, ACT and WA state regulators from time to time.

Scorecard

In Section 6, Scorecard, below we provide a score for each regulator based on their enforcement reporting, the trend in enforcement over the past 5 years and, in the case of the State and Territory regulators, their relative performance. Given the limitations on the available data this score is very broadly indicative at best.

In relation to their enforcement trends we have used the following five possible assessments: "falling", "trending down", "steady", "trending up" and "increasing". In this section we indicate following our summary of the available enforcement statistics our conclusion as to which of these five is appropriate for each regulator based on the available data. That conclusion is then transferred to the Scorecard in Section 6.

As noted above, ideally measurement of the effectiveness of enforcement work would have regard to outcomes. Some agencies have attempted to implement outcome measures but these have not been generally considered successful including by the agencies themselves. It is

however clear that without outputs we won't get outcomes. Provided we have confidence that the regulators are undertaking good risk assessments then more enforcement work rather than less is very likely to be associated with better outcomes. In the absence of reliable outcome measures consumers and the public rely on outputs to understand what has happened and to have some reassurance that they are less likely than otherwise to face unfair market conditions.

A further difficulty is that counting raw numbers may not account for the complexity of matters, particularly in relation to court action or complex investigations leading to enforcement action. It is likely that all things being equal in the absence of distinct policies about the types of matters that will be taken on these will even out over time for any given agency, although one or several unusually resource intensive matters may impact on an agency's data for a particular year. We did not locate any discussion of a change in policy or a year in which there were particularly complex matters in any of the regulators recent Annual reports.

A note on the data

Appendix A to this report provides all the information that we could locate relevant to the consumer protection enforcement activity of each regulator. The tables in this section summarise that data by focusing on enforcement actions. Generally speaking the tables exclude information

about compliance activities (for example inspections), activities that are not clearly consumer protection, information on money ordered to be paid as penalties or similar, and information about Acts or remedies where no action was taken in any of the years covered (i.e. rows of zeros). The tables in this section set out data drawn from the published Annual Reports and, where noted, other sources published by or for the relevant agency. Sometimes information published in one year was not available in another year. In the tables NA indicates “not available” and NR indicates “not relevant”. NR is used, for example, for years when the relevant law was not in force.

It should be noted that the figures in relation to prosecutions and civil court actions couldn’t always be reconciled to summary information published in annual reports. Where available we have examined the narrative report of each court matter to judge as best we are able if it related to consumer protection or not (and in some cases have also excluded contempt proceedings from the list⁴⁹).

See Appendix A for lengthier versions of these tables with additional data included.

In the following tables:

- NA means that the data is not available

⁴⁹ An error in our research method has meant that contempt proceedings were excluded for ACCC and NSW OFT but included for CAV and WA OCP. The number of proceedings are not sufficiently large to significantly influence the results of the research.

- NR means that the data is not relevant (for example the relevant legislation did not apply in that year)

4.2 Australian Competition and Consumer Commission

Table 4 summarises the enforcement work reported by the ACCC. Chart 1 presents total litigation actions, total undertakings and grand total over time in graph form.

Table 4: ACCC Enforcement Actions 2001/02 – 2011/12

Financial Year		01/02	02/03	03/04	04/05	05/06
Litigation commenced	Consumer protection	31	18	14	12	4
	Small business	14	3	1	8	1
	Product safety	2	2	0	2	3
	Subtotal	47	23	15	22	8
Undertakings	Consumer protection	14	15	19	30	33
	Small business	2	2	2	1	4
	Product safety	6	7	5	19	14
	Subtotal	22	24	26	50	51
Total actions		69	47	41	72	59

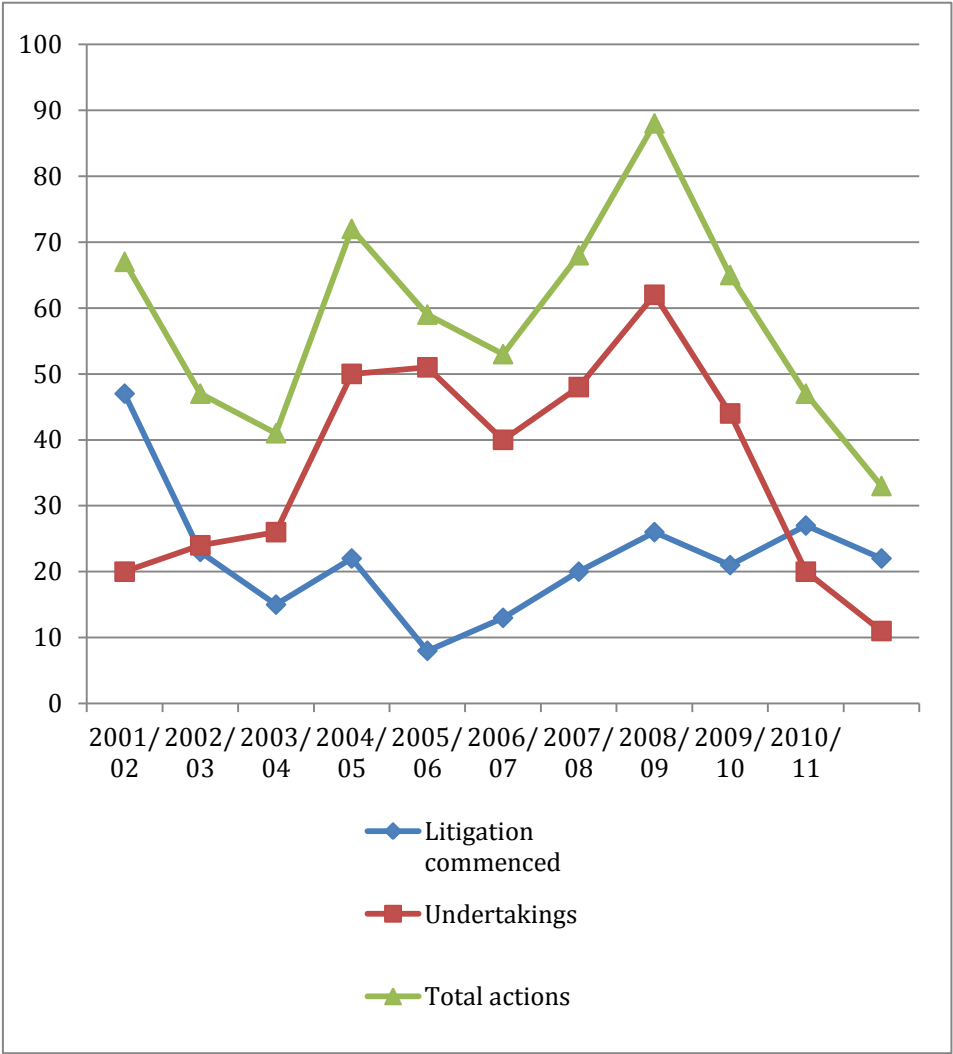
Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Litigation commenced	Consumer protection	10	15	22	16	22	18
	Small business	0	3	3	3	2	1
	Product safety	3	2	1	2	3	3
	Subtotal	13	20	26	21	27	22
Undertakings	Consumer protection	26	27	34	30	17	9
	Small business	3	5	3	3	1	1
	Product safety	12	17	26	11	2	1
	Subtotal	41	49	63	44	20	11
Total actions		54	69	89	65	47	33

Observations

There are no clear trends in the ACCC ten-year data. It is however possible to say:

- Undertakings became a much more popular enforcement tool for the seven years from 2003/04, in particular from 2004/05, but have dropped off markedly in the two most recent years.

Chart 1: ACCC Enforcement Actions 2001/02 – 2011/12



Litigation declined markedly over the 5 years to 2005/06 but slowly but steadily recovered in the following 6 years. While total actions went up and then declined, the

proportion that involves litigation has steadily increased. Given litigation is generally a harder option for a regulator (for example it takes considerably more resources and sometimes courage than settling for an enforceable undertaking) and often but not always produces better results, an overall assessment of 'trending up' is fair.

Overall assessment: "Trending up"⁵⁰ (based on most recent 6 years of data).

4.3 Australian Securities and Investments Commission

Tables 5 and 6 summarise the information provided by ASIC in its Annual Reports and on its web site about enforcement outcomes over the past five years. The primary difficulty with the ASIC data is in knowing which data relates to each of its two main regulatory functions: regulation of the retail financial services industry and regulation of capital markets. Most of the data provided in most years mixes the two together. It's pleasing to note that since February 2012 ASIC's six monthly enforcement reports now distinguish matters by area of activity, separating financial services from market integrity, corporate governance and small business compliance.

⁵⁰ The five available assessments are "falling", "trending down", "steady", "trending up" and "increasing". See Section 5, *Scorecard*, below.

Table 5: ASIC Enforcement Actions 2006/07 – 2011/12

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Criminal proceedings finalised						
Overall	51	52	39	23	26	28
Criminals convicted						
Financial services	NA ⁵¹	23	NA	NA	NA	NA
Overall	42	49	34	22	25	27
Criminals jailed						
Financial services	NA	14	12	8[1]	NA	NA
Overall	21	23	19	12	16	20
% successful criminal litigation						
Overall	88%	NA	80%	80%	NA	NA
Civil proceedings completed						
Overall	76	44	35	30	34	24
% successful civil litigation						
Overall	98%	NA	94%	94%	NA	NA
Litigation commenced						
Overall	NA	NA	NA	217	130	134
Litigation concluded						
Overall	430	280	186	156	202	179

51 In this and following tables NA – not available – means that no figure for this data was published in that year, or that the information that is published is not clear.

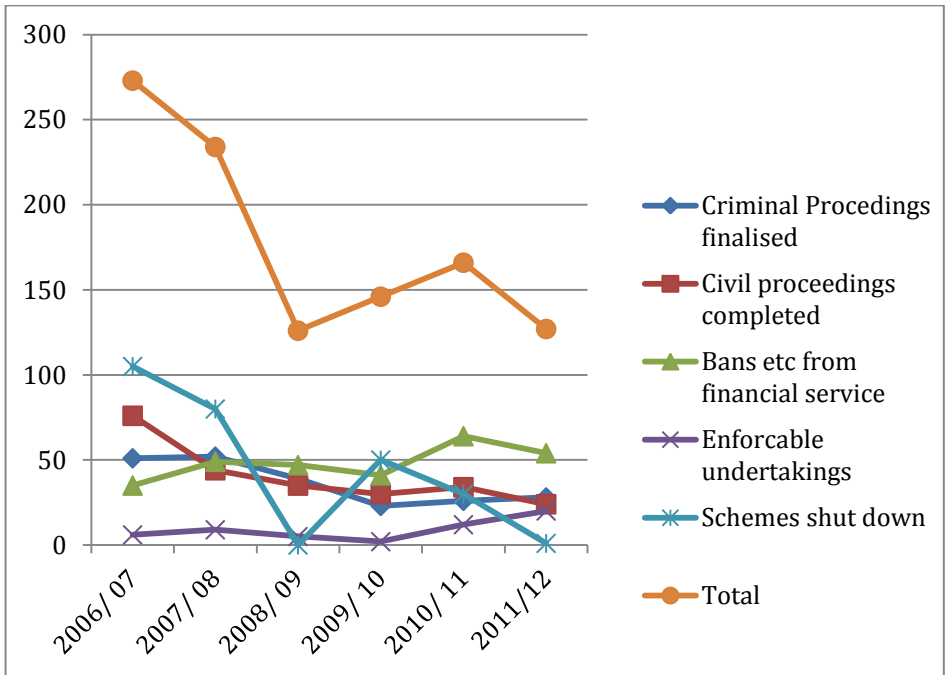
Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
% successful litigation						
Overall	97%	94%	90%	91%	90%	92%
Bans, cancellations and suspensions from providing financial services						
AFS licence cancellations/suspensions	NA	NA	5	19	NA	6
Banned from offering fin/s	35	49	42	22	NA	48
Total ⁵²	35	49	47	41	64	54
Illegal schemes shutdown or action taken						
Overall	105	80[2]	NA	50	30	1
Enforceable undertakings						
Overall	6	9	5	2	12	20

Table 6: Financial outcomes of selected ASIC Enforcement Actions 2006/07 – 2011/12, \$millions

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Recoveries, costs, compensation or fines	\$102	\$50	\$14.50	\$287	NA	NA
Assets frozen	\$38	\$96	\$13.80	\$15.50	NA	NA
Total	\$140	\$146	\$28	\$302	\$113	\$19.80

⁵² No number for AFS license cancellations is provide for the 2007, 2008 or 2011 years; in estimating a total number of Bans Cancellations and Suspensions for 2007 and 2008 we have assumed that there were no license suspensions. The true total will be no lower than the figure shown. Totals only provided for 2011.

Chart 2: ASIC Enforcement Actions 2006/07 – 2011/12



Observations

1. Over the six-year period ASIC saw a generally downward trend in enforcement actions that seems to have flattened out in the last 3 years. This trend is somewhat offset by a significant increase in bans, suspensions and cancellations of licenses.
2. In relation to criminal and civil proceedings and shutting down illegal schemes, the downward trend was consistent and marked. While it has flattened in recent years it has

stayed low. There has been a modest increase in the use of enforceable undertakings and a steady increase in bans.

3. The summary figures used to generate Chart 2 for criminal and civil proceedings and enforceable undertakings cover both of ASIC's roles. The incomplete data for financial services as opposed to overall criminal prosecutions shown in Table 5 tend to suggest that the decline is true of financial services as well as overall.

Overall assessment:

ASIC's last 4 years are steady following a decline from the previous two years. Overall ASIC appear to be heading in the right direction. While it is very close call as to whether the correct rating is steady or trending down we think all things considered "Steady" is the most appropriate rating, particularly in light of recent overall performance as a regulator.

Box 3: The false comfort of high rates of successful litigation

From time to time the media, politicians or regulators themselves become overly focused on the success rate of court litigation. ASIC itself reports on the percentage of successful litigation. We think that this is a dangerously misleading measure. ASIC (and the ACCC) are often punished by the media for running cases that do not succeed as if the regulator should only ever run cases that are certain to do so. There are several problems here.

- if the case were certain to succeed there would be no need to run it as the rational other party would often settle (except perhaps in unusual cases where the offender saw financial advantage in delaying the inevitable penalty and opprobrium). Regulators are bound to lose some cases based on the vicissitudes of a trial, how witnesses come up to proof, unexpected new information known to only one party etc
- the law is often unclear. Sometimes the most efficient or only way to clarify what is expected of business and what a consumer is entitled to is to have the matter determined by a court.
- if a regulator is concerned that anything less than 100 per cent success is a cause for censure, it will be extremely timid in taking enforcement action and

vulnerable to pressure from alleged offenders

- regulators have an important role in taking on test case to test the limits of the law. Few others, particularly not consumers, are going to be in a position to do this. This means taking some difficult or unclear cases that is inherently at greater risk of failing. However, in terms of clarifying the operation of the law, losing a case and winning it have equal benefit.

Regulators (and governments) need to be bold and explain to the media that it is not all about winning, that model litigant policies do allow them to do their job (including taking on matters to test the law) and give reasons such as those as to why they ought to lose now and again. See also see Box 4: Enforcement Agencies as Model Litigants

4.4 ACT Office of Regulatory Services

Table 7 summarises the enforcement work reported by the ACT Office of Regulatory Services. As can be seen very little of it relates to consumer protection.

Table 7: ACT Enforcement Actions 2006/07 – 2011/12

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12⁵³
Infringement notices	Security industry	NA	NA	NA	34	15	NA
	Motor vehicle industry	NA	NA	NA	1	1	NA
	Other ⁵⁴	NA	NA	NA	0	42	NA
	Total	NA	39	53	35	58	34
Disciplinary proceedings⁵⁵	Liquor	NA	NA	26	4	10	3
	Security	NA	NA	12	0	0	0
	Tobacco	NA	NA	1	0	0	1
	Agents ⁵⁶	NA	NA	0	0	3	1 ⁵⁷

⁵³ The figures for the disciplinary actions for 2008/09, 2009/10, & 2010/11 are taken from the 2010/11 annual report where they are described as “proceedings commenced”. Comparable figures are not included in the 2011/12 annual report. The figures in the disciplinary proceedings part of the 2011/12 column are all matters reported on the website for 2011/12 as at 30 November 2012. This may or may not include all matters for 2011/12 (the latest action was from December 2011) and may or may not be comparable with previous years. It seems that the matters on the website are limited to successful court actions, and don’t include just matters commenced.

⁵⁴ This includes matters which would not be considered consumer protection for the purposes of this report—for example, matters relating to non-compliance with smoke free zones.

⁵⁵ These figures are for proceedings commenced by the Commissioner of Fair Trading during the relevant financial year. Note that there is information in the Annual Reports for 2006/07 and 2007/08 on disciplinary proceedings, however it is unclear if these relate to matters commenced by the Commissioner of Fair Trading or the people seeking review of the decisions. Hence these matters have not been included in the table.

⁵⁶ It appears that “agents” includes real estate agents, stock and station agents, business agents, travel agents and employment agents.

⁵⁷ This action related to Rumbles Realty Pty Ltd. Criminal action was also brought against Wayne Rumble, of Rumbles Realty.

Observations

Despite having responsibility to enforce Fair Trading Legislation during the period examined, the ACT Office of Regulatory Services does not report very many consumer protection enforcement matters and reports no civil proceedings at all. Security, tobacco and liquor matters are not considered consumer protection matters for the purposes of this report.

Disciplinary matters relate to matters brought by the Commissioner for Fair Trading in the Consumer and Trader Tribunal.

For 2009/10, 2010/11 and 2011/12 the Annual Reports of the Department of Justice and Community Safety include the figures on “Compliance with Fair Trading Legislation” set out in Table 8. The ACT Office of Regulatory Services states that these figures are calculated on the basis of information collected during the compliance program. It is quite difficult to work out what these mean and whether they are of any value at all in assessing the agency’s performance.⁵⁸

⁵⁸ The 2009/10 Annual Report says in the footnote “Compliance activity and statistical information will be based upon the compliance programs as published on an annual basis. It should be noted that the program will change on an annual basis, but the detail will be available to support the indicator”. It is difficult to understand how the figures were calculated from the available information. The figures provided in this table are similar to the numbers provided for total number of inspections for each year – 2525 (09/10), 3180 (10/11) and 5182 (11/12). It is not clear how the ACT ORS defined “non-compliant” businesses. It appears that these figures do not differentiate consumer protection compliance work from inspections relation to liquor and tobacco licensing.

Table 8: Compliance with Fair Trading Legislation in the ACT.

Financial Year	09/10	10/11	11/12
Number of individual, business and workplaces that comply with relevant fair trading legislation	2507	3112	4615
% of individual, business and workplaces that comply with relevant fair trading legislation (target over 80%)	95%	98%	89%

The data on infringement notices goes up and down, however the lack of data to demonstrate that much enforcement work has actually been undertaken dictates that ACT ORS must be given the lowest possible ranking.

Overall assessment: “Falling”

4.5 NSW Office of Fair Trading

Table 9 summarises the enforcement work reported by the NSW Office of Fair Trading. Chart 3 presents total enforcement actions in 6 categories in visual form. The NSW Office of Fair Trading’s 2011/12 Year in Review was not available by 30 November 2012 and so data from that year is not included. While NSW OFT’s quarterly reports are available it is difficult to relate the data included in them to that in past Year in Review documents.⁵⁹

⁵⁹ For example we were unable to determine which litigation matters in the quarterly reports belonged in which of the annual report categories.

Table 9: NSW Enforcement Actions 2006/07 – 2010/11

Financial Year	06/07	07/08	08/09	09/10	10/11
Successful prosecutions finalised⁶⁰					
Consumer Credit Administration Act	2	0	0	1	NR
Credit (Finance Brokers) Act	1	NR	NR	NR	NR
Crimes Act ⁶¹	7	6	3	6	7
Electricity Safety Laws	7	3	13	5	1
Fair Trading Act	10	21	15	18	21
Fitness Services (Pre-paid fees) Act	1	0	0	0	0
Home Building Act	31	37	23	27	10
Motor Dealers Act	29	21	12	21	23
Motor Vehicle Repairs Act	21	6	4	2	2
Pawnbrokers & Second-Hand Dealers Act	0	0	0	0	2
Property, Stock and Business Agents Act	6	4	4	2	1
Trade Measurement Act	2	3	2	3	0
Travel Agents Act	0	0	0	0	0
Valuers Act	0	0	0	0	0
Total	116	101	76	85	67

⁶⁰ Statistics on prosecutions commenced are not published by NSW OFT. Only information on matters finalised is available. Further only information on successful prosecutions (not all commenced prosecutions) is provided.

⁶¹ Prosecutions under the Crimes Act appear mainly to be prosecutions for using false instruments or making false declarations; it is not clear which substantive consumer or other issues within the remit of the OFT are involved. See for example: http://www.fairtrading.nsw.gov.au/pdfs/About_us/Enforcement_Action_Report_June_2011.pdf p2.

Financial Year	06/07	07/08	08/09	09/10	10/11
Civil litigation finalised⁶²					
Supreme Court	3	4	3	1	4
Supreme Court injunctions under PSHDA ⁶³	0	0	2	0	0
Total	3	4	5	1	4
Disciplinary actions⁶⁴					
Conveyancers Licensing Act	NA	NA	NA	0	NR
Home Building Act	NA	NA	NA	11	14
Motor Dealers Act	NA	NA	NA	17	9
Motor Vehicle Repairs Act	19	NA	NA	14	24
Pawnbrokers and Second-Hand Dealers Act	NA	NA	NA	0	2
Property, Stock and Business Agents Act	NA	NA	NA	49	48
Travel Agents Act	NA	2	NA	4	1
Valuers Act	NA	NA	NA	0	0
Total	19	2	0	95	98
Enforceable undertakings⁶⁵					
Total	1	2	0	0	1

⁶² Statistics on civil matters commenced are not published by NSW OFT. Only information on matters finalised is available.

⁶³ Pawnbrokers and Second-Hand Dealers Act

⁶⁴ The Director-General has the power to suspend or cancel a license under the pieces of legislation listed in this section. The decisions are usually reviewable by the Administrative Decisions Tribunal

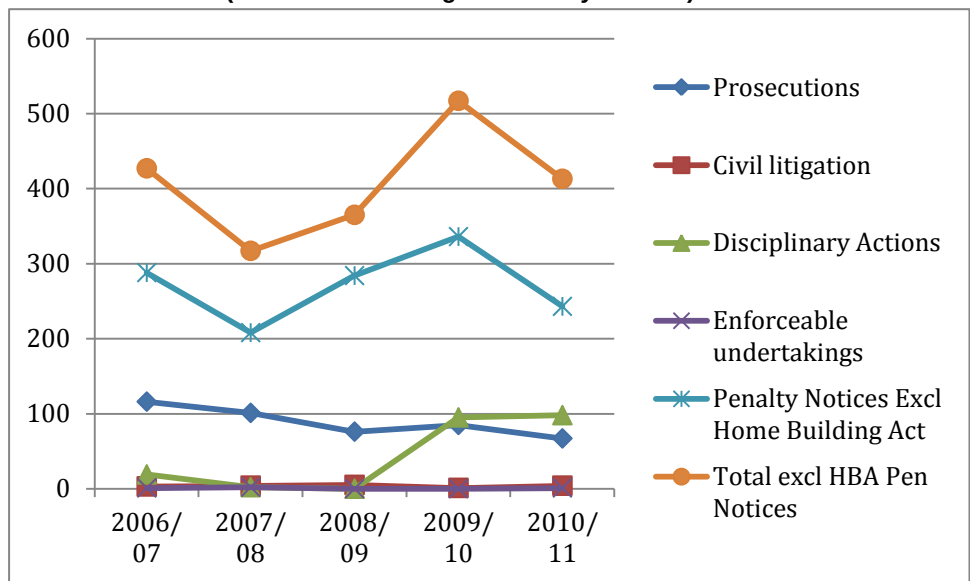
⁶⁵ Very little information is available on enforceable undertakings. See note below.

Financial Year	06/07	07/08	08/09	09/10	10/11
Penalty/ Infringement notices – number					
Consumer Credit Administration Act	NR	NR	NR	NR	NR
Credit (Finance Brokers) Act	NR	NR	NR	NR	NR
Crimes Act	NR	NR	NR	NR	NR
Electricity Safety Laws	3	4	16	27	22
Fair Trading Act	14	19	19	40	32
Fitness Services (Pre-paid Fees) Act	0	0	0	0	0
Home Building Act	647	397	435	253	273
Motor Dealers Act	84	71	146	137	116
Motor Vehicle Repairs Act	2	4	47	27	2
Pawnbrokers & Second-Hand Dealers Act	12	3	4	10	10
Property, Stock and Business Agents Act	139	75	31	83	61
Trade Measurement Act	34	33	21	12	NR
Travel Agents Act	NR	NR	NR	NR	NR
Valuers Act	0	0	0	0	0
Total	935	605	719	589	516
Public warnings⁶⁶					
Total	NA	NA	NA	NA	4

⁶⁶ Only information for public warnings from 2011 is available on the OFT website. See note below.

Financial Year	06/07	07/08	08/09	09/10	10/11
Warning letters⁶⁷					
Total	NA	NA	NA	NA	NA
Show cause⁶⁸					
Home Building Act	NA	57	NA	60	75
Total	NA	NA	NA	NA	NA

**Chart 3: NSW Office of Fair Trading Enforcement Actions 2006/07 – 2010/11
(excl Home Building Act Penalty Notices)**



Observations

Home Building Act penalty notices are by far the largest category of enforcement outcome by number, and they

⁶⁷ See below note.

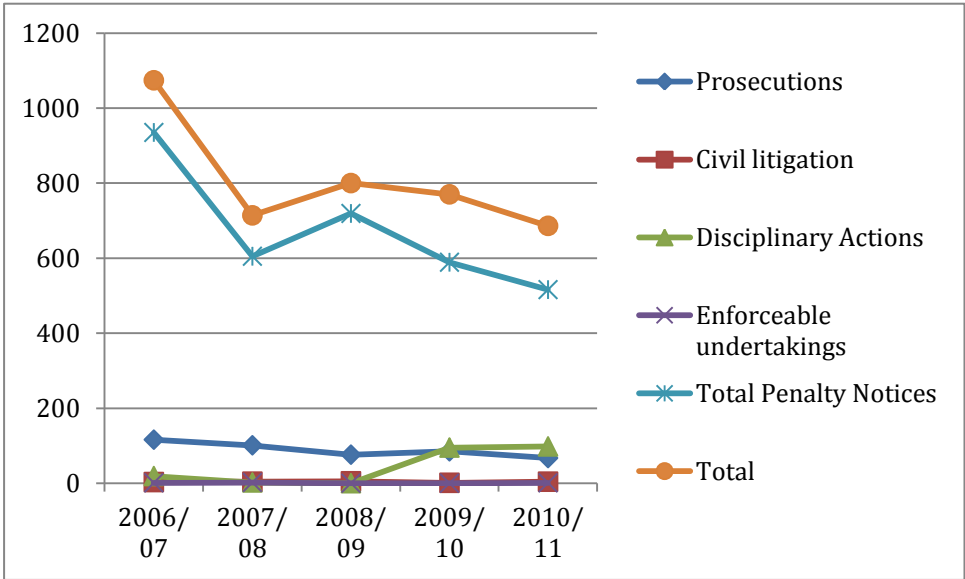
⁶⁸ Substantiation notices were introduced by the ACL. Before the introduction of the ACL the OFT had the power to issue "show cause notices" under the listed legislation.

tend to distort the OFT NSW figures in relation to the remainder of their work.

Chart 3 excludes those penalty notices. This data suggests that, penalty notices aside, the NSW OFT has experienced over the past five years a gradual decline in the number of prosecutions and an upturn in disciplinary matters, while penalty notice numbers have bounced around. The low number of civil actions and enforceable undertakings and the increase in disciplinary actions do not offset that decline. If one includes the large number of home building matters (Chart 4) the downward trend is more marked.

Overall assessment: Trending down

**Chart 4: NSW Office of Fair Trading Enforcement Actions 2006/07 – 2010/11
(Incl Home Building Act Penalty Notices)**



4.6 Queensland Office of Fair Trading

Very little statistical information about the enforcement work of the Qld OFT over the past 6 years is publicly available. Qld OFT has from time to time provided additional information on its enforcement work, however this information is often not comprehensive and not comparable year to year.⁶⁹

The only data provided is that in Table 10. Further it is unclear from the Annual Reports and website what 'enforcement actions' actually means in terms of the enforcement outcomes that might have been achieved (criminal and civil prosecutions, undertakings, penalty notices and so on). As a result the Qld OFT data is not comparable in any way with the work done by other regulators.

Table 10: Qld Enforcement Actions 2006/07 – 2010/11

Financial Year	06/07	07/08	08/09	09/10	10/11
Number of enforcement actions initiated	3750 ⁷⁰	3064	3900	3720	1529

In addition to the above figures, which may or may not all relate to 'enforcement' outcomes, the Qld OFT reports on measures more usually considered to be compliance or

⁶⁹ See Appendix A for examples.

⁷⁰ This figure was obtained from the 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report. Another figure – 3049 – is given for the same indicator for 2006/07 in the 2007/08 Department of Justice and Attorney-General annual report.

complaint handling. Noting Krpan's useful distinction between compliance as an outcome and enforcement as an activity designed to achieve that outcome, monitoring for compliance may perhaps better considered as investigative work that may or may not lead to a need to take specific enforcement outcomes.

Table 11: Qld Compliance Activities 2006/07 – 2011/12

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12⁷¹
Number of entities monitored for compliance	10532 ⁷²	12391	13800	11870	NA	NA
Number of complaints finalised	15800 ⁷³	NA	13735	17660	NA	NA
Amount of redress achieved for consumers (\$) ⁷⁴	5.35M ⁷⁵	5.517M	5.76M	6.5M	4.8M	6M
Percentage of disputes satisfactorily finalised ⁷⁶	79% ⁷⁷	86%	88%	90%	89%	88%

⁷¹ The DJAG 2011/12 Annual Report was not available at 30 November 2012. The data in the table come from the DJAG portion of the Service Delivery Statement for 2012/13.

⁷² This figure from 2007/08 Department of Justice and Attorney-General annual report not 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report.

⁷³ This figure was obtained from the 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report. Another figure – 12292 – is given for the same indicator for 2006/07 in the 2007/08 Department of Justice and Attorney-General annual report.

⁷⁴ Redress is described in the 2010/11 Department of Justice and Attorney-General Annual Report as “the compensation, or the in-kind value to address issues a consumer has complained about. The amount of redress can vary significantly as it depends on the nature of complaints on hand. Redress can be achieved through conciliation, investigations, prosecution, restitution and from the Property Agents and Motor Dealer’s Claim Fund.”

⁷⁵ This figure was obtained from the 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report. Another figure – \$3.278M – is given for the same indicator for 2006/07 in the 2007/08 Department of Justice and Attorney-General annual report.

⁷⁶ This indicator refers to consumer complaints not enforcement actions. “Satisfactorily finalised disputes” result in one of the following: complaint resolved, apology obtained, partial/full redress obtained, redress over/above that entitled to obtained, repairs/replacement/exchange obtained or compliance action commenced.

⁷⁷ Figure used from 2007/08 Department of Justice and Attorney-General Annual Report not 2006/07 Department of Tourism, Fair Trading and Wine Industry Development Final Report.

Alternative measure of enforcement outcomes

In 2007/08 and 2008/09 years Qld OFT reported an innovative ‘outcome’ measure—the level of consumer confidence in the market. However it was discontinued as it “provided little value as a performance measure”. We tend to agree. This likely reflects the fact that factors out of the control of Qld OFT are more significant in consumer’s minds than the agency’s education, compliance and enforcement activities.

Table 12: QLD OFT Alternative Measures of Enforcement Outcomes 2006/07 – 2010/11

Financial Year	06/07	07/08	08/09	09/10	10/11
Extent of consumer confidence in the marketplace	77%	75%	NA	NA	NA
Extent of business confidence in the marketplace	76%	75%	NA	NA	NA

Observations

1. As noted above there is very little useful data to draw conclusions about the performance of the Qld OFT in relation to enforcement.
2. Measured in its own terms the amount of work has gone up and down, with a general upward trend for the first four years and then a marked drop off judged by the ‘number of enforcement actions’ and ‘amount of redress achieved for consumers’.

Nevertheless the lack of data to demonstrate that any enforcement work has actually been undertaken dictates that Qld OFT must be given the lowest possible ranking.

Overall assessment: “Falling”

4.7 NT Consumer Affairs

Table 13 summarises the enforcement work reported by NT Consumer Affairs. Table 14 sets out the compliance and complaint handling work reported by the NT CA. With the exception of Queensland we have not separately reported on compliance work for other regulators. As noted elsewhere, we do not consider compliance and complaint handling work to be consumer protection enforcement. We nevertheless included this information in relation to Qld and NT to provide context for the paucity of data in relation to consumer protection enforcement.

Table 13: NT Enforcement Actions 2006/07 – 2010/11

Financial Year	06/07	07/08	08/09	09/10	10/11
Traders placed on notice	NA	NA	18	12	4
Investigations referred for prosecution	NA	1 ⁷⁸	1	1	0
Investigations involving or leading to banned products	NA	2	5	1	1

⁷⁸ The Annual Report states 1 court action for 2007/08. It is assumed that this means a prosecution.

Financial Year	06/07	07/08	08/09	09/10	10/11
Investigations/notification involving or leading to recalled products	NA	0	137	45	0
Investigations involving or leading to mandatory standards	NA	NA	1	1	14
Investigations involving or leading to warning labels on products	NA	NA	9	5	4
Corrective advertising obtained	NA	NA	4	NA	NA
Trader publicly named	NA	NA	6	NA	NA

Table 14: NT Compliance Actions 2006/07 – 2010/11

Financial Year	06/07	07/08	08/09	09/10	10/11
Investigations conducted ⁷⁹	NA	87	95	52	45
Investigations concluded	NA	67 ⁸⁰	76	44	42
Complaints withdrawn, resolved where no breach was disclosed	NA	NA	32	15	18
Complaints referred to other organisations	NA	NA	113	59	7
Trader visits	NA	114	168	105	69
Compliance education provided	NA	NA	41	64	86
Contracts annulled or varied	NA	NA	7	251	62

⁷⁹ It is unclear what this statistic means ie is it only investigations commenced or does it include investigations which are carried forward from the previous year.

⁸⁰ Compliance and product safety matters are included in different tables in the 2007/08 Annual Report. This figure is the sum of the entries in the tables.

Observations

There is very little reported statistical information on enforcement actions taken by NT CA. The data published mainly relates to compliance and complaints related activity, rather than enforcement activity. The Annual Reports at times contain discussion of some of the enforcement actions taken.

Assuming that there is no enforcement action that has been taken but not reported within the time period, the level of enforcement action of the NT Consumer Affairs (as distinct from investigations which may lead to enforcement action) is astoundingly low, especially given the very high proportion of NT consumers who are vulnerable and disadvantaged and the known problems that they face.

The lack of data to demonstrate that any enforcement work has actually been undertaken (with the possible exception of for the 08/09 year) dictates the lowest possible ranking.

Overall assessment: “Falling”

4.8 SA Consumer and Business Services

Table 15 summarises the enforcement work reported by the SA Office of Consumer and Business Services over the period 2006/07 to 2010/11. Chart 5 presents total enforcement actions in visual form.

Table 15: SA Enforcement Actions 2006/07 – 2010/11

Financial Year		06/07	07/08	08/09	09/10	10/11
Prosecutions - number⁸¹	Building Work Contractors Act	8	18 ⁸²	5	7	16
	Conveyancers Act	0	0	0	0	4
	Fair Trading Act	1	1	3	5	1
	Land Agents Act	0	4	2	0	0
	Land and Business (Sale and Conveyancing) Act	0	2	1	0	0
	Plumbers, Gas Fitters and Electricians Act	5	3	2	0	2
	Second-Hand Vehicle Dealers Act	1	3	2	2	2
	Security and Investigations Agents Act	0	4	3	1	0
	Total	15	35	18	15	25

⁸¹ This appears to only include successful prosecutions, including those where there has been no conviction recorded.

⁸² This figure includes one matter which was misreported in the Annual Report—it was unclear whether it was for a prosecution or disciplinary matter. It also includes a matter where an unlicensed builder was given a suspended sentence for continuing to work unlicensed in contempt of an interim injunction.

Financial Year		06/07	07/08	08/09	09/10	10/11
Court actions – disciplinary	Building Work Contractors Act	1	1	1	0	2
	Fair Trading Act	0	0	0	0	1
	Land Agents Act	0	0	1	0	0
	Plumbers, Gas Fitters and Electricians Act	3	2	2	0	0
	Second-Hand Vehicle Dealers Act	1	1	1	2	4
	Security and Investigations Agents Act	1	1	3	3	0
	Total	6	5	8	5	7
Total court actions	Total	21	40	26	20	32
Assurances⁸³	Building Work Contractors Act	13	8	0	6	9
	Consumer Credit (South Australia) Act	0	1	0	0	0

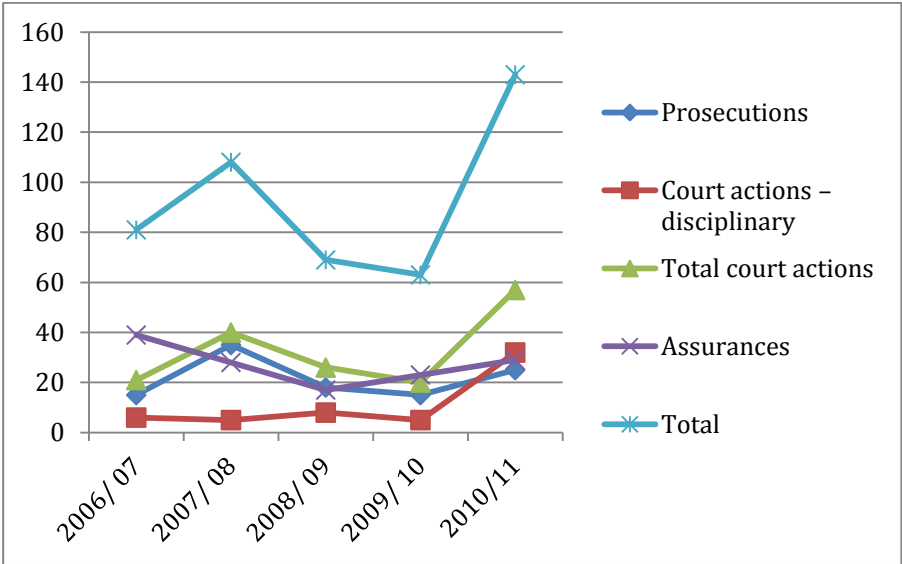
⁸³ The Commissioner for Consumer Affairs can accept an assurance (a formal guarantee, in writing) from a trader. Usually, the assurance states that the trader will refrain from engaging in specified unlawful conduct. A trader who fails to comply with an assurance given is guilty of an offence under section 81 of the Fair Trading Act 1987 and liable for prosecution. The register of assurances is kept pursuant to the provisions of Section 80 of the Fair Trading Act 1987 and is the register required to be kept by Section 80.

Financial Year		06/07	07/08	08/09	09/10	10/11
Assurances⁸⁴	Fair Trading Act	2	5	0	3	3
	Land Agents Act	9	0	0	2	2
	Plumbers, Gas Fitters and Electricians Act	10	7	0	0	4
	Second-Hand Vehicle Dealers Act	4	3	0	11	10
	Security and Investigations Agents Act	1	4	0	1	1
	Total	39	28	17	23	29
Product safety matters⁸⁵	Total	20	NA	56	71	39

⁸⁴ The Commissioner for Consumer Affairs can accept an assurance (a formal guarantee, in writing) from a trader. Usually, the assurance states that the trader will refrain from engaging in specified unlawful conduct. A trader who fails to comply with an assurance given is guilty of an offence under section 81 of the Fair Trading Act 1987 and liable for prosecution. The register of assurances is kept pursuant to the provisions of Section 80 of the Fair Trading Act 1987 and is the register required to be kept by Section 80.

⁸⁵ These are non-court matters, where compliance activities resulted in recalls, rectifications, seizures, voluntary withdrawals and removals of products.

Chart 5: Total SA Enforcement Actions 2006/07 – 2010/11



Observations

While prosecutions have gone up and down in a range, the total number of court actions is trending up. Given most of that upwards trend is in one year only and prosecutions are not at their peak, “steady” is the most appropriate rating on the available data.

Overall assessment: "Steady"

4.9 Tasmanian Consumer Affairs and Fair Trading

Table 16 summarises the enforcement work reported by Tasmanian Consumer Affairs and Fair Trading. Chart 6 presents total enforcement actions in 6 categories in visual form.

Table 16: Tasmanian Enforcement Actions 2006/07 – 2011/12⁸⁶

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecution Actions⁸⁷	Australian Consumer Law ⁸⁸	NR	NR	NR	NR	0	2
	Consumer Affairs Act	0	0	0	0	1	0
	Door to Door Trading Act	0	0	0	1	1	NR
	Fair Trading Act	3	1	11	2	7	11
	Housing Indemnity Act	2	3	0	0	1	0

⁸⁶ Data on prosecutions under the Security and Investigation Agents Act in the Prosecutions Actions have not been included as the data provided between years is radically inconsistent. See Appendix A.

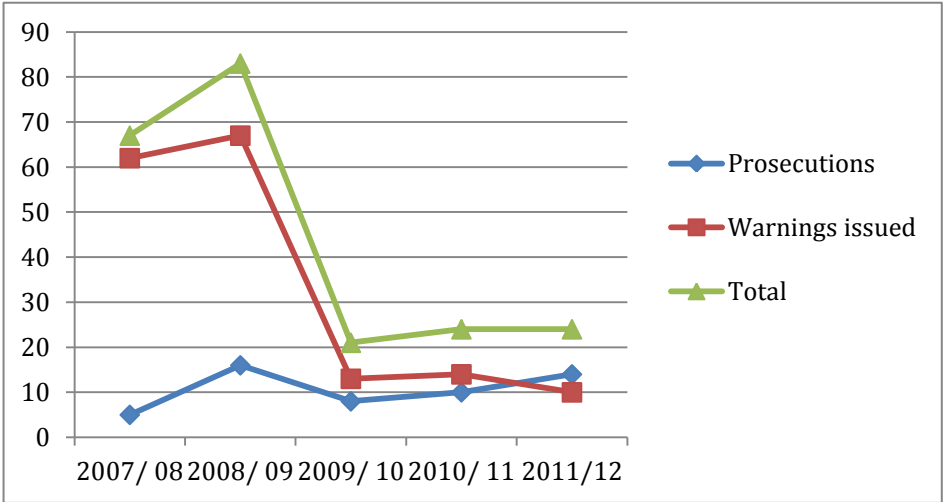
⁸⁷ This figure is for actions commenced. Some actions may have been withdrawn, not proven or be pending at the end of year.

⁸⁸ The Australian Consumer Law came into effect on 1 January 2011.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecution Actions	Motor Vehicle Traders Act	NR	NR	NR	NR	0	1
	Sale of Hazardous Goods Act	1	0	0	0	0	0
	Surveyors Act	0	1 ⁸⁹	0	0	0	0
	Trade Measurement Act	3	0	5	5	NR	NR
	Total Prosecutions	9	5	16	8	10	14
Warnings issued	Fair trading	19	48	NA	NA	NA	NA
	Total Warnings	30	62	67	13	14	10
Licenses suspended or cancelled	Security and Investigation Agents Act	2	3	12	19	NA	NA

⁸⁹ 1 prosecution for 9 charges.

Chart 6: Tasmania Total Enforcement Actions 2006/07 – 2011/12



Observations

Reported Tasmanian data does not include a wide range of enforcement options with only prosecutions, warnings and licensing action reported.

The total number of warnings issued drops in the last three years. It is possible but perhaps unlikely that warnings under the Fair Trading ceased altogether in 2010 and 2011 although that is unlikely.

Giving greatest weight to the prosecutions data, the overall assessment is “Steady”.

4.10 Consumer Affairs Victoria

Table 17 summarises the enforcement work reported by Consumer Affairs Victoria. Chart 7 presents total prosecutions finalised, civil actions finalised and, enforceable undertakings obtained, and a grand total of these over five years.

Table 17: CAV Enforcement Actions 2006/07 – 2010/11

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions finalised						
Consumer Credit (Vic) Act	0	0	0	0	0	0
Conveyancers Act	0	0	0	0	0	1
Domestic Building Contracts Act	33	19	13	9	10	5
Estate Agents Act	2	2	2	6	2	3
Fair Trading Act	1	12	2	4	5	0
Introduction Agents Act	0	1	0	0	0	0
Motor Car Traders Act	5	8	8	14	8	6
Sale of Land Act	1	0	0	0	0	0
Trade Measurement Act	0	0	0	0	0	0
Travel Agents Act	0	0	0	0	0	0

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Total	42	42	25	33	25	15 ⁹⁰
Civil litigation finalised⁹¹						
Consumer Credit (Vic) Act	0	1	0	0	1	0
Conveyancers Act	0	0	0	2	0	3
Domestic Building Contracts Act	5	0	1	0	0	0
Estate Agents Act	1	1	4	4	5	7
Fair Trading Act	11	5	10	1	4	2
Introduction Agents Act	0	0	0	0	0	0
Motor Car Traders Act	10	0	4	3	1	3
Sale of Land Act	0	0	0	0	0	0
Travel Agents Act	2	0	0	0	0	0
Total	29	7	19	10	11	15

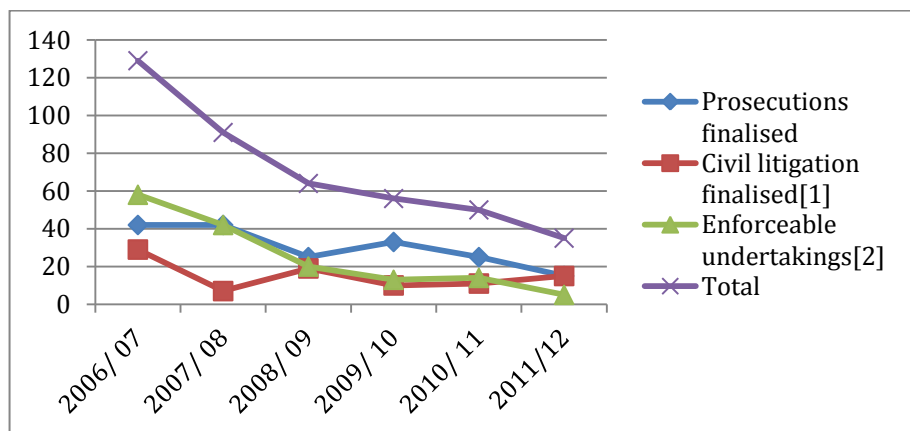
⁹⁰ In their 2012 Online Annual Report Consumer Affairs Victoria report 27 prosecutions without breaking these down by area of enforcement. As with all regulators, our research counted the actual cases listed on the CAV web site which involved consumer issues. See Annual Report: Year in Review – Activities: <http://annualreport.consumer.vic.gov.au/introduction-highlights/year-in-review-activities.html>. For more details about how cases were counted as part of this research see Appendix A.

⁹¹ Statistics on civil matters commenced are only included in the 2010/11 CAV Annual Report. For the other years only information on matters finalized is available. Hence civil matters finalized is used in the table though matters commenced is preferable.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Enforceable undertakings⁹²						
Consumer Credit (Vic) Act	0	0	0	0	0	0
Conveyancers Act	NR	NR	0	1	3	0
Domestic Building Contracts Act	1	1	4	1	1	0
Estate Agents Act	3	14	5	4	5	0
Fair Trading Act	34	21	2	5	3	5
Introduction Agents Act	0	0	0	0	0	0
Motor Car Traders Act	18	0	6	1	2	0
Sale of Land Act	0	1	0	0	0	0
Trade Measurement Act	2	5	3	1	NR	NR
Travel Agents Act	0	0	0	0	0	0
Total	58	42	20	13	14	5
Grand Total	129	91	64	56	50	35

⁹² The Fair Trading Act s 146 gave the Director power to accept a written undertaking in relation to any matter where the Director has a power or function under the *Fair Trading Act 1999* or matters in relation to the contravention of any other consumer Acts listed (exceptions are noted by NR in the table). A similar power is contained in s 198 of the *Australian Consumer Law and Fair Trading Act 2012*.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Other actions - inconsistent data						
Penalty/ Infringement notices – number ⁹³	188	NA	77	119	50	NA ⁹⁴
Public warnings	NA	NA	NA	NA	1	1
Warning letters ⁹⁵	643	NA	332	302	508	487
Substantiation notices issued ⁹⁶	3	NA	NA	NA	NA	NA

Chart 7: CAV Enforcement Actions 2006/07 – 2011/12

⁹³ Most of the CAV Annual Reports provide a figure for infringement notices issued overall. It was not possible to tell how many people/companies the letters had been issued to or for what kind of matters they had been issued. Therefore the figure may contain infringement notices which were issued for non-consumer protection matters, or numerous notices issued to different people for the same breach.

⁹⁴ We have been unable to find any data on infringement notices for 2011/12 published by CAV.

⁹⁵ Most of the CAV Annual Reports provide a figure for warning letters issued overall. It was not possible to tell how many people/companies the letters had been issued to or for what kind of matters they had been issued. Therefore the figure may contain letters which were issued for non-consumer protection matters, or numerous letters issued to different people for the same breach.

⁹⁶ Only one Annual Report (2006/07) contains any reference to substantiation notices. Three were issued in that year but it is unclear who they were issued to and under what law.

Observations

1. CAV most commonly undertook prosecutions under the Domestic Building Contracts Act.
2. CAV most commonly initiated civil proceedings and obtains enforceable undertakings under the Fair Trading Act.
3. Total enforcement actions (of those where consistent statistics are reported over the 5 years) have trended down significantly.
4. The trend is most marked in enforceable undertakings but also generally true of prosecutions concluded and civil litigation finalised.
5. Types of enforcement actions where incomplete information is published also show a marked downward trend (penalty notices) and a trend that is down and then back up (but not yet equal to the first year) for warning letters, the lowest level of sanction.

Overall assessment: Trending down

4.9 Western Australia Consumer Protection Division

Table 18 summarises the consumer protection enforcement work reported by the WA Consumer Protection Division. Chart 8 presents total prosecutions

finalised, civil actions finalised and, enforceable undertakings obtained, and a total of these over five years.

Table 18: WA Enforcement Actions 2006/07 – 2011/12

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions in Magistrates Court finalised⁹⁷						
Australian Consumer Law	NR	NR	NR	NR	0	0 ⁹⁸
Building Laws	23	25	32	35	25	0
Consumer Credit Code	0	2	0	0	0	0
Credit Administration Act	0	0	0	0	0	1
Debt Collectors' Licensing Act	0	0	0	0	0	1
Door to Door Trading Act	1	7	9	0	2	0
Employment Agents Act	0	0	0	0	3	0
Fair Trading Act	6	13	7	4	12	9 ⁹⁹

⁹⁷ Unlike for other consumer regulators, due to the nature of the reporting, figures in the table are for individuals prosecuted rather than for the overall number of prosecution matters.

⁹⁸ See following footnote.

⁹⁹ Note that the 2011/12 Annual Report lists "prosecutions" – by which it appears to mean all court actions - under the Fair Trading Act and under the Australian Consumer law. The Fair Trading Act WA includes provisions that apply the Australian Consumer Law as a law of WA, so strictly speaking matters under the ACL would seem to be also matters under the Fair Trading Act. As far as is relevant there appear to be two individuals who were prosecuted under the all of the ACL, the Fair Trading Act and motor vehicle laws., Their cases are counted under motor vehicle laws only. There was another individual prosecuted under the ACL, but they did not appear in court and a warrant was issued for them. As the matter is pending, it was not included in the table (which otherwise includes finalised matters). See WA Consumer Protection Division *Annual Report: Appendix 3: Prosecutions* http://www.commerce.wa.gov.au/PDF/Reports/Annual_Reports/2012/DoC_AR_2011-12_-_App.pdf.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Hairdressers Registration Act ¹⁰⁰	7	5	3	4	0	0
Motor Vehicle Laws ¹⁰¹	7	4	2	10	21	10
Painters' Registration Act ¹⁰²	10	11	14	6	7 ¹⁰³	0
Petroleum Products Pricing Act	1	0	0	0	0	0
Real Estate & Business Agents Act ¹⁰⁴	0	0	0	0	0	0
Settlement Agents Act ¹⁰⁵	NA	4	0	0	0	0
Trade Measure Laws	2	0	0	0	0	0
Travel Agents Act	1	0	0	0	0	0
Water Services Licensing Act ¹⁰⁶	5	9	5	7	6	3
Totals	63	80	72	66	76	25

¹⁰⁰ Administered by the Hairdressers Registration Board until it ceased on 30 November 2010.

¹⁰¹ Includes matters bought under the Motor Vehicles Dealers Act and Motor Vehicles Repairers Act. Administered by Motor Vehicle Industry Board until 30 June 2011.

¹⁰² Administered by Painters' Registration Board until 29 August 2011. The Annual Report of the Painters' Registration Board is for the calendar not financial year and the litigation is listed without dates. Therefore, the figures provided are for the calendar year eg the 2006/07 entry is the 2006 figure.

¹⁰³ There is no mention of matters taken by the Settlement Agents Supervisory Board in the 2006/07 Annual Reports.

¹⁰⁴ Administered by the Real Estate and Business Agents Supervisory Board until 30 June 2011.

¹⁰⁵ Administered by the Settlement Agents Supervisory Board until 30 June 2011.

¹⁰⁶ Administered by Plumbers' Licensing Board, now part of the Building Commission Division.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Civil litigation matters finalised						
Common law	0	0	3	0	0	0
Australian Consumer Law	NR	NR	NR	NR	0	3
Fair Trading Act	3	0	0	4	5	2
Total	3	0	3	4	5	5
Matters finalised in the State Administrative Tribunal						
Building Laws ¹⁰⁷	11	12	25	16	11	0
Consumer Credit (Western Australia) Code	1	0	0	1	0	0
Credit (Administration) Act	0	0	0	0	NR	NR
Debt Collectors Licensing Act	0	0	0	0	0	0
Employment Agents Act	0	0	0	0	0	0
Finance Brokers Control Act	2	0	0	1	1	0
Hairdressers Registration Act	0	1	0	0	0	0
Land Valuers Licensing Act ¹⁰⁸	0	1	0	3	0	0

¹⁰⁷ Due to the nature of reporting by the Builders Registration Board these figures are for the number of people prosecuted not the overall number of matters.

¹⁰⁸ Administered by the Land Valuers Licensing Board until 30 June 2011. Due to the nature of reporting by the Land Valuers Board these figures are for the number of people prosecuted not the number of matters.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Motor Vehicle Laws	2	0	0	1	1	2
Painters' Registration Act	2	0	0	0	0	0
Real Estate & Business Agents Act	15	18	13	6	7	5
Settlement Agents Act	NA	7	3	1	4	3
Travel Agents Act	0	1	0	0	0	0
Water Services Licensing Act	0	1	0	0	0	0
Total	33	41	41	29	24	10
Penalty/ Infringement notices – number¹⁰⁹						
Building Laws	172	36	141	109	106	NA
Fair Trading Act	NA	NA	NA	NA	NA	NA
Finance Brokers Control Act	NA	NA	NA	NA	NA	NA
Motor Vehicle Laws	NA	3	NA	NA	NA	NA
Petroleum Products Pricing Act	NA	NA	NA	NA	NA	NA
Water Services Licensing Act	NA	NA	NA	NA	NA	NA
Total	172	39	141	109	106	NA
Grand Total	271	160	257	208	211	40

¹⁰⁹ This information has been aggregated from prose note in the reports rather than taken from information provided in table form. It is likely that it is not comprehensive, however we were unable to locate any comprehensive reporting.

Chart 8: WA Enforcement Actions 2006/07 – 2010/11

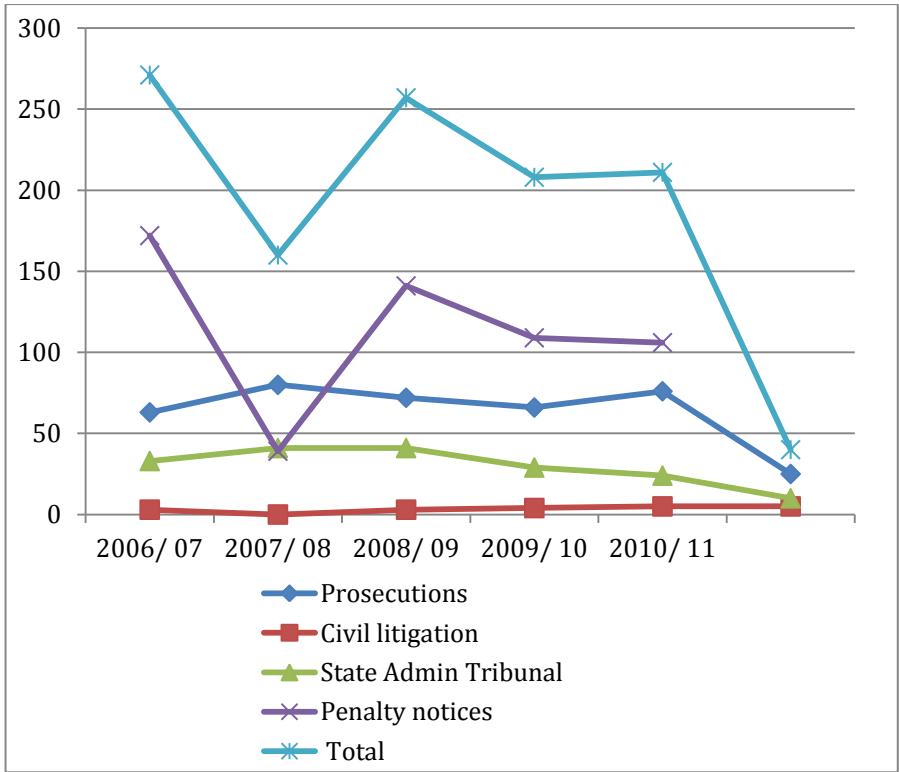


Table 19 summarises enforcement work undertaken by the WA DOC using less common powers while table 20 summarises other indicators of enforcement compliance compiled by WA DOC.

Table 19: WA Enforcement Actions 2006/07 – 2011/12 – other powers

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Disciplinary outcomes¹¹⁰						
Building Laws	4	6	7	5	5	0
Finance Brokers Control Act	0	0	0	1	0	0
Hairdressers Registration Act	0	0	0	0	0	0
Land Valuers Licensing Act	0	1	0	2	0	0
Motor Vehicle Laws	0	0	0	1	1	1
Painters' Registration Act	1	0	0	0	0	0
Real Estate & Business Agents Act	8	7	2	2	5	2
Travel Agents Act	0	1	0	0	0	0
Total	13	15	9	11	11	3
Prohibition notices						
Total	NA	654	831	NA	NA	NA
Traders named						
Total	NA	41	38	NA	NA	NA
"Orders to remedy" defects						
Motor Vehicle Laws	NA	102	87	NA	NA	NA
Notice to remedy breach						
Trade Measure Laws	NA	NA	NA	NA	NA	NA
Rectification notices						
Water Services Licensing Act ¹¹¹	NA	84	NA	NA	NA	NA

¹¹⁰ Covers disqualifications, cancellations and suspensions by the State Administrative Tribunal only

¹¹¹ Issued by the Plumbers Licensing Board.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
Warning letters¹¹²						
Credit (Administration) Act	12	6	11	4	NR	NR
Debt Collectors Licensing Act	14	8	2	3	0	1
Land Valuers Licensing Act	7	3	2	0	0	6
Motor Vehicle Laws	NA	NA	NA	NA	NA	45
Real Estate and Business Agents Act	NA	NA	NA	NA	NA	84
Settlement Agents Act	NA	NA	NA	NA	72	20
Total	NA	447 ¹¹³	NA	NA	NA	NA
Product bans						
Total	NA	6	3	NA	NA	NA
Product recalls						
Total	NA	10	11	NA	NA	NA

Observations

1. The overall enforcement outcomes trend in WA was fairly steady over the years to 2010/11. The sharp drop off in prosecutions in the 2011/12 year may or may not be fully explained by transfer of responsibility for consumer credit to the national regulator ASIC and changes flowing

¹¹² This list is not comprehensive as information on warning letters was not easily available. It includes warning letters, administrative warnings, cautions, education or advice issued under some of the Acts. .

¹¹³ Includes administrative warning letters only. From *Year in Review* 2007/08.

from the introduction of the Australia Consumer Law. In the absence of any way to make that assessment the appropriate rating is "Steady".

Table 20: WA - Other indicators of enforcement outcomes 2006/07 – 2011/12

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
The extent to which traders comply with regulatory requirements ¹¹⁴	97%	93%	97%	95%	95%	95%
The extent of consumer confidence in Western Australia's trading environment	NA	NA	71%	68%	73%	75.5%
The extent to which consumers believe businesses generally act fairly towards consumer ¹¹⁵	77%	78%	77%	75%	75%	79%

2. WA has made use of a number of powers that either were not granted to other states, not frequently used by them or not/rarely reported, for example powers to name a trader and warning letters (Table 19).

Overall assessment: Steady

¹¹⁴ WA DOC calculated these figures by looking at the percentage of compliant traders identified during routine and proactive inspections.

¹¹⁵ WA DOC obtained these figures through surveying a sample of consumers.

5. The enforcement culture and policies of consumer regulators

“Pick important problems, fix them and then tell everybody.”¹¹⁶

A number of factors have been identified as likely to affect the effectiveness of a consumer protection regulator’s enforcement work. They include the legal powers that it has been granted by parliament and the level of resources made available by government. These are either entirely or to a large extent outside the control of the agency.

Another key factor is the culture of the organisation. An enforcement culture cannot be measured directly from Annual Reports and web based reporting. Leadership and a focus by senior management on developing an appropriate culture are critical. Nevertheless there are a number of things that are likely to go together with an effective enforcement culture or at least be a pre-requisite to effective enforcement. These include:

- a published enforcement policy,
- the quality of the enforcement policy,

¹¹⁶ M Sparrow *Plenary presentation* National Environmental Innovations Symposium, Washington DC USA, 6 December, 2000, <http://www.epa.gov/environmentalinnovation/symposium/docs/sparrow.pdf>

- a statement of enforcement priorities or a statement about how the regulator will target enforcement activities and/or identifying and respond to compliance risks (this may be included in the enforcement policy), and
- a clear indication in published enforcement policies that the regulator is prepared to be proactive in relation to emerging issues, litigation risks and the interests of vulnerable and disadvantaged consumers.

A regulator with a strong enforcement culture will:

- be willing to act early to nip emerging problems in the bud to 'set the tone' for a market (see Box 1: Responding to Compliance Risks with a Campaign Approach).
- be prepared to take appropriate risks, particularly when choosing to litigate or not (see Box 3: The false comfort of high rates of successful litigation) and
- work to overcome the challenges in achieving enforcement outcomes where the victims of illegal behaviour have difficulty presenting as strong and/or credible witnesses due to their disadvantage (see Box 6: Protecting the interest of the most vulnerable consumer).

- actually undertake enforcement, usually in both civil and criminal jurisdictions. An enforcement culture (not to mention the skill required to undertake enforcement) will only be developed where enforcement is actually taken. Some of the data surveyed above suggests that some regulators have not undertaken any civil litigation at all.

An enforcement culture (not to mention the skill required to undertake enforcement) will only be developed where enforcement is actually taken. Some of the data surveyed above suggests that some regulators have not undertaken any civil litigation at all.

Conversely there are indicia that may suggest a reluctant enforcer. These include:

- too enthusiastic application of the model litigant policy (see Box 4: Enforcement Agencies as Model Litigants);
- too much weight given to the cost of enforcement (see Box 5: How much will it cost to enforce that?); and

- too much attention to success rates in litigation (see Box 3: The false comfort of high rates of successful litigation).

There are a number of other potential influences on the enforcement cultures of consumer regulators that may raise barriers to good practice enforcement. Considering these issues in detail or assessing whether they are or are not at play in the case of a particular regulator is outside the scope of this report. It is however useful to identify those possible influences. We have identified the following:

- *Regulator location* Where the regulator sits in an agency that also has business development or business promotion functions, there is a risk that the enforcement culture will be undermined or unjustifiably softened.
- *Narrow industry specific remit* Where the remit of the regulator is too narrowly focused it can both lose sight of the ultimate aim – to benefit consumers – and fail to learn from the experience of regulators in other industries or with broader remits: A regulator that is industry-specific may be at a great risk of industry capture. It may also result in an insufficient breadth of view to borrow effective tools or solutions from other markets.
- *Potential conflicts with other functions of the regulator* Such conflicts can undermine a regulator's enforcement effectiveness: do the other functions of

the regulator (for example as a conciliator or licensor) impact on enforcement decisions?

- *The regulators attitude to media coverage and its strategy and capacity to correct wrong impressions in the media* Concern about media reporting of unsuccessful prosecutions can make regulators overly cautious. They need to stake their ground and explain why less certain prosecutions or civil actions are appropriate in some cases, and why a 100% win rate would be indicia of failure not success as a regulator.
- *Concerns about too much “red tape” impeding business* Regulators are sometimes criticised for taking "disproportionate" action against business. Often, this sort of criticism considers only the interests of the affected business and not the actual or potential harm caused to consumers that the enforced regulations seeks to protect. This is not to say that regulators should not ensure that their resources are well targeted. But fear of criticism may improperly deter some regulatory actions. Further weighing against any such reluctance is the value in avoiding an apparent need for additional regulations to address a problem that could have been fixed or ameliorated through good enforcement of current law.

5.1 Written enforcement policies

At the time of writing the ACCC, ASIC, Victoria, NSW, Qld, WA, SA, NT and the ACT have published enforcement policies.

Tasmania does not have a publically available enforcement policy of its own. It references the ACL enforcement policy on its website.

ASIC did not have an enforcement policy prior to February 2012. The ACCC released a new policy in February 2012¹¹⁷. The ACCC, CAV, NSW, ACT and WA policies have been updated since the introduction of the ACL on 1 January 2011. The Queensland policy is dated 2010.

It is clearly important that the regulators responsible for the enforcement of the ACL (that is, each of the regulators reviewed in this report other than ASIC) consistently work cooperatively to produce more or less seamless coordination in their approaches. Ideally the enforcement approaches of the States and Territories would be reasonably similar, taking into account any particular circumstances, with a complementary arrangement between each State/Territory and the ACCC. It is at least theoretically desirable for these nine agencies to agree a single joint enforcement policy consistent with good

¹¹⁷ASIC, *Information Guide 151*, 'ASIC's approach to enforcement', available at: [http://www.asic.gov.au/asic/pdfliib.nsf/LookupByFileName/INFO-151-ASIC's-approach-to-enforcement.pdf/\\$file/INFO-151-ASIC's-approach-to-enforcement.pdf](http://www.asic.gov.au/asic/pdfliib.nsf/LookupByFileName/INFO-151-ASIC's-approach-to-enforcement.pdf/$file/INFO-151-ASIC's-approach-to-enforcement.pdf).

practice. On the other hand there is a risk of this leading to a lowest common denominator approach.

5.2 Scope and effectiveness of enforcement policies

It is beyond the scope of this paper to conduct an analysis of each enforcement policy and compare that analysis to evidence in the literature and elsewhere as to effective approaches.

Each published policy identifies a number of factors that the agency takes into consideration in setting enforcement priorities. These include focus on an assessment of the risk of non-compliance and the harm that may be caused as a result.

NSW (annually) and the ACCC (in its new policy) identify specific priorities for enforcement action. The ACCC's priorities are:

- conduct of significant public interest or concern
- conduct resulting in a substantial consumer (including small business) detriment
- anticompetitive conduct involving cartel behaviour or misuse of market power
- unconscionable conduct, particularly involving large national companies or traders

- conduct demonstrating a blatant disregard for the law
- conduct involving issues of national or international significance
- conduct detrimentally affecting disadvantaged or vulnerable consumer groups
- conduct in concentrated markets which impacts on small business consumers or suppliers
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
- where ACCC action is likely to have a worthwhile educative or deterrent effect, and/or
- where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair trading laws.

Box 4: Enforcement Agencies as Model Litigants

The law imposes obligations upon government agencies when handling claims and conducting litigation that are higher than for ordinary citizens. There is an expectation that governments act fairly and properly¹¹⁸, that they meet court-imposed deadlines and comply with court orders. All Australian governments have a common law responsibility to act as model litigants.

The Victorian government revised its model litigant guidelines in 2011. In introducing the guidelines the government states:

Broadly, the Guidelines provide that the State should act fairly and consistently, avoid litigation where possible, pay legitimate claims without litigation, and keep litigation costs to a minimum.

All Government departments and agencies and their lawyers are obliged to follow the Guidelines.¹¹⁹

While clearly it is an important element of the rule of law that governments act fairly and comply fully and promptly with the decisions of independent courts, there is a risk that, unless carefully drafted and applied, model litigant

¹¹⁸ A Tsacalos, The model litigant policy in the spotlight, 02 September 2011, <http://www.mondaq.com/australia/x/144208/Public+Sector+Government/The+model+litigant+policy+in+the+spotlight>

¹¹⁹ Department of Justice, Victorian Model Litigant Guidelines [http://www.justice.vic.gov.au/home/the+justice+system/justice+legislation/justice+-+victorian+model+litigant+guidelines+-+\(pdf\)](http://www.justice.vic.gov.au/home/the+justice+system/justice+legislation/justice+-+victorian+model+litigant+guidelines+-+(pdf))

policies will act as a brake on legitimate litigation required to effectively enforce consumer protection law. But this need not be so. As noted by one enforcement agency: “The model litigant policy does not prevent Commonwealth agencies from acting firmly and properly to protect Government interests.” Nor in that agency’s view does the policy prevent an agency from pursuing “litigation in order to clarify a significant point of law, even if the other party wishes to settle the dispute.”¹²⁰

We were concerned about some past references to the model litigant policy by the leadership of consumer protection regulators and so reviewed agencies’ stated approach as part of the current research. The enforcement discussions in agencies Annual Reports, do not suggest that the model litigant rules currently raise any particular concerns for State and Territory consumer protection authorities. The ACCC made reference to the policy in 2002 and 2005 but not recently. ASIC has found itself in controversy in relation to the rule in another context. In 2010 the then Chairman of ASIC defended ASIC’s compliance with the rule in the media following a NSW Court of Appeal judgment in a matter arising from ASIC’s market supervision jurisdiction.

Former Commonwealth Attorney-General, the Hon. Daryl

¹²⁰

Williams QC has pointed out that the model litigant policy should not inhibit regulators from taking enforcement activity. In relation to the policy's obligation to avoid litigation wherever possible and the related requirement that litigation that is issued has reasonable prospects of success, Williams has said:

Indeed, there are some agencies such as regulatory agencies that need, in many cases, to institute litigation in order to discharge their statutory functions.

The prosecution of these proceedings will form a substantial part of the role of the agency. In these circumstances, the model litigant obligation to avoid litigation wherever possible means that a proper assessment must be made in each case of whether there are reasonable grounds for bringing the proceedings.

There will generally be reasonable grounds for starting proceedings where there are reasonable prospects of success. There may also be reasonable grounds for instituting or defending proceedings or for bringing an appeal where the prospects of success are not strong.

An agency will have reasonable grounds for pursuing litigation where the institution or continuation of the litigation is justified in the public interest, including where pursuit of the litigation is a

legitimate means of clarifying the law on a particular topic. (emphasis added)¹²¹

¹²¹ Hon Daryl R Williams AM QC MP, 'Justice and Accountability: The Establishment of the Administrative Review Tribunal and the Model Litigant Obligation', Speech by the to the Government Law Group, September 2000

Box 5: How much will it cost to enforce that?

Enforcement agencies have limited budgets and must ensure that their resources are targeted. At the same time they have duties to respond to breaches of the law in ways that are effective. Combined with other agency risks that may arise from litigation (criticism for failure, criticism for failing to meet court timelines) there is a danger that agencies will too easily shy away from litigation. Agencies, which don't undertake litigation regularly, may well have difficulty in undertaking any litigation effectively. In the absence of good systems and experienced staff the risks of getting it wrong will increase.

Some of the regulators enforcement policies attempt to deal with this balance.

The former ACCC policy stated:

*litigation is costly compared to other compliance and enforcement actions. Where breaches are blatant, repeated and/or cause significant detriment, the regulator will target those traders for prosecution. ACL regulators have a range of other tools available, which may be used as an alternative to prosecution.*¹²²

¹²² ACCC Compliance and Enforcement Policy 23 December 2010, <http://www.accc.gov.au/content/index.phtml/itemId/964220>

The current ACCC policy is somewhat different in emphasis:

Legal action is taken where, having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious ..., where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

The ASIC policy¹²³ states that in considering whether to commence enforcement action:

We are prepared to pursue matters if an important legal obligation could be tested or clarified, and we have the necessary evidence. However, a relevant consideration for us is also the cost and time required to achieve an appropriate remedy through enforcement action. (page 4)

In considering the particular enforcement remedy to be taken, the policy states that when considering the public benefit, ASIC should consider “The length and expense of a contested hearing and the remedies available compared with other remedies that may be available more quickly

¹²³ ASIC Information Sheet 151: ASIC's approach to enforcement February 2012

(e.g. improved compliance under an enforceable undertaking” (page 8).

The *WA Enforcement and Prosecution Policy* also states that prosecution action in the criminal courts and disciplinary action in the State Administrative Tribunal should be taken when it is appropriate to do so in a particular case and should not be used only as a last resort. However, the policy sets a very high bar for either action to be taken. The policy is very proscriptive about what needs to be in place in terms of strength of evidence, availability and reliability of witnesses, likelihood of evidence being excluded etc. The policy seems to discourage officers from taking court action.

There is no reference to adverse costs risks, but the policy states that one consideration in determining whether to prosecute a matter or take disciplinary action in the tribunal is whether it is expensive and too time consuming for CPD staff in circumstances where other enforcement options can be used.

Box 6: Protecting the interest of the most vulnerable consumer

Vulnerable and disadvantaged consumers are less likely to be able to use dispute-resolution or the courts to protect their own interests, and they often rely on regulators to protect them from market misconduct.

But vulnerable and disadvantaged consumers raise particular challenges for consumer protection enforcement activity. They are often less willing to complain, more easily intimidated, less likely to have retained documentary records and less likely to perform well as witnesses in court proceedings where among other things they can be readily confused under skilled cross examination¹²⁴. Often vulnerable consumers will be members of a class of consumers who have suffered a loss, and it is obviously asking a lot of a vulnerable individual to participate in lengthy and complicated court enforcement processes

¹²⁴ The difficulties faced by some vulnerable witnesses have been recognised by the Australian Law Reform Commission in their report into the Uniform Evidence Law. The ALRC noted that some cross-examination techniques “can adversely affect the ability of a person with an intellectual disability to recall an event accurately, and repetition of questions can cause a person with an intellectual disability to change his or her answers. This may result in the witness giving the questioner a response which the questioning process has led the witness to perceive to be the ‘correct’ answer, even though the witness may effectively be agreeing to something which is not true.” Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102), chapter 5, available at: <http://www.alrc.gov.au/publications/5.%20Examination%20and%20Cross-Examination%20of%20Witnesses%20/examination-witnesses> This may often also be true of consumers with other forms of disadvantage or vulnerability.

when there may be limited benefit to them individually.

Both the NSW OFT's Annual Compliance Priorities and the ACCC in its February 2012 policy specifically focus on vulnerable and disadvantaged consumers. The NSW OFT identifies as one of 4 business practices being targeted as a priority "Breaches against potentially vulnerable groups of consumers, where the business' conduct is targeted in such a way that consumers have no reasonable prospect of either recognising the non-compliant conduct and/or seeking redress." The ACCC has also identified this group as a priority as noted earlier in this section.

While it is very welcome for regulators to prioritise the interests of vulnerable and disadvantaged consumers, there is a specific problem in relation to the evidence of vulnerable and disadvantaged consumers. There is a clear focus on ensuring that the regulator has the evidence available to succeed in court. None of the policies that we are aware of have grappled with the reluctance of litigators to build cases relying on the evidence of vulnerable individuals. Our experience suggests that in deciding whether or not to litigate regulators are less willing to take on cases affecting vulnerable and disadvantaged consumers that significantly rely on individual consumer testimony. And in their defence, courts and the rules of evidence are not generally open to approaches that may ameliorate the impact on vulnerable consumers.

There are a number of things regulators and others could

do to address this problem.

First regulators could do better in supporting vulnerable witnesses. They should consider different approaches to support such witnesses to partake in regulatory enforcement action. This could include working directly with a consumer's support person, such as a financial counsellor or advocate. It could also facilitate other forms of support for such as consumers, such as peer support. Regulators should also consider alternative ways to provide relevant evidence that does not rely on individual testimony (i.e. statements, survey evidence etc).

Regulators should engage with community agencies and advocacy organisations to determine the best way to support such clients, so that they are able to support regulatory enforcement action effectively.

Second, regulators could work with courts, policy makers, consumer advocates and others to address the fundamental problem inherent in court's approach to evidence. In our view courts are too focussed on individual testimony and insufficiently willing to use appropriately qualified survey evidence, let alone take cognisance of a growing body of knowledge relating to consumer psychology and behaviour.

Our legal system should also explore the applicability of tendency or coincidence evidence principles in civil litigation involving corporate conduct. These evidentiary principles are applicable to criminal law, and provide that

evidence about particular conduct that shows a tendency to engage in a particular way (propensity evidence), or evidence about two or more events such as to show that it is improbable that they occurred coincidentally, may be admissible where it has significant probative value.

Finally there is a danger that courts may prioritise the interests of a single trader over those of a diffuse but large group of consumers that the agency is acting in the interests of. This has particular applicability in respect of industry licensing, where regulators (and appeal bodies) may be concerned more for a trader's livelihood in refusing to grant a licence compared to the interests of consumers that might be affected by the conduct of traders.¹²⁵ Possible responses include regulators putting extra effort into identifying the harm to consumers generally and individually when making decisions whether or not to cancel a license or exclude a business from a market and more generally educating the public including the judiciary on the balance that they have made.

At the regulatory level, legislation that creates licensing schemes should more explicitly state that the purpose of

¹²⁵ In the area of financial advice, decisions by the Australian Securities and Investments Commission to deny or revoke a license based on concerns that the financial advisor was non-compliant with certain protections have been set aside by the Administrative Appeals Tribunal and replaced with license conditions or enforceable undertakings. See, eg, Saxby Bridge Financial Planning Pty Ltd and Ors and Australian Securities and Investments Commission [2003] AATA 480 (28 May 2003); Enforceable Undertaking of Fortrend Securities, available at: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/017029229.pdf/\\$file/017029229.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/017029229.pdf/$file/017029229.pdf)

the licensing scheme is to ensure consumer protection through compliance with the law, and not to create a barrier to entry to a profession or market. Further the legislation that governs administrative review could more clearly state that a Court or Tribunal must give adequate weight to consumer detriment caused by a licensee in any review of a regulator's decision to cancel a license or exclude a market participant.

Box 7: Telling Everybody: Publicising enforcement

If regulators are to take up Sparrow's prescription for effective regulation, the question arises how are they are to "tell people about it". Much of this report is directed at explaining the importance of effective and regular compilation of data regarding a regulator's activities. However annual reports whilst critical for accountability and measurement have shortcomings in terms of timeliness, reach and readability.

Consumer regulators need to ensure that regulated industries, governments and the public are aware of their work. Individual enforcement successes need to be communicated to other businesses who can be reassured that they are not being unfairly disadvantaged by a rival as well as deterred from similar conduct. Governments and the public need to know that consumer protection laws are being upheld and compliance promoted.¹²⁶ They also need to be able to assess whether they are getting value for money. The need for transparent reporting is discussed in section 3 above. Here the issue is the value for money that is obtained through making sure enforcement policies, areas of concern and enforcement action are well known among both suppliers and customers in particular consumer markets.

¹²⁶ See for example Parker, C & Lehmann Nielson V *The Fels Effect: Responsive regulation and the Impact of Business Opinions of the ACCC* (2011) 20 Griffith law Review 91.

In an ever increasingly crowded information space, accessing mainstream media can rarely be beaten for reach and impact. Websites, and guidance material can play a secondary role but these rarely reach public consciousness unless a specific need arises.

It has also been noted that use of the media is a key way of engaging consumers—a large and diffuse group—whose support, amongst others, is critical to the success of regulators.¹²⁷

There are examples of effective use of the media by regulators. We have not conducted a systematic review and there are no doubt examples of good practice beyond those we mention below. In Australia the ACCC has long had the practice of issuing a media release each time it commences proceedings. This has been adopted more recently by other regulators.

The ACCC's use of the media perhaps had its zenith under the Chairmanship of Professor Allan Fels. Whilst there were loud protests from big business and considerable focus on appropriate use of the media by the Dawson Review, there were in fact no voices suggesting it was not appropriate to use the media at all.¹²⁸ Indeed most regulators are specifically required to make information

¹²⁷ See for example Asher, Allan *enhancing the standing of competition authorities with consumers*, ICN Conference Korea, 2003

¹²⁸ See for example Healey, Deborah *The ACCC and the Media: Improving the Ratings* [2003] UNSWLawJl 22; Yeung, Karen *Does the ACCC Engage in trail by Media* (2005) 27(4) *Law & Policy* 549.

available about their functions and inform the public regarding issues affecting their interests.¹²⁹

More recently we have seen the ACCC use media effectively as part of its return to a campaigning approach to enforcement—where publicity surrounding enforcement actions has also served as a vehicle for more general compliance and educative messages.

ASIC too has increased its willingness to comment publicly on issue of concern to the public. It has also had great success with its significant investment in the MoneySmart website, which goes beyond the simple provision of information, and instead focuses on significantly more useful guidance, tools and calculators.

Overseas we can see examples where regulators have ventured much further. See for example www.epa.gov where the US EPA makes use of interactive tools, blogs, media releases, podcasts and more.

Ofcom in the UK have a dedicated media centre containing not only all current media releases, useful facts and figures, as well as access to analysts and contacts for the media team.

¹²⁹ See for example s.28 *Competition and Consumer Act 2010*

6. Scorecard for each consumer regulator

The purpose of this section is to provide an overall scorecard for each of the ten consumer regulators reviewed. Due to the difficulties in comparing data the scorecard considers only three items:

- how well the regulator reports on its enforcement work,
- whether the regulator has been increasing or decreasing the overall amount of enforcement work, and
- for State and Territory regulators, their comparative rate of prosecutions per capita.

6.1 Reporting

A score for reporting has been assigned as follows:

Description	Score	Typical characteristics	
Wholly inadequate	0		Qld, ACT, NT
Poor	2	May have one or more of the following features: Significant areas of enforcement not reported, lack of comparability year on year, significant inconsistencies	Tasmania, SA OBS, ASIC (prior to 2012)
Fair	4	Covers most essential items, data on most enforcement tools available. No unexplained inconsistencies. Qualitative information available.	ACCC, ASIC*, NSW OFT, CAV, WA,
Good	6	Covers all or most essential items; data on all enforcement tools available, possible to distinguish enforcement in consumer matters from small business matters, comparable over time. Qualitative information available.	We note that ASIC's improved reporting since early 2012 would have been ranked 'Good'.

*We have averaged ASIC's poor reporting for periods before 2011/12 with their good reporting in 2012 noting their commitment to continue doing so.

6.2 Overall trend in enforcement outcomes

Is the total level of enforcement work increasing or decreasing? Is the balance between enforcement tools changing in ways that are consistent with a clearly articulated enforcement strategy?

It may be argued that it is not possible to know, based on current data, the appropriate level of enforcement, and in the absence of such knowledge it may be unreasonable to expect an agency to increase the level of enforcement outcomes achieved.

Our answer to this is simple: levels of consumer complaint to regulators, and in particular the level of problems experienced by vulnerable and disadvantaged consumers reported to legal and social welfare agencies, mean it is not possible to argue with a straight face that current levels of enforcement are adequate in any State or Territory in Australia.

Description	Score	Typical characteristics	
Falling	0	Overall downwards trend in enforcement. So little enforcement reported that not possible to fall much lower.	ACT, Qld, NT
Trending down	2	Overall reduction and no compensatory increase in major actions. Or steady trend but balance of outcomes moving to softer options. Significant fluctuations in enforcement in both directions.	NSW, Vic
Steady	3	Steady enforcement (overall and on major matters) outcomes with no significant fluctuations.	ASIC, SA, Tasmania, WA
Trending up	4	Major actions increasing somewhat (e.g. prosecutions and civil actions)	ACCC (considering most recent 6 years)
Increasing	6	Generally upwards trend in enforcement outcomes achieved.	

6.3 Relative enforcement performance

In the absence of adequate comparable reporting of enforcement outcomes achieved across the range of enforcement tools, we have compared per capita performance on prosecutions. Total reported prosecutions over the 5 reported years to 2010/11¹³⁰ have been added and then compared to population to gain a rate per million people in that State/Territory. Three jurisdictions (ACT, NT and Queensland) have been excluded due to lack of data.

Description	Score	Characteristics	States/Score
Much lower than average	1	More than 50% below the mean for the 5 states	
Low rate per capita	2	More than 20 % below the mean	Vic
Average/Close to average	3		NSW, SA
Higher than average	4	More than 20% above the mean	
Much higher than average	5	More than 50% above the mean	Tas, WA

¹³⁰ Of the five states that provide relevant data, 2011/12 figures are available for only Victoria and WA and so we have used the 5 years where all States have published data.

Table 21: Rate of Prosecutions Per Million Population, last 5 years

State/ Territory	Population (millions)	06/ 07	07/ 08	08/ 09	09/ 10	10/ 11	Most recent 5 years	Rate per million most recent 5 years	% Variation from average
ACT*	0.365								
NSW	7.303	116	101	76	85	67	445	60.93	-4.32%
NT*	0.23								
QLD*	4.58								
SA	1.657	15	35	18	15	25	108	65.18	-0.07%
TAS	0.51	25	10		10	16	61	119.61	+54.36%
VIC	5.624	42	42	25	33	25	167	29.69	-35.56%
WA	2.346	63	80	72	66	76	357	152.17	+86.92%
Average								65.25	

Source: Tables in Section 4; *ACT, NT and QLD excluded due to lack of adequate data

6.4 Summary of Scorecard

National Regulators – two criteria

	Reporting (maximum of 4)	Trend (maximum of 12)	Total (maximum of 18)
ACCC	4	8	12
ASIC	4	6	10

State and Territory Regulators – 3 criteria

	Reporting (max. of 6)	Trend (max. of 6)	Relative amount (max. of 6)	Total (max. of 18)
ACT	0	0	0	0
NSW OFT	4	2	3	9
NT CA	0	0	0	0
QLD OFT	0	0	0	0
SA CBS	2	3	3	8
TAS CAFT	2	3	5	10
CAV	4	2	2	8
WA CPD	4	3	6	13

6.5 Commentary on Overall Scores

Undertaking enforcement and reporting on it are both important, but doing it is the more important. The tables provide twice the weight for undertaking enforcement as reporting. In the case of the national regulators this is done by scoring the enforcement trend out of 12 while reporting is scored out of 6. For State and Territory regulators there are two measures that relate to undertaking enforcement, each scored out of six.

The WA CPD's score for the relative amount of enforcement work undertaken is very high compared to other jurisdictions. It is possible that this flows from large numbers of less important enforcement actions (something that may also be true to some extent in NSW). However the quality of reporting across all regulators is so poor, and lacking in comparability, that it is not possible to make this conclusion with any degree of certainty.

This points to one of the limitations of deriving a scorecard based on the available inconsistent data. It is at least theoretically possible that a regulator that has undertaken a large number of similar, not particularly difficult and/or not particularly important enforcement actions is being compared to one that has used more resources to take on harder, more challenging and more important matters. This problem should be addressed as and when regulators discuss developing comparable reporting methods (see recommendation 2 (a)).

7. Recommendations

The purpose of this section is outline recommendations for action by individual consumer regulators, the consumer regulators as a whole, consumer groups, the courts, the media and government.

In general, consumer protection regulators need to do more enforcement work, and they need to be more accountable by better reporting on what they do and why. To a greater and lesser degree State and territory regulators could take many steps forward by emulating the current approach of the two key national consumer protection regulators, ASIC and the ACCC

Our two primary recommendations go to these matters. Our further recommendations are designed to assist in more specific ways achieve the goal of more effective consumer protection enforcement.

Primary recommendations

Recommendation 1: Increase the quantity of enforcement work

There is room for all consumer protection regulators to increase the amount of enforcement work that they undertake. There is significant need for an increase in activity on the part of Qld, NT, ACT, NSW and Vic and possibly WA. In doing so they should consider the following:

- Regulators should ensure that they are undertaking enforcement action in a strategic way designed to achieve particular articulated outcomes in the marketplace
- To increase enforcement work is not just about increasing the total number of enforcement actions, but, subject to the demands of the articulated strategy, to increase actions across the regulatory pyramid and in particular to ensure that there are sufficient actions at the 'pointy end' of the pyramid to have a real deterrent effect on businesses that may otherwise fail to comply.
- Increasing enforcement action includes taking on litigation when that is required including where it is necessary to test the law. Governments and the community have an interest in the law being tested to ensure that it meets policy objectives and where adequate avoids the need for debate and inquiry on the imposition of further regulation.
- To facilitate an increase in enforcement work regulators should have regard to the issues of regulatory agency culture set out in Section 5 of this report.
- To actually deliver the required increase in enforcement work regulators need to consider the barriers that they are currently facing in doing so and work to overcome them, whether they relate to

internal culture, fear of media criticism, lack of resources allocated to enforcement or other matters.

Recommendation 2: Report better on enforcement work

With the exception of ASIC and the ACCC, who should seek to maintain current high standards, all consumer protection regulators should significantly improve the way they report on their enforcement work to the community, so that consumers and businesses can be sure that they are performing a good job. This is particularly critical for ACT, NT, Qld, SA and Tas. In particular:

- Regulators should use a consistent and as far as possible standard set of reporting indicators to enhance the ability of the community to compare regulatory performance
- All regulators should report on litigation commenced. Litigation commenced rather than litigation resolved is a more useful and up-to-date indicator of how proactive a regulator has been in any given year.
- Regulators should clearly separate reporting on their consumer protection enforcement from any other jurisdictions that they are also responsible for.
- Regulators should report the number of each of the main types of enforcement action per agreed

amount of population (for example per 100,000 adults).

- Regulators should quantify and report on their budget allocation and the staffing resources allocated to enforcement
- Regulators should report in a timely fashion. Ideally regulators would provide period and year to date reports on their web site or at least report each 6 months as ASIC has now started to do. In any event regulators should report within 3-4 months of the end of the relevant period.

Further Recommendations

Recommendation 3: Vulnerable and disadvantaged consumers as witnesses

That government, regulators and consumer organisations work with courts and policy makers to ensure that the interests of vulnerable and disadvantaged consumers benefit from CP enforcement including

Regulators should develop processes to better support witnesses noting the suggestions at Section 5 of this report.

Regulators should work with Courts, policy makers and consumer organisations to explore the use of alternative forms of evidence to prove breaches of the law and/or losses incurred by consumers as a result of those

breaches including tendency or coincidence evidence and appropriately robust survey evidence.

Recommendation 4: Use of the media

Regulators should make more systemic use of the media to increase the deterrence value of their enforcement actions and to gain maximum educative value from enforcement outcomes.

Government, regulators and consumer organisations should educate the media about the role of regulators and enforcement, including challenging the media's understanding that regulators must always win in court.

Recommendation 5: Reporting to consumer organisations

Regulators should set up improved systems to regularly and routinely report to consumer organisations on outcomes of complaints made by or through those organisations.

Recommendation 6: Model litigant policy

Regulators and the governments to which they are accountable should ensure that the model litigant policy does not interfere with regulators' ability to use their enforcement powers to protect consumers and where appropriate to test the law.

Appendix A: Detailed data on regulator enforcement activity

This section sets out the data obtained for each regulator in more detail. It also provides notes on how the primary data for each agency was interpreted to generate the data in the tables in Appendix A (which are in turn summarised in Section 5 of the main body of the report).

Please also see section 4.1 above for an overview of how data was collected, our approach to interpretation and some specific limitations on the data.

A1.1 ACCC ENFORCEMENT ACTIVITY 2001-2012

ACCC Litigation commenced and undertakings obtained

Financial Year		01/ 02	02/03	03/04	04/05	05/06
Litigation commenced	Consumer protection	31	18	14	12	4
	Small business	14	3	1	8	1
	Product safety	2	2	0	2	3
	Total	47	23	15	22	8
Undertakings	Consumer protection	14	15	19	30	33
	Small business	2	2	2	1	4
	Product safety	6	7	5	19	14
	Total	22	24	26	50	51

Financial Year		06/07	07/08	08/09	09/10	10/11	11/ 12 ¹³¹
Litigation commenced	Consumer protection	10	15	22	16	22	18
	Small business	0	3	3	3	2	1
	Product safety	3	2	1	2	3	3
	Total	13	20	26	21	27	22
Undertakings	Consumer protection	26	27	34	30	17	9
	Small business	3	5	3	3	1	1
	Product safety	12	17	26	11	2	1
	Total	41	49	63	44	20	11

NR = not relevant

NA = not available

Notes:

The table shows enforcement activity undertaken by the ACCC over the 11 years to 2011/12. The data is drawn from ACCC Annual Reports, ACCCount bulletins, and the Undertakings and Infringement Notice Registers on the ACCC website.

The ACCC administered the Trade Practices Act 1974 until it was superseded by the Competition and Consumer Act 2010 on 1 January 2011.

Detailed information about cases litigated and undertakings entered into can be found in the ACCCount

¹³¹ It is unclear how many cases in 2010/11 and 2011/12 were brought under the ACL. Of the cases included in litigation commenced, one case in 2010/11 and one case in 2011/12 specifically mention the ACL in the description in ACCCount.

bulletin, which has been published since mid 2007¹³². Information about cases and undertakings is also published in the ACCC Annual Report, with detailed information being included until 2009/10. Information about undertakings is also available in the Undertakings Register on the ACCC website.

The following rules were used when compiling the table:

- Where a matter involves both litigation and an undertaking it is only counted once (under litigation).
- Where a matter is pursued against multiple people (e.g. directors) associated with the same company, or against the company and directors of the company it is counted once.
- Where a matter involves one or more different companies it is counted for each company.

The following issues arose when compiling the litigation section of the table:

- Litigation commenced is the most useful measure of enforcement activity and was available in the ACCCount bulletins. It has therefore been used for the ACCC, while litigation finalised it used for other regulators.

¹³² Prior to ACCCount the ACCC published an 'ejournal'. It's only available in hard copy now (see <http://www.accc.gov.au/content/index.phtml/itemId/302655>) making it difficult to access.

- The following types of cases are not included in the numbers so as to avoid double counting or because they are not strictly relevant: contempt proceedings¹³³, appeals, reviews, proceedings for failure to provide information, costs proceedings, actions commenced against the ACCC and ACCC interventions in private cases.

Use of New Australian Consumer Law Remedies

The powers of the ACCC have been significantly impacted by the introduction of the Australian Consumer Law (ACL). The *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*, which received royal assent on 14 April 2010, was the first of two acts to implement the ACL. The remainder of the ACL was implemented by the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* which received the Royal Assent on 13 July 2010. As a result of these amendments the ACL is now contained in Schedule 2 of the *Competition and Consumer Act 2010* (which has replaced the Trade Practices Act). The ACL came into effect on 1 January 2011.

The ACL provides the ACCC with an increased range of remedies in consumer protection matters. The ACCC gained power to issue infringement notices and substantiation notices and the court now has the power to

¹³³ An error in our research method has meant that contempt proceedings were *excluded* for ACCC and NSW OFT but *included* for CAV and WA OCP. The number of contempt proceedings are not sufficiently large to significantly influence the results of the research.

order civil pecuniary penalties, compensation orders, non-party redress, non-punitive orders, and adverse publicity orders. As the ACL only commenced on 1 January 2011 data for the use of these remedies is only available for the 2010/11 and 2011/12 years.

In 2010/11, 48 infringement notices were paid,¹³⁴ totalling almost \$300,000.¹³⁵ In 2011/12 the ACCC received payments for 27 infringement notices¹³⁶ amounting to \$178,200.

In 2010/11 the ACCC obtained orders for \$4.7 million in civil pecuniary penalties, with the figure for 2011/12 being \$10.7 million.

In August 2010, the ACCC issued its first public warning notice.

¹³⁴ Many of these notices are for multiple breaches by a single company. For example, SingTel Optus Pty Ltd paid 27 infringement notices amounting to \$178,200. It is not clear from the Annual Reports whether there are any notices that have not been paid.

¹³⁵ Exact figure unavailable.

¹³⁶ Many of these notices were also for multiple breaches by companies.

A1.2 ACT Office of Regulatory Services Enforcement Activity 2006-2011

Enforcement action for ACT ORS for 2006-2011

Financial Year		06/ 07	07/ 08	08/ 09	09/ 10	10/ 11	11/12 ¹³⁷
Infringement notices	Security industry	NA	NA	NA	34	15	NA
	Motor vehicle industry	NA	NA	NA	1	1	NA
	Other ¹³⁸	NA	NA	NA	0	42	NA
	Total	NA	39	53	35	58	34
Disciplinary proceedings 139	Liquor	NA	NA	26	4	10	3
	Security	NA	NA	12	0	0	0
	Tobacco	NA	NA	1	0	0	1
	Agents ¹⁴⁰	NA	NA	0	0	3	1 ¹⁴¹

¹³⁷ The figures for the disciplinary actions for 2008/09, 2009/10, & 2010/11 are taken from the 2010/11 annual report where they are described as “proceedings commenced”. Comparable figures are not included in the 2011/12 annual report. The figures in the disciplinary proceedings part of the 2011/12 column are all matters reported on the website for 2011/12 as at 30 November 2012. This may or may not include all matters for 2011/12 (the latest action was from December 2011) and may or may not be comparable with previous years. It seems that the matters on the website are limited to successful court actions, and don’t include just matters commenced.

¹³⁸ This includes matters which would not be considered consumer protection for the purposes of this report – for example, matters relating to non-compliance with smoke free zones.

¹³⁹ These figures are for proceedings commenced by the Commissioner of Fair Trading during the relevant financial year. Note that there is information in the Annual Reports for 2006/07 and 2007/08 on disciplinary proceedings, however it is unclear if these relate to matters commenced by the Commissioner of Fair Trading or the people seeking review of the decisions. Hence these matters have not been included in the table.

¹⁴⁰ It appears that “agents” includes real estate agents, stock and station agents, business agents, travel agents and employment agents.

¹⁴¹ This action related to Rumbles Realty Pty Ltd. Criminal action was also brought against Wayne Rumble, of Rumbles Realty.

NR = not relevant

NA = not available

Notes:

The Office of Regulatory Services (ACT ORS) falls within the Justice and Community Safety Directorate and is responsible for fair trading and consumer protection, amongst other things.

It is unclear from the website or the Annual Reports, which laws with a consumer protection focus the ACT ORS is responsible for. It is responsible for the ACL in the ACT, which replaced the following ACT laws when it commenced on 1 January 2011:

- Door-to-Door Trading Act 1991
- Fair Trading Act 1992 (in part)
- Fair Trading (Consumer Affairs) Act 1973
- Lay-by Sales Agreements Act 1963

The information in the tables is obtained from the website¹⁴² and the Annual Reports of the Department of Justice and Community Safety. The website contains

¹⁴² See <http://www.ors.act.gov.au/>. Accessed on 1 December 2012.

information on recent court decisions,¹⁴³ product safety alerts,¹⁴⁴ scam alerts¹⁴⁵ and public warnings.¹⁴⁶

There is limited information about enforcement action taken in relation to consumer protection matters. The ACT ORS plays a significant role in the regulation of the liquor and tobacco industries, as is reflected in the table, however this is not considered consumer protection for the purpose of this report.

Disciplinary matters relate to matters brought by the Commissioner for Fair Trading in the Consumer and Trader Tribunal.

For 2009/10, 2010/11 and 2011/12 the Annual Reports of the Department of Justice and Community Safety include the below figures. The figures are calculated on the basis of information collected during the compliance program.

Financial Year	09/10	10/11	11/12
Number of individual, business and workplaces that comply with relevant fair trading legislation	2507	3112	4615
% of individual, business and workplaces that comply with relevant fair trading legislation (target over 80%)	95%	98%	89%

¹⁴³ See http://www.ors.act.gov.au/publications/court_decisions. Accessed on 1 December 2012.

¹⁴⁴ See http://www.ors.act.gov.au/community/fair_trading/product_safety/product_safety_alerts. Accessed on 1 December 2012.

¹⁴⁵ See http://www.ors.act.gov.au/community/fair_trading/scam_alerts#List. Accessed on 1 December 2012

¹⁴⁶ See http://www.ors.act.gov.au/community/fair_trading/public_warnings. Accessed on 1 December 2012.

A1.3 Australian Securities & Investments Commission – Consumer Protection Enforcement Activity 2006-2012

Enforcement action for ASIC for 2006-2012

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Criminal proceedings finalised	Overall	51	52	39	23	26	28
Criminals convicted	Financial services	NA	23	NA	NA	NA	NA
	Overall	42	49	34	22	25	27
Criminals jailed	Financial services	NA	14	12	8 ¹⁴⁷	NA	NA
	Overall	21	23	19	12	16	20
% successful criminal litigation	Overall	88%	NA	80%	80%	NA	NA
Civil proceedings completed	Overall	76	44	35	30	34	24
% successful civil litigation	Overall	98%	NA	94%	94%	NA	NA
Recoveries, costs, compensation or fines	Overall	\$102m	\$50m	\$14.5m	\$287m	NA	NA

¹⁴⁷ This figure includes Oliver Banovec who was convicted of investment fraud and perjury. It is unclear whether it relates to the provision of financial services to retail investors.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Assets frozen	Overall	\$38m	\$96m	\$13.8m	\$15.5m	NA	NA
Total of recoveries, costs, compensation, fines or/and assets frozen	Overall	\$140m	\$146m	\$28m	\$302m	\$113m	\$19.8m
Litigation commenced	Overall	NA	NA	NA	217	130	134
Litigation concluded	Overall	430	280	186	156	202	179
% successful litigation	Overall	97%	94%	90%	91%	90%	92%
Bans, cancellations and suspensions from providing financial services	AFS license cancellations/suspensions	NA	NA	5	19	NA	6
	Banned from offering financial services	35	49	42	22	NA	48 ¹⁴⁸
	Total	NA	NA	47	41	64	54
Illegal schemes shutdown or action taken	Overall	105	80 ¹⁴⁹	NA	50	30	1

¹⁴⁸ Calculated by subtracting number of AFS licenses cancelled/suspended from total.

¹⁴⁹ Number of illegal investment schemes wound up

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Amount of funds frozen and recovered for investors from illegal investment schemes	Overall	NA	>\$50m funds frozen	NA	NA	NA	NA
Enforceable undertakings	Overall	6	9	5	2	12	20

NR = not relevant

NA = not available

Notes

The above information was obtained from the ASIC Annual Reports.

ASIC is Australia's corporate, markets and financial services regulator. The aim of data collation was to look at the enforcement work of ASIC as it relates to financial services provided to consumers and retail investors. It is difficult and often not possible to isolate the financial services work. In the table "Overall" figures include all of ASIC's enforcement activity and are not limited to financial services for consumers and retail investors.

Where there are multiple different types of enforcement action taken for a matter, for example a prosecution and an undertaking, each action is counted.

There is a list of enforceable undertakings available on the ASIC website.¹⁵⁰ There are a range of different matters covered by the list. It is not always clear which relate to consumer protection in financial services matters. We have treated them as follows:

When the enforceable undertaking relates to the following it is not included in the figures:

- Auditors who have engaged in incompetent or deceptive behaviour e.g. the auditor for an HIH subsidiary
- Liquidators who have engaged in incompetent or deceptive behaviour
- Failing to disclose an issue or price sensitive information to the Australian Stock Exchange
- Failing to comply with its continuous disclosure obligations
- The agreement with ANZ bank in relation to the Opus Price matter

When the enforceable undertaking relates to the following it is included in the figures:

¹⁵⁰See

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertaking+register%3A+list?openDocument#>. Accessed 24 November 2012.

- Where retail investors or consumers are directly affected
- Offering to buy shares but misrepresenting the value of them
- Directors of a company where an employee engaged in misleading or deceptive conduct towards retail investors
- Individual enforceable undertakings are counted separately, even if they relate to people from the same company.

A1.4 NSW Office of Fair Trading Enforcement Activity 2006-2011

Enforcement action for NSW OFT for 2006-2011

Financial Year		06/07	07/08	08/09	09/10	10/11
Successful prosecutions finalised ¹⁵¹	Consumer Credit Administration Act	2	0	0	1	NR
	Conveyances Licensing Act	0	0	0	0	1
	Credit (Finance Brokers) Act	1	NR	NR	NR	NR

¹⁵¹ Statistics on prosecutions commenced are not published by NSW OFT. Only information on matters finalized is available. Further only information on successful prosecutions (not all commenced prosecutions) is provided.

Financial Year		06/07	07/08	08/09	09/10	10/11
Successful prosecutions finalised	Crimes Act ¹⁵²	7	6	3	6	7
	Electricity Safety Laws	7	3	13	5	1
	Fair Trading Act	10	21	15	18	21
	Fitness Services (Pre-paid Fees) Act	1	0	0	0	0
	Funeral Funds Act	0	0	0	0	0
	Home Building Act	31	37	23	27	10
	Motor Dealers Act	29	21	12	21	23
	Motor Vehicle Repairs Act	21	6	4	2	2
	Pawnbrokers and Second-Hand Dealers Act	0	0	0	0	2

¹⁵² Prosecutions under the Crimes Act appear mainly to be prosecutions for using false instruments or making false declarations; it is not clear which substantive consumer or other issues within the remit of the OFT are involved. See for example http://www.fairtrading.nsw.gov.au/pdfs/About_us/Enforcement_Action_Report_June_2011.pdf p2.

Financial Year		06/07	07/08	08/09	09/10	10/11
Successful prosecutions finalised	Property, Stock and Business Agents Act	6	4	4	2	1
	Trade Measurement Act	2	3	2	3	0
	Travel Agents Act	0	0	0	0	0
	Valuers Act	0	0	0	0	0
	Total	116	101	76	85	67
Penalties/ fines for prosecutions finalised (\$)	Consumer Credit Administration Act	41541	0	0	183600	NR
	Conveyancers Licensing Act	0	0	0	0	7579
	Credit (Finance Brokers) Act	35027	NR	NR	NR	NR
	Crimes Act	20877	12800	67250	17112	187717
	Electricity Safety Laws	13437	31354	44837	26706	5579
	Fair Trading Act	34075	130322	69312	83304	112040
	Fitness Services (Pre-paid Fees) Act	0	0	0	0	0

Financial Year		06/07	07/08	08/09	09/10	10/11
Penalties/ fines for prosecutions finalised (\$)	Funeral Funds Act	0	0	0	0	0
	Home Building Act	313583	269561	299482	171883	61404
	Motor Dealers Act	292431	769421	76210	207816	238182
	Motor Vehicle Repairs Act	29759	13818	5084	18661	2958
	Pawnbrokers and Second-Hand Dealers Act	0	0	0	0	2458
	Property, Stock and Business Agents Act	35081	7737	4819	2252	4158
	Trade Measurement Act	4538	6520	3373	12543	0
	Travel Agents Act	0	0	0	0	0
	Valuers Act	0	0	0	0	0
	Total	820349	1241533	570367	723877	622075

Financial Year		06/07	07/08	08/09	09/10	10/11
Civil litigation finalised ¹⁵³ Civil litigation finalised	Supreme Court injunctions under FTA ¹⁵⁴	3	4	3	1	4
	Supreme Court injunctions under PSHDA ¹⁵⁵	0	0	2	0	0
	Total	3	4	5	1	4
Civil penalties ordered ¹⁵⁶	NR					
Disciplinary actions ¹⁵⁷	Conveyancers Licensing Act	NA	NA	NA	0	NR
	Funeral Funds Act	NA	NA	NA	0	0
	Home Building Act	NA	NA	NA	11	14
	Motor Dealers Act	NA	NA	NA	17	9

¹⁵³ Statistics on civil matters commenced are not published by NSW OFT. Only information on matters finalized is available.

¹⁵⁴ Fair Trading Act

¹⁵⁵ Pawnbrokers and Second-Hand Dealers Act

¹⁵⁶ As the civil action taken was limited and only injunctions are included in the table, this subheading is not relevant.

¹⁵⁷ The Director-General has the power to suspend or cancel a license under the pieces of legislation listed in this section. The decisions are usually reviewable by the Administrative Decisions Tribunal.

Financial Year		06/07	07/08	08/09	09/10	10/11
Disciplinary actions	Motor Vehicle Repairs Act	19	NA	NA	14	24
	Pawnbrokers and Second-Hand Dealers Act	NA	NA	NA	0	2
	Property, Stock and Business Agents Act	NA	NA	NA	49	48
	Travel Agents Act	NA	2	NA	4	1
	Valuers Act	NA	NA	NA	0	0
	Total	NA	NA	NA	95	98
Enforceable undertakings 158	Total	1	2	NA	NA	1
Penalty/ Infringement notices – number	Consumer Credit Administration Act	NR	NR	NR	NR	NR
	Conveyancers Licensing Act	0	0	0	0	0
	Credit (Finance Brokers) Act	NR	NR	NR	NR	NR

¹⁵⁸ Very little information is available on enforceable undertakings. See note below.

Financial Year		06/07	07/08	08/09	09/10	10/11
Penalty/ Infringement notices – number	Crimes Act	NR	NR	NR	NR	NR
	Electricity Safety Laws	3	4	16	27	22
	Fair Trading Act	14	19	19	40	32
	Fitness Services (Pre- paid Fees) Act	0	0	0	0	0
	Funeral Funds Act	NR	NR	NR	NR	NR
	Home Building Act	647	397	435	253	273
	Motor Dealers Act	84	71	146	137	116
	Motor Vehicle Repairs Act	2	4	47	27	2
	Pawnbrokers and Second- Hand Dealers Act	12	3	4	10	10
	Property, Stock and Business Agents Act	139	75	31	83	61
	Trade Measurement Act	34	33	21	12	NR

Financial Year		06/07	07/08	08/09	09/10	10/11
Penalty/ Infringement notices – number	Travel Agents Act	NR	NR	NR	NR	NR
	Valuers Act	0	0	0	0	0
	Total	935	605	719	589	516
Penalty/ Infringement notices – amount (\$)	Consumer Credit Administration Act	NR	NR	NR	NR	NR
	Conveyancers Licensing Act	0	0	0	0	0
	Credit (Finance Brokers) Act	NR	NR	NR	NR	NR
	Crimes Act	NR	NR	NR	NR	NR
	Electricity Safety Laws	600	800	9200	15100	10700
	Fair Trading Act	8250	11500	10450	22550	18150
	Fitness Services (Pre-paid Fees) Act	440	0	0	0	0
	Funeral Funds Act	NR	NR	NR	NR	NR
	Home Building Act	595800	502000	611150	383050	403000
	Motor Dealers Act	100980	108020	280830	521840	167640

Financial Year		06/07	07/08	08/09	09/10	10/11
Penalty/ Infringement notices – amount (\$)	Motor Vehicle Repairs Act	5830	22000	39160	46090	11000
	Pawnbrokers and Second- Hand Dealers Act	9600	1100	1660	7590	8090
	Property, Stock and Business Agents Act	194150	118250	50050	122100	83600
	Trade Measurement Act	14850	17160	10780	6380	NR
	Travel Agents Act	NR	NR	NR	NR	NR
	Valuers Act	0	0	0	0	0
	Total	930500	780830	1013280	1124700	702180

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Public warnings ¹⁵⁹	Total	NA	NA	NA	NA	4	6
Warning letters ¹⁶⁰	Total	NA	NA	NA	NA	NA	NA

¹⁵⁹ Only information for public warnings from 2011 onwards is available on the OFT website.

See note below.

¹⁶⁰ See below note.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Substantiation notices (post ACL) Show cause 161	Consumer Credit Administration Act	NA	NA	NA	NA	NA	NA
	Conveyancers Licensing Act	NA	NA	NA	NA	NA	NA
	Fair Trading Act	NA	NA	NA	NA	NA	NA
	Funeral Funds Act	NA	NA	NA	NA	NA	NA
	Home Building Act	NA	57	NA	60	75	NA
	Motor Dealers Act	NA	NA	NA	NA	NA	NA
	Motor Vehicle Repairs Act	NA	NA	NA	NA	NA	NA
	Pawnbrokers and Second-Hand Dealers Act	NA	NA	NA	NA	NA	NA
	Property, Stock and Business Agents Act	NA	NA	NA	NA	NA	NA

¹⁶¹ Substantiation notices were introduced by the ACL. Before the introduction of the ACL the OFT had the power to issue “show cause notices” under the listed legislation.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Substantiation notices (post ACL) Show cause	Travel Agents Act	NA	NA	NA	NA	NA	NA
	Valuers Act	NA	NA	NA	NA	NA	NA
	Total	NA	NA	NA	NA	NA	NA

NR = not relevant

NA = not available

Notes:

The figures in the table are compiled from the information provided in the *Year in Review* publications and in the quarterly statistics reports published by the OFT (only the previous two years available on the website). The Year in Review 2011/12 report was not available at the date of writing. While the quarterly reports for 2011/12 were available the data has not been compiled and included in the table. This is because the data for the previous years came from statistics in the Year in Review publication. As it was unclear to us how these statistics had been compiled, we could not compile the information in the quarterly reports to ensure that the data for 2011/12 was comparable with earlier years.

From the Year in Review and quarterly publications it was difficult to determine which matters involved a consumer protection issue. As a result the legislation likely to cover consumer protection issues was extracted from the list of laws administered by the NSW OFT. See list below. The

matters conducted under these laws have been included in the table. This may mean that non-consumer protection matters are included in the figures.

The enforcement actions under the following Acts are included in the figures:

- Australian Consumer Law
- Consumer Credit Administration Act (repealed on 17 July 2009)
- Conveyances Licensing Act
- Credit (Finance Brokers) Act (repealed on 5 August 2004)
- Crimes Act
- Electricity Safety Act (superseded by Electricity (Consumer Safety) Act) & Electricity (Consumer Safety) Act (“Electrical Safety laws”)
- Fair Trading Act
- Fitness Services (Pre-paid Fees) Act
- Funeral Funds Act
- Home Building Act
- Motor Dealers Act
- Motor Vehicle Repairs Act

- Pawnbrokers and Second-Hand Dealers Act
- Property, Stock and Business Agents Act
- Trade Measurement Act (repealed 1 February 2009)
- Travel Agents Act
- Valuers Act

There are a number of issues that arose when compiling the table:

- All prosecutions and civil litigation commenced would have been a more useful indicator of enforcement activity in any given year. However this information was not available in the NSW OFT publications and website. Only disaggregated information about the number of successful prosecutions finalised and civil litigation finalised was available, and hence these are the figures included in the table.
- Some of the figures provided by the NSW OFT include both the number of defendants (prosecuted or issued with penalty notices etc) and number of offences. It is only the number of defendants that is included in the table as this is a more useful indicator of the enforcement work of the OFT.

Of the civil litigation matter undertaken by the NSW OFT, the following are not included in the table:

- Matters in the Administrative Decisions Tribunal – Most of the laws that give the NSW OFT a licensing function allow appeals from refusals and disqualifications to the Administrative Decisions Tribunal. These cases are not enforcement action by NSW OFT.
- Appeals and other reviews to any court or tribunal as this would involve double counting
- Contempt proceedings¹⁶²
- The figures under “Supreme Court other” as it was impossible to ascertain what these matters involved
- The figures for matters in the Consumer Trader & Tenancy Tribunal as it was impossible to ascertain what these matters involved
- Matters which did not involve a consumer protection element

The figures for civil litigation should include only initial applications by the NSW OFT for consumer protection matters. However, this figure was difficult to isolate. Therefore the only matters that were included were Supreme Court injunctions under any of the relevant pieces of legislation.

¹⁶² An error in our research method has meant that contempt proceedings were *excluded* for ACCC and NSW OFT but *included* for CAV and WA OCP. The number of contempt proceedings are not sufficiently large to significantly influence the results of the research.

There is limited information available on enforceable undertakings and it is not clear whether the information available is complete. The NSW OFT website includes a “list of recent enforceable undertakings”¹⁶³ that notes three enforceable undertakings dated 13/01/2012, 07/09/2011 and 29/07/2010. The NSW OFT’s *Year in Review* publications mention enforceable undertakings, but it is difficult to calculate exactly how many enforceable undertakings were obtained in a given year. The table includes the number of enforceable undertakings that are referred to on the NSW OFT website and *Year in Review* publications.

The OFT website lists public warnings from 2011¹⁶⁴ but not earlier years.

The NSW OFT does issue a number of warning letters per year. There is reference in the *Year in Review* publications to warning letters but no consolidated data is available. There is no way of knowing how many warning letters have been issued and so the data has been recorded as not available.

The NSW OFT does issue a number of show cause notices per year. There is reference in the *Year in Review* publications to show cause notices but little consolidated

¹⁶³ See

http://www.fairtrading.nsw.gov.au/About_us/Data_and_statistics/Compliance_and_enforcement_data/Enforceable_undertakings.html. Accessed on 1 December 2012.

¹⁶⁴ See http://www.fairtrading.nsw.gov.au/About_us/News_and_events/Public_warnings.html. Accessed on 1 December 2012.

data is available. Where there is no way of knowing with any certainty how many show cause notices have been issued, the data has been recorded as not available. Only information relating to show cause notices issues under the Home Building Act is available.

Some of the laws that the NSW OFT has responsibility for have had little to no enforcement activity over the 2006-2011 period. There was only one penalty notice (\$440) issued under the Fitness Services (Pre-paid Fees) Act in 2006/07, in the five-year period. Although there was some investigation under the Valuers Act, there are no enforcement outcomes for this Act for the period of 2006-2011. There are no enforcement outcomes for the Funeral Funds Act for the period of 2006-2011.

Other indicators compiled by NSW OFT for 2006-2011¹⁶⁵

Financial Year	06/07	07/08	08/09	09/10	10/11
Proportion of successful prosecutions	95%	92%	96%	90%	86%
Percentage of consumers confident in fair operation of the marketplace	73%	79%	74%	75%	72%

¹⁶⁵ As the 2011/12 Year in Review had not been published by the date of writing (1 December 2012) the information in the table in this section does not include figures for 2011/12.

Notes:

The percentage of successful prosecutions is calculated using the figures for total number of offences resulting in conviction or where the offender is found guilty but no conviction is recorded, divided by the total number of offences (not defendants) prosecuted.

The NSW OFT has a target of $\geq 90\%$ successful prosecutions. The 2010/11 Annual Report states that figures for 2010/11 were impacted by taking on increasingly complex prosecutions, including under amended provisions of the Crimes Act 1900.

The “Percentage of consumers confident in fair operation of the marketplace” figures are obtained through a survey of consumers. The figures are used as a measure of consumer confidence. The NSW OFT notes that factors that affect consumers’ confidence may include the effectiveness of fair trading laws in NSW, but may also include personal, national and global factors. The results are used to indicate the environment in which the NSW OFT operates, rather than its own performance as a regulator. The target for this indicator is 68%.

A1.5 NT Consumer Affairs Enforcement Activity 2006-2011

Enforcement and compliance action for NT CA for 2006-2011

This table includes both enforcement and compliance action for the reasons noted in the discussion of the NT under section 3 above.

Financial Year	06/07	07/08	08/09	09/10	10/11
Investigations conducted ¹⁶⁶	NA	87	95	52	45
Investigations concluded	NA	67 ¹⁶⁷	76	44	42
Complaints withdrawn, resolved to the satisfaction of the complainant or where no breach was disclosed	NA	NA	32	15	18
Complaints referred to other organisations	NA	NA	113	59	7
Traders placed on notice	NA	NA	18	12	4
Investigations referred for prosecution	NA	1 ¹⁶⁸	1	1	0
Trader visits	NA	114	168	105	69
Compliance education provided	NA	NA	41	64	86

¹⁶⁶ It is unclear what this statistic means ie is it only investigations commenced or does it include investigations which are carried forward from the previous year. It is assumed it is the latter.

¹⁶⁷ Compliance and product safety matters are included in different tables in the 2007/08 Annual Report. This figure is the sum of the entries in the tables.

¹⁶⁸ The Annual Report states 1 court action for 2007/08. It is assumed that this means a prosecution.

Financial Year	06/07	07/08	08/09	09/10	10/11
Contracts annulled or varied	NA	NA	7	251	62
Investigations involving or leading to banned products	NA	2	5	1	1
Investigations/notification involving or leading to recalled products	NA	0	137	45	0
Investigations involving or leading to mandatory standards	NA	NA	1	1	14
Investigations involving or leading to warning labels on products	NA	NA	9	5	4
Corrective advertising obtained	NA	NA	4	NA	NA
Trader publicly named	NA	NA	6	NA	NA

NR = not relevant

NA = not available

Notes:

Consumer Affairs (NT CA) is part of the Department of Justice in the Northern Territory. It is responsible for the following laws:

- Accommodation Providers Act
- Business Tenancies (Fair Dealings) Act
- Consumer Affairs and Fair Trading Act (CAFTA)
- Consumer Credit Act

- Price Exploitation Prevention Act
- Registration of Interests in Motor Vehicle & Other Goods Act
- Sale of Goods Act
- Trade Measurement Act
- Trade Measurement Administration Act
- Uncollected Goods Act
- Warehousemen's Liens Act

The information in the table above is taken from the Annual Reports of the Commissioner for Consumer Affairs.

As can be seen from the above there is almost no statistical information available on enforcement actions taken by NT CA. The data in the table mainly relates to compliance and complaints related activity, rather than enforcement activity. There was very little enforcement activity data provided. The Annual Reports at times contain discussion of some of the enforcement actions taken.

There is trade measurement compliance data available in the Annual Report before this function was transferred to the Commonwealth. It does not provide any information about enforcement activity and so has not been included in the table.

It appears that the statistics provided are for matters that concluded in the relevant financial year. Investigations that commenced in financial year but did not conclude prior to end of the year are counted in later annual reports.

Matters may be counted a number of times in the table. For example, a complaint may be received which is relevant to multiple other organisations, as well as requiring a compliance visit which leads to compliance education.

A1.6 Queensland Office of Fair Trading Enforcement Activity 2006-2011

Enforcement action for QLD OFT for 2006-2012

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12 ¹⁶⁹
Number of enforcement actions initiated	3750 ¹⁷⁰	3064	3900	3720	1529	NA
Number of entities monitored for compliance	10532 ¹⁷¹	12391	13800	11870	NA	NA

¹⁶⁹ The DJAG 2011/12 Annual Report was not available at 30 November 2012. The data in the table come from the DJAG portion of the Service Delivery Statement for 2012/13. We note that the DJAG 2011/12 annual report was released on 7 December 2012 indicating that 1829 enforcement actions were initiated that year.

¹⁷⁰ This figure was obtained from the 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report. Another figure – 3049 – is given for the same indicator for 2006/07 in the 2007/08 Department of Justice and Attorney-General annual report.

¹⁷¹ Figure used from 2007/08 Department of Justice and Attorney-General annual report not 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12 ¹⁶⁹
Number of complaints finalised	15800 ¹⁷²	NA	13735	17660	NA	NA
Amount of redress achieved for consumers (\$) ¹⁷³	5.35M ¹⁷⁴	5.517M	5.76M	6.5M	4.8M	6M
Percentage of disputes satisfactorily finalised ¹⁷⁵	79% ¹⁷⁶	86%	88%	90%	89%	88%
Extent of consumer confidence in the marketplace ¹⁷⁷	77%	75%	NA	NA	NA	NA

¹⁷² This figure was obtained from the 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report. Another figure – 12292 – is given for the same indicator for 2006/07 in the 2007/08 Department of Justice and Attorney-General annual report.

¹⁷³ Redress is described in the 2010/11 Department of Justice and Attorney-General Annual Report as “the compensation, or the in-kind value to address issues a consumer has complained about. The amount of redress can vary significantly as it depends on the nature of complaints on hand. Redress can be achieved through conciliation, investigations, prosecution, restitution and from the Property Agents and Motor Dealer’s Claim Fund.”

¹⁷⁴ This figure was obtained from the 2006/07 Department of Tourism, Fair Trading and Wine Industry Development final report. Another figure – \$3.278M – is given for the same indicator for 2006/07 in the 2007/08 Department of Justice and Attorney-General annual report.

¹⁷⁵ This indicator refers to consumer complaints not enforcement actions. “Satisfactorily finalised disputes” result in one of the following: complaint resolved, apology obtained, partial/full redress obtained, redress over/above that entitled to obtained, repairs/replacement/exchange obtained or compliance action commenced.

¹⁷⁶ Figure used from 2007/08 Department of Justice and Attorney-General Annual Report not 2006/07 Department of Tourism, Fair Trading and Wine Industry Development Final Report. There is no clear information about what kind of decisions are being referred to in the Annual Reports.

¹⁷⁷ This measure was discontinued after 2007/08 as it was decided it had little value as a performance measure.

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12 ¹⁶⁹
Extent of business confidence in the marketplace ¹⁷⁸	76%	75%	NA	NA	NA	NA
Percentage of decisions upheld on appeal ¹⁷⁹	NA	72% ¹⁸⁰	NA	NA	71.4%	60%

Source: The following annual reports: 2006-07 Department of Tourism, Fair Trading and Wine Industry Development, 2007-08 Department of Justice and Attorney-General, 2008-09, Department of Employment, Economic Development and Innovation, 2009-10 Department of Employment, Economic Development and Innovation, 2010/11 Department of Employment, Economic Development and Innovation and 2010/11 2007-08 Department of Justice and Attorney-General The following Service Delivery Statements: 2008-09 Queensland State Budget - Service Delivery Statements – Department of Justice and Attorney-General, 2009-10 Department of Employment, Economic Development and Innovation, 2010-11 Department of Employment, Economic Development and Innovation, 2011-12 Department of

¹⁷⁸ This measure was discontinued after 2007/08 as it was decided it had little value as a performance measure.

¹⁷⁹ This indicator measures appeals upheld against appeals lodged. It is unclear what kinds of matters are included in this indicator.

¹⁸⁰ This is an estimate and was obtained from the Department of Justice and Attorney-General 2008/09 Service Delivery Statement.

Justice and Attorney-General and 2012-13 Department of Justice and Attorney-General.

NR = not relevant

NA = not available

Notes:

The figures included in this table are taken from the Annual Reports and the Service Delivery Statements. The numbers included in the two documents are in some places contradictory. There is no explanation why. Footnotes indicate which figure has been used in this report.

As can be seen from the above table very little statistical information about the enforcement work of the Qld OFT was publicly available. The information included in the table was obtained from the Annual Reports and Service Delivery Statement, which forms part of the Budget Papers, for the Department, which had responsibility for the Office of Fair Trading for the relevant year.

The Department of Employment, Economic Development and Innovation (DDEDI), the Department of Justice and Attorney-General (DJAG) and the Department of Tourism, Fair Trading and Wine Industry Development (DTFTWID) have all had responsibility for the OFT over the last 5 years. It is currently the responsibility of the Department of Justice and Attorney-General.

The website contains consumer alerts,¹⁸¹ product safety warnings,¹⁸² but they could not be collated as it was unclear what dates the alerts/warnings were issued on.

The Qld OFT has consistently reported only a very small amount of data and very little of it throws any direct light on its enforcement performance. In 2007/08 and 2008/09 years Qld OFT did attempt to use an innovative ‘outcome’ measure – the level of consumer confidence in the market. However it was discontinued as it “provided little value as a performance measure”. This likely reflects the fact that factors out of the control of Qld OFT are more significant in consumer’s minds than their education, compliance and enforcement activities.

Qld OFT has from time to time provided additional information on its enforcement work. This information is often not comprehensive and is not comparable year to year. Examples of such reporting include:

In 2006/07 the following actions were taken:

- 158 warnings were issued to traders overcharging compared to recorded price of goods
- enforcement action was taken “against scammers and fraudsters, resulting in over \$1.1 million in fines and compensation for victims”

¹⁸¹ See <http://www.fairtrading.qld.gov.au/consumer-alerts.htm>. Accessed 12 January 2012.

¹⁸² See <http://www.fairtrading.qld.gov.au/Product-safety-warnings.htm>. Accessed 12 January 2012.

- the Trade Measurement Branch activities saved an estimated \$573,350 for consumers by ensuring they were not short-changed by purchasing underweight goods or receiving less than they paid for

In 2008/09 the following actions were reported:

- as a result of compliance attention to credit providers 64 credit providers entered into conduct deeds preventing them from using operating models seeking to avoid the cap and 15 warnings were issued for various breaches including lack of warning statements and contractual disclosure issues. Credit compliance officers negotiated the return of more than \$1m to consumers who were unlawfully charged excess interest and fees by lenders and penalty payments of \$102,500 were made by traders to the Consumer Credit Fund. One credit provider alone repaid over \$680,000 to 915 vulnerable consumers.
- as a result of an enhanced security regime and resources, 123 licences were suspended or cancelled, 21 compliance operations were completed — checking over 733 businesses and 3,678 entities, and 151 warnings, 223 infringement notices and 9 prosecutions were finalised.
- 30 disciplinary actions were finalised in the Commercial and Consumer Tribunal and 71 matters

were finalised in court with fines, costs and orders to pay compensation made in the order of \$430,000.

In 2010/11 the following action was reported:

Operation Turner was implemented to target unlicensed motor dealers and odometer tamperers, resulting in 19 prosecutions and fines totalling \$123,500.

A1.7 SA Consumer and Business Services Enforcement Activity 2006-2011

Enforcement action for SA CBS for 2006-2011

Financial Year		06/07	07/08	08/09	09/10	10/11
Prosecutions - number ¹⁸³	Building Work Contractors Act	8	18 ¹⁸⁴	5	7	16
	Conveyancers Act	0	0	0	0	4
	Fair Trading Act	1	1	3	5	1
	Land Agents Act	0	4	2	0	0
	Land and Business (Sale and Conveyancing) Act	0	2	1	0	0

¹⁸³ This appears to only include successful prosecutions, including those where there has been no conviction recorded.

¹⁸⁴ This figure includes one matter which was misreported in the Annual Report – it was unclear whether it was for a prosecution or disciplinary matter. It also includes a matter where an unlicensed builder was given a suspended sentence for continuing to work unlicensed in contempt of an interim injunction.

Financial Year		06/07	07/08	08/09	09/10	10/11
	Plumbers, Gas Fitters and Electricians Act	5	3	2	0	2
	Second-Hand Vehicle Dealers Act	1	3	2	2	2
	Security and Investigations Agents Act	0	4	3	1	0
	Total	15	35	18	15	25
Prosecutions – fines ordered (\$)	Building Work Contractors Act	71400	56800	22750	18700	56100
	Conveyancers Act	0	0	0	0	25000
	Fair Trading Act	400	5000	17500	17000	1200
	Land Agents Act	0	32000	40000	0	0
	Land and Business (Sale and Conveyancing) Act	0	1100	900	0	0
	Plumbers, Gas Fitters and Electricians Act	5650	29600	1200	0	5500
	Second-Hand Vehicle Dealers Act	0	28000	12000	6200	6450

Financial Year		06/07	07/08	08/09	09/10	10/11
	Security and Investigations Agents Act	0	14000	2250	4000	0
	Total	77450	166500	96600	45900	94250
Court actions – disciplinary	Building Work Contractors Act	1	1	1	0	2
	Fair Trading Act	0	0	0	0	1
	Land Agents Act	0	0	1	0	0
Court actions – disciplinary	Plumbers, Gas Fitters and Electricians Act	3	2	2	0	0
	Second-Hand Vehicle Dealers Act	1	1	1	2	4
	Security and Investigations Agents Act	1	1	3	3	0
	Total	6	5	8	5	7
Total court actions	Total	21	40	26	20	32
Assurances	Building Work Contractors Act	13	8	0	6	9
	Consumer Credit (South Australia) Act	0	1	0	0	0
	Fair Trading Act	2	5	0	3	3

Financial Year		06/07	07/08	08/09	09/10	10/11
	Land Agents Act	9	0	0	2	2
	Plumbers, Gas Fitters and Electricians Act	10	7	0	0	4
	Second-Hand Vehicle Dealers Act	4	3	0	11	10
	Security and Investigations Agents Act	1	4	0	1	1
Assurances	Total	39	28	17	23	29
Product safety matters ¹⁸⁵	Total	20	NA	56	71	39

NR = not relevant

NA = not available

Notes:

Consumer and Business Services (SA CBS) is a division of the Attorney-General's Department. It was previously called Office of Consumer and Business Affairs.

The consumer protection work done by SA CBS under the following Acts and their Regulations has been included in

¹⁸⁵ These are non-court matters, where compliance activities resulted in recalls, rectifications, seizures, voluntary withdrawals and removals of products.

the table (note if a matter under one of these Acts does not appear to be of a consumer protection nature it isn't included):

- Australian Consumer Law
- Building Work Contractors Act 1995
- Consumer Credit (South Australia) Act 1995
- Conveyancers Act 1994
- Fair Trading Act 1987
- Hairdressers Act 1988
- Land Agents Act 1994
- Land and Business (Sale and Conveyancing) Act 1994
- Land Valuers Act 1994
- Plumbers, Gas Fitters and Electricians Act 1995
- Prices Act 1948
- Second-Hand Vehicle Dealers Act 1995
- Security and Investigations Agents Act 1995
- Travel Agents Act 1986

SA CBS may take disciplinary action against a licensee under the following legislation. See the table for action taken under this legislation for the reporting period:

- Building Work Contractors Act 1995
- Conveyancers Act 1994
- Fair Trading Act 1987
- Hairdressers Act 1988
- Land Agents Act 1994
- Land Valuers Act 1994
- Plumbers, Gas-Fitters and Electricians Act 1995
- Second-hand Vehicle Dealers Act 1995
- Security and Investigation Agents Act 1995
- Trade Measurement Act 1993 and
- Travel Agents Act 1986.

There are a number of laws for which there are no entries in the table. There was no evidence of court actions or assurances taken in relation to these laws for the reporting period.

The figures were compiled from the Annual Reports of the Commissioner for Consumer Affairs.

The rules followed when compiling the table:

- It was difficult to determine when multiple actions were taken against people in the same company. As a result, unlike other jurisdictions, actions that may be against people in the same company have been counted separately.
- Where a matter was pursued under two Acts it has only been counted under one.
- The Court Actions are for matters concluded not commenced in the given year.
- The Court Actions appear to be only for successful court actions.
- The “Prosecutions – fines ordered (\$)” section only includes fines and bonds, and not costs or compensation ordered.

The product safety matters are not court matters. They are recalls, rectifications, seizures, voluntary withdrawals and removals that result from compliance activities.

The Annual Reports provided details of warnings letters. However, it appears that the figures include tenancy and unregistered business names matters, which are not considered consumer protection matters for the purposes of this report. It was not possible to separate the consumer protection matters from non-consumer protection matters, and so the figures have not been included in the table.

The Annual Reports provided details of expiation notices. However, it appears that the majority of the notices were issued in relation to tenancy rather than consumer protection matters. Therefore, the figures have not been included in the table.

The Annual Reports refer to public warnings and often mention warnings issued. However, it was not clear exactly how many were issued in any given year and so this has been left off the table.

Civil Remedies are referred to on the CBS SA website.¹⁸⁶ Under section 85 of the *Fair Trading Act 1987*, if the Court is satisfied that a person has suffered loss or damage the court may make an order for compensation. It is unclear how many times this occurred in the reporting period. Until the 2010/10 Annual Report there are only two explicit references to court ordered compensation or refunds in the Annual Reports. On 4 June 2008 a court ordered an unlicensed builder to refund a consumer their \$440 deposit; and on 22 September 2009 a court convicted an unlicensed builder and ordered them to pay \$6444.41 compensation for rectification work along with a fine. The 2010/11 Annual Report makes reference to a number of compensation orders. It indicates that a total of six traders were ordered to pay \$25,015.11 in compensation altogether to previous clients.

¹⁸⁶ See http://www.ocba.sa.gov.au/about/compliance/enforcement.html#Civil_Remedies. Accessed on 3 March 2012.

A1.8 Tasmanian Consumer Affairs and Fair Trading Enforcement Activity 2006-2011

Enforcement action for Tas CAFT for 2006-2012¹⁸⁷

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecution Actions ¹⁸⁸	Australian Consumer Law	NR	NR	NR	NR	0	2
	Consumer Affairs Act	0	0	0	0	1	0
	Door to Door Trading Act	0	0	0	1	1	NR
	Fair Trading Act	3	1	11	2	7	11
	Housing Indemnity Act	2	3	0	0	1	0
	Motor Vehicles Traders Act	NR	NR	NR	NR	0	1
	Sale of Hazardous Goods Act	1	0	0	0	0	0
	Surveyors Act	0	1 ¹⁸⁹	0	0	0	0

¹⁸⁷ We have not included compliance data for Tasmania as we have done for Queensland and the Northern Territory where there enforcement data is thin. For those who would like that information there is a table of the compliance activities for the last five years on p64/65 of the 2010/11 Department of Justice Annual report. See http://www.justice.tas.gov.au/_data/assets/pdf_file/0017/180710/dojar_2010-11_secure.pdf

¹⁸⁸ This figure is for actions commenced. Some actions may have been withdrawn, not proven or be pending at the end of year.

¹⁸⁹ 1 prosecution for 9 charges.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecution Actions	Trade Measurement Act	3	0	5	5	NR	NR
	Total Prosecutions	9	5	16	8	10	14
Warnings issued	Fair trading	19	48	NA	NA	NA	NA
	Total Warnings	30	62	67	13	14	10
Licenses suspended or cancelled	Security and Investigation Agents Act	2	3	12	19	NA	NA

NR = not relevant

NA = not available

Notes:

Consumer Affairs and Fair Trading (Tas CAFT) is a division of the Department of Justice.

Tas CAFT has responsibility for a number of laws with a consumer protection purpose including:

- Australian Consumer Law
- Consumer Affairs Act 1988
- Conveyancing Act 2004
- Disposal of Uncollected Goods Act 1968
- Housing Indemnity Act 1992

- Motor Vehicle Traders Act 2011 (commenced 1 April 2012)
- Prepaid Funerals Act 2004
- Property Agents and Land Transactions Act 2005
- Sale of Goods (Vienna Convention) Act 1987
- Sale of Goods Act 1896
- Second-hand Dealers and Pawnbrokers Act 1994
- Security and Investigations Agents Act 2002
- Travel Agents Act 1987

The information in the tables was collected from the Consumer section of the Department of Justice Annual Reports. There was limited statistical information available in the Annual Reports. At times the Annual Reports contain discussion of some of the enforcement action taken.

We have not included data about prosecutions under the Security and Investigations Agents Act 2002 as we couldn't make sense of the published data.

In June 2012 Tas CAFT issued its first public warning notice under the ACL.

A1.9 Consumer Affairs Victoria Enforcement Activity 2006-2011

Enforcement action for CAV for 2006-2011

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions finalised	Consumer Credit (Victoria) Act	0	0	0	0	0	0
	Conveyance rs Act	0	0	0	0	0	1
	Credit Act	0	0	0	0	0	0
	Credit (Administrati on) Act	NR	NR	NR	NR	NR	NR
	Domestic Building Contracts Act	33	19	13	9	10	5
	Estate Agents Act	2	2	2	6	2	3
	Fair Trading Act	1	12	2	4	5	0
	Funerals Act	0	0	0	0	0	0
	Introduction Agents Act	0	1	0	0	0	0
	Motor Car Traders Act	5	8	8	14	8	6
	Private Agents Act	0	0	0	0	0	0

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions finalised	Sale of Land Act	1	0	0	0	0	0
	Second-Hand Dealers and Pawnbrokers Act	0	0	0	0	0	0
	Trade Measurement Act	0	0	0	0	0	0
	Travel Agents Act	0	0	0	0	0	0
	Total	42	42	25	33	25	15
Penalties/ fines for prosecutions finalised (\$)	Consumer Credit (Victoria) Act	0	0	0	0	0	0
	Conveyancers Act	0	0	0	0	0	10000
	Credit Act	0	0	0	0	0	0
	Credit (Administration) Act	NR	NR	NR	NR	NR	0
	Domestic Building Contracts Act	403815	407700	40000	51250	132650	85700
	Estate Agents Act	0	1000	27500	23450	0	26000

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Penalties/ fines for prosecution s finalised (\$)	Fair Trading Act	3500	54900	25000	18200 ¹⁹⁰	3000	0
	Funerals Act	0	0	0	0	0	0
	Introduction Agents Act	0	12000	0	0	0	0
	Motor Car Traders Act	52000	222000	32800	95975 ¹⁹¹	22500 ¹⁹²	88000
	Private Agents Act	0	0	0	0	0	0
	Sale of Land Act	0	0	0	0	0	0
	Second-Hand Dealers and Pawnbrokers Act	0	0	0	0	0	0
	Trade Measurement Act	0	0	0	0	0	0
	Travel Agents Act	0	0	0	0	0	0
	Total	459315	697600	125300	188875	158150	209700

¹⁹⁰ Includes a court ordered donation of \$200.

¹⁹¹ Includes a court ordered donation of \$1000.

¹⁹² Includes a court ordered donation of \$8500.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Compensation ordered for prosecutions finalised (\$) ¹⁹³	Consumer Credit (Victoria) Act	0	0	0	0	0	0
	Conveyancers Act	0	0	0	0	0	0
	Credit Act	0	0	0	0	0	0
	Credit (Administration) Act	NR	NR	NR	NR	NR	NR
	Domestic Building Contracts Act	172485	321786	94121	172550	145570	35453
	Estate Agents Act	208678	75293	0	2000	10000	0
	Fair Trading Act	0	4124	5000	45500	860	0
	Funerals Act	0	0	0	0	0	0
	Introduction Agents Act	0	0	0	0	0	0
	Motor Car Traders Act	0	0	0	34542	69217 ¹⁹⁴	34750
	Private Agents Act	0	0	0	0	0	0

¹⁹³ Includes money paid to court or other funds eg Motor Car Traders Guarantee Fund.

¹⁹⁴ Includes an order that the defendant discharge a loan to a third party for \$28,717.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Compensation ordered for prosecutions finalised (\$)	Sale of Land Act	0	0	0	0	0	0
	Second-Hand Dealers and Pawnbrokers Act	0	0	0	0	0	0
	Trade Measurement Act	0	0	0	0	0	0
	Travel Agents Act	0	0	0	0	0	0
	Total	381163	401203	99121	254592	225647	70203
Civil litigation finalised ¹⁹⁵	Consumer Credit (Victoria) Act	0	1	0	0	1	0
	Conveyancers Act	0	0	0	2	0	3
	Credit Act	0	0	0	0	0	0
	Credit (Administration) Act	NR	NR	NR	NR	NR	0
	Domestic Building Contracts Act	5	0	1	0	0	0

¹⁹⁵ Statistics on civil matters commenced are only included in the 2010/11 and 2011/12 CAV Annual Reports. For the other years only information on matters finalised is available. Hence civil matters finalised is used in the table though matters commenced is preferable.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Civil litigation finalised	Estate Agents Act	1	1	4	4	5	7
	Fair Trading Act	11	5	10	1	4	2
	Funerals Act	0	0	0	0	0	0
	Introduction Agents Act	0	0	0	0	0	0
	Motor Car Traders Act	10	0	4	3	1	3
	Private Agents Act	NR	NR	NR	NR	NR	NR
	Sale of Land Act	0	0	0	0	0	0
	Second-Hand Dealers and Pawnbrokers Act	0	0	0	0	0	0
	Trade Measurement Act	NR	NR	NR	NR	NR	NR
	Travel Agents Act	2	0	0	0	0	0
Total		29	7	19	10	11	15

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Compensation ordered for civil litigation finalised ¹⁹⁶	Consumer Credit (Victoria) Act	0	0	0	0	171232 ¹⁹⁷	0
	Conveyancers Act	0	0	0	0	0	2500
	Credit Act	0	0	0	0	0	0
	Credit (Administration) Act	NR	NR	NR	NR	NR	0
	Domestic Building Contracts Act	93029	0	0	0	0	0
	Estate Agents Act	0	0	157896	6300	26500	10000
	Fair Trading Act	27485	21639	14845	0	0	2500
	Funerals Act	0	0	0	0	0	0
	Introduction Agents Act	0	0	0	0	0	0
	Motor Car Traders Act	2333	0	1403	1000	0	0
	Private Agents Act	NR	NR	NR	NR	NR	0

¹⁹⁶ Includes money paid to court or other funds eg Motor Car Traders Guarantee Fund.

¹⁹⁷ Includes an order for a civil penalty for \$124,417 under the Consumer Credit (Victoria) Code.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Compensation ordered for civil litigation finalised	Sale of Land Act	0	0	0	0	0	0
	Second-Hand Dealers and Pawnbrokers Act	0	0	0	0	0	0
	Trade Measurement Act	NR	NR	NR	NR	NR	0
	Travel Agents Act	87998	0	0	0	0	0
	Total	210845	21639	174144	7300	197732	15000
Disciplinary actions ¹⁹⁸	NA						
Enforceable undertakings ¹⁹⁹	Consumer Credit (Victoria) Act	0	0	0	0	0	0
	Conveyancers Act	NR	NR	0	1	3	0
	Credit Act	0	0	0	0	0	0

¹⁹⁸ Under the Fair Trading Act, the Director of CAV has the power to suspend licenses issued under the Consumer Credit (Victoria) Act, Conveyancers Act, Estate Agents Act, Introduction Agents Act, Motor Car Traders Act, Second-Hand Dealers and Pawnbrokers Act and Travel Agents Act. There was no data available about any such enforcement action taken.

¹⁹⁹ The Fair Trading Act s 146 gave the Director power to accept a written undertaking in relation to any matter where the Director has a power or function under the *Fair Trading Act 1999* or matters in relation to the contravention of any other consumer Acts listed (exceptions are noted by NR in the table). A similar power is contained in s 198 of the *Australian Consumer Law and Fair Trading Act 2012*.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Enforceable undertakings	Credit (Administration) Act	0	0	0	0	0	0
	Domestic Building Contracts Act	1	1	4	1	1	0
	Estate Agents Act	3	14	5	4	5	0
	Fair Trading Act	34	21	2	5	3	5
	Funerals Act	0	0	0	0	0	0
	Introduction Agents Act	0	0	0	0	0	0
	Motor Car Traders Act	18	0	6	1	2	0
	Private Agents Act	NR	NR	NR	NR	NR	0
	Sale of Land Act	0	1	0	0	0	0
	Second-Hand Dealers and Pawnbrokers Act	0	0	0	0	0	0
	Trade Measurement Act	2	5	3	1	NR	0

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Enforceable undertakings	Travel Agents Act	0	0	0	0	0	0
	Total	58	42	20	13	14	5
Penalty/ Infringement notices – number ²⁰⁰	Total	188	NA	77	119	50	NA ²⁰¹
Penalty/ Infringement notices – amount (\$) ²⁰²	NA	NA	NA	NA	NA	NA	NA
Public warnings	Total	NA	NA	NA	NA	1	1
Warning letters ²⁰³	Total	643	NA	332	302	508	487

²⁰⁰ Most of the CAV Annual Reports provide a figure for infringement notices issued overall. It was not possible to tell how many people/companies the letters had been issued to or for what kind of matters they had been issued. Therefore the figure may contain infringement notices which were issued for non-consumer protection matters, or numerous notices issued to different people for the same breach.

²⁰¹ The CAV website states that “we do publish the number and type of infringement notices we issue” <http://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/about-infringement-notices> accessed January 2012 however the 2012 Annual Report does not include such information and we have been unable to find it elsewhere on the CAV web site.

²⁰² No information was provided on the value of infringement notices issued in any year.

²⁰³ Most of the CAV Annual Reports provide a figure for warning letters issued overall. It was not possible to tell how many people/companies the letters had been issued to or for what kind of matters they had been issued. Therefore the figure may contain letters which were issued for non-consumer protection matters, or numerous letters issued to different people for the same breach.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Substantiated notices issued ²⁰⁴	Total	3	NA	NA	NA	NA	NA

NR = not relevant

NA = not available

Notes:

The table includes enforcement action taken under the following laws administered by CAV that have a consumer protection aim:

Consumer Credit (Victoria) Act 1995 (NB - the consumer credit function of CAV was referred to the Commonwealth on 1 July 2010)

- Conveyancers Act 2006
- Credit Act 1984
- Credit (Administration) Act 1984
- Domestic Building Contracts Act 1995
- Estate Agents Act 1980

²⁰⁴ Only one Annual Report (2006/07) contains any reference to substantiation notices. Three were issued in that year but it is unclear who they were issued to and under what law.

- Fair Trading Act 1999²⁰⁵
- Funerals Act 2006
- Introduction Agents Act 1997 (repealed 1 July 2011)
- Motor Car Traders Act 1986
- Private Agents Act 1966 (repealed 1 July 2011)
- Sale of Land Act 1962
- Second-Hand Dealers and Pawnbrokers Act 1989
- Trade Measurement Act 1995 (repealed 1 July 2010)
- Travel Agents Act 1986

Note that the above laws (except the Fair Trading Act) are referred to as the consumer Acts.

The Australian Consumer Law commenced on 1 January 2011. It was enacted into Victorian law as the *Australian Consumer Law and Fair Trading Act 2012*. It is unclear whether any enforcement action taken by CAV after that date was taken under the ACL.

The figures were compiled using the following rules:

²⁰⁵ The Fair Trading Act generally ceased to apply to conduct from 1 January 2010 but was replaced by the Australian Consumer Law and Fair Trading Act. As most of the data above refers to matters finalised it is possible that Fair Trading Act matters would be finalised in 2010/11 or 2011/12.

- Where a matter is pursued against multiple people (e.g. from the same company) associated with the same matter it is counted once
- Where a matter falls under a number of pieces of legislation it is counted only once. Where the action has been taken under a consumer Act and the Fair Trading Act, it is counted under the consumer Act so as to indicate what kind of matter it is
- Where there are a number entries in the Annual Reports for the same prosecution or civil litigation matter, it is counted as one matter
- Where there are multiple different types of enforcement action taken for a matter, for example a prosecution and a civil claim, each action is counted
- Where a matter has been conducted and then follow up action is taken (for example a defendant breaches an undertaking or court order) the follow up action is counted separately, contempt proceedings included²⁰⁶.

There are a number of issues, which arose for the Prosecutions section of the table:

²⁰⁶ An error in our research method has meant that contempt proceedings were *excluded* for ACCC and NSW OFT but *included* for CAV and WA OCP. The number of contempt proceedings are not sufficiently large to significantly influence the results of the research.

- It appears that only successful prosecutions are included in the reporting. *All* prosecutions would have been preferable.
- Only statistics for prosecutions finalised are available.²⁰⁷ Hence the table covers prosecutions finalised though prosecutions commenced would have been preferable.
- A prosecution may result in four different amounts to be paid – a fine, money to a compensation fund, compensation directly to consumer/s and costs. In the above table, this has resulted in there being two sections for money ordered – fines and compensation. Costs have not been included.

The following issues arose when compiling the civil litigation section of the table:

- Only statistics for civil actions finalised are available.²⁰⁸ Hence the table covers civil actions finalised though civil actions commenced would have been preferable.
- The figures for civil litigation finalised do not include any applications for reviews, appeals, decisions regarding the granting of licences, amicus

²⁰⁷ The 2010/11 and 2011/12 Annual Reports do provide a list of actions commenced, but it is not clear what kind of actions they are.

²⁰⁸ See footnote above.

interventions or matters regarding the production of documents or information

- A defendant in a civil litigation matter may have to pay compensation and costs. The table only contains the compensation amounts awarded.

The following issues arose when compiling the enforceable undertakings section of the table:

- The Annual Reports for 2006/07, 2007/08 and 2008/09 contained detailed information about enforceable undertakings. However, from 2009/10 detailed information about enforceable undertakings is not included in the Annual Reports though it is currently available from the website.²⁰⁹
- It is difficult to ascertain how many public warnings were issued by CAV for the five years covered by the table. The CAV website lists recent public warnings, the earliest being 17 February 2010.²¹⁰ In addition to public warnings that are issued by CAV, defendants may also agree to publish a public

²⁰⁹ See <http://www.consumer.vic.gov.au/CA256EB5000644CE/ListMaker?ReadForm&1=950-Newsroom~&2=015-Enforceable+undertakings~&3=~&V=ListingD~&K=EnforceableUndertakings~&REFUNID=B6744B0B139AD2DFCA2576E7001FBBE4~>. Accessed on 9 January 2012.

²¹⁰ See <http://www.consumer.vic.gov.au/CA256EB5000644CE/ListMaker?ReadForm&1=950-Newsroom~&2=020-Public+warnings~&3=~&V=ListingD~&K=PublicWarnings~&REFUNID=C21C2FD498BCA7D4CA2576E7001FBBD7~> Accessed 26 November 2012.

warning notice in an undertaking or be ordered to as a result of litigation.

- Some of the laws that CAV has responsibility for have had little to no enforcement activity over the 2006-2011 period. For example the Private Agents Act 1966 does not appear to have been used. It is aimed at debt collectors and it appears that CAV viewed other laws as being more appropriate. The Private Agents Act 1966 was repealed on 1 July 2011.

A1.10 Western Australia Department of Commerce – Consumer Protection Enforcement Activity 2006-2011

Enforcement action for WA DOC for 2006-2012

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions in Magistrates Court finalised ²¹¹	Australian Consumer Law	NR	NR	NR	NR	0	0 ²¹²
	Building Laws	23	25	32	35	25	0
	Consumer Credit (Western Australia) Code	0	2	0	0	0	0
	Credit Administration Act	0	0	0	0	0	1
	Debt Collectors Licensing Act	0	0	0	0	0	1
	Door to Door Trading Act	1	7	9	0	2	0

²¹¹ Unlike for other consumer regulators, due to the way prosecution figures are reported, the figures in the table are for individuals prosecuted rather than for the overall number of prosecution matters.

²¹² Note that there were two individuals who were prosecuted under the ACL, but their cases are counted under motor vehicle laws. There was another individual prosecuted under the ACL, but they did not appear in court and a warrant was issued for them. As the matter is pending, it was not included in the table.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions in Magistrates Court finalised	Employment Agents Act	0	0	0	0	3	0
	Fair Trading Act	6	13	7	4	12	9 ²¹³
	Hairdressers Registration Act ²¹⁴	7	5	3	4	0	0
	Motor Vehicle Laws ²¹⁵	7	4	2	10	21	10
	Painters' Registration Act ²¹⁶	10	11	14	6	7 ²¹⁷	0
	Petroleum Products Pricing Act	1	0	0	0	0	0
	Real Estate & Business Agents Act ²¹⁸	0	0	0	0	0	0

²¹³ Note that there were two additional individuals who were prosecuted under the Fair Trading Act, but their cases are counted under motor vehicle laws.

²¹⁴ Administered by the Hairdressers Registration Board until 30 November 2010.

²¹⁵ Includes matters brought under the Motor Vehicles Dealers Act and Motor Vehicles Repairers Act. Administered by Motor Vehicle Industry Board until 30 June 2011.

²¹⁶ Administered by Painters' Registration Board until 29 August 2011. The Annual Report of the Painters' Registration Board is for the calendar not financial year and the litigation is listed without dates. Therefore, the figures provided are for the calendar year eg the 2006/07 entry is the 2006 figure.

²¹⁷ There is no mention of matters taken by the Settlement Agents Supervisory Board in the 2006/07 Annual Reports.

²¹⁸ Administered by the Real Estate and Business Agents Supervisory Board until 30 June 2011.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Prosecutions in Magistrates Court finalised	Settlement Agents Act ²¹⁹	NA	4	0	0	0	0
	Trade Measure Laws	2	0	0	0	0	0
	Travel Agents Act	1	0	0	0	0	0
	Water Services Licensing Act ²²⁰	5	9	5	7	6	3
	Total	63	80	72	66	76	25
Penalties/ fines for prosecutions finalised (\$) ²²¹	Australian Consumer Laws	NR	NR	NR	NR	NR	0
	Building Laws	66400	47700	162567	111990	61000	0
	Consumer Credit (Western Australia) Code	0	0	0	0	0	9000
	Debt Collectors Licensing Act	0	0	0	0	0	2008
	Door to Door Trading Act	4400	10100	3300	0	5000	0

²¹⁹ Administered by the Settlement Agents Supervisory Board until 30 June 2011.

²²⁰ Administered by Plumbers' Licensing Board, now part of the Building Commission Division.

²²¹ The Annual Reports include information about fines and costs awarded. Only fines information is included in the table.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Penalties/ fines for prosecution s finalised (\$)	Employment Agents Act	0	0	0	0	1400	0
	Fair Trading Act	7500	20000	67600	8700	27350	13750
	Hairdressers Registration Act ²²²	960	4195	3044	3500	0	0
	Motor Vehicle Laws	7000	11000	7000	27500	71500	70200
	Painters' Registration Act	4050	5850	6250	2800	3550	0
	Petroleum Products Pricing Act	20000	0	0	0	0	0
	Real Estate & Business Agents Act	0	0	0	0	0	0
	Settlement Agents Act	NA	8750	0	0	0	0
	Trade Measure Laws	5600	0	0	0	0	0
	Travel Agents Act	8000	0	0	0	0	0
	Water Services Licensing Act	3200	7000	18150	10250	6300	6800
	Total	127110	114595	267911	164740	176100	101758

²²² The figures provided in the Hairdressers Registration Board Annual Reports include the fine and costs ordered. Therefore these figures include costs, though this is not usual for the table.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Civil litigation matters finalised	Common law	0	0	3	0	0	0
	Australian Consumer Law	NR	NR	NR	NR	0	3
	Fair Trading Act	3	0	0	4	5	2
	Total	3	0	3	4	5	5
Monetary orders in civil matters	Common law	0	0	17464	0	0	0
	Australian Consumer Law	NR	NR	NR	NR	0	0 ²²³
	Fair Trading Act	0	0	0	NA ²²⁴	223436	0
	Total	0	0	17464	NA	223436	0
Matters finalised in the State Administrative Tribunal	Building Laws ²²⁵	11	12	25	16	11	0
	Consumer Credit (Western Australia) Code	1	0	0	1	0	0
	Credit (Administration) Act	0	0	0	0	NR	NR
	Debt Collectors Licensing Act	0	0	0	0	0	0

²²³ Compensation was ordered in one case, but the amount was yet to be settled.

²²⁴ Matters settled by consent and amounts not disclosed.

²²⁵ Due to the nature of reporting by the Builders Registration Board these figures are for the number of people prosecuted not the overall number of matters.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Matters finalised in the State Administrative Tribunal	Employment Agents Act	0	0	0	0	0	0
	Finance Brokers Control Act	2	0	0	1	1	0
	Hairdressers Registration Act	0	1	0	0	0	0
	Land Valuers Licensing Act 226	0	1	0	3	0	0
	Motor Vehicle Laws	2	0	0	1	1	2
	Painters' Registration Act	2	0	0	0	0	0
	Real Estate & Business Agents Act	15	18	13	6	7	5
	Settlement Agents Act	NA	7	3	1	4	3
	Travel Agents Act	0	1	0	0	0	0
	Water Services Licensing Act	0	1	0	0	0	0
	Total	33	41	41	29	24	10

²²⁶ Administered by the Land Valuers Licensing Board until 30 June 2011. Due to the nature of reporting by the Land Valuers Board these figures are for the number of people prosecuted not the number of matters.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Penalties ordered by SAT	Building Laws	38000	84500	74600	49501	28000	0
	Consumer Credit (Western Australia) Code	7900	0	0	0	0	0
	Credit (Administration) Act	0	0	0	0	0	0
	Debt Collectors Licensing Act	0	0	0	0	0	0
	Employment Agents Act	0	0	0	0	0	0
	Finance Brokers Control Act	2500	0	0	1000	1000	0
	Hairdressers Registration Act	0	2000	0	0	0	0
	Land Valuers Licensing Act	0	300	0	1000	0	0
	Motor Vehicle Laws	1000	0	0	0	0	0
	Painters' Registration Act	0	0	0	0	0	0
	Real Estate & Business Agents Act	24200	75500	17450	26500	14000	10036

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Penalties ordered by SAT	Settlement Agents Act	NA	23000	9000	10000	10250	15500
	Travel Agents Act	0	1000	0	0	0	0
	Water Services Licensing Act	0	2000	0	0	0	0
	Total	73600	188300	101050	88001	53250	25536
Disciplinary outcomes 227	Building Laws	4	6	7	5	5	0
	Credit (Administration) Act	0	0	0	0	0	0
	Debt Collectors Licensing Act	0	0	0	0	0	0
	Employment Agents Act	0	0	0	0	0	0
	Finance Brokers Control Act	0	0	0	1	0	0
	Hairdressers Registration Act	0	0	0	0	0	0
	Land Valuers Licensing Act	0	1	0	2	0	0

²²⁷ Covers disqualifications, cancellations and suspensions by the State Administrative Tribunal only.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Disciplinary outcomes	Motor Vehicle Laws	0	0	0	1	1	1
	Painters' Registration Act	1	0	0	0	0	0
	Real Estate & Business Agents Act	8	7	2	2	5	2
	Settlement Agents Act	0	0	0	0	0	0
	Travel Agents Act	0	1	0	0	0	0
	Water Services Licensing Act	0	0	0	0	0	0
	Total	13	15	9	11	11	3
Penalty/ Infringement notices – number	Building Laws	172	36	141	109	106	NA
	Fair Trading Act	NA	NA	NA	NA	NA	NA
	Finance Brokers Control Act	NA	NA	NA	NA	NA	NA
	Motor Vehicle Laws	NA	3	NA	NA	NA	NA
	Petroleum Products Pricing Act	NA	NA	NA	NA	NA	NA

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Penalty/ Infringement notices – number	Water Services Licensing Act	NA	NA	NA	NA	NA	NA
Penalty/ Infringement notices – amount (\$)	Building Laws	7410	NA	6240	NA	NA	NA
	Motor Vehicle Laws	NA	13000	NA	NA	NA	NA
Prohibition notices	Total	NA	654	831	NA	NA	NA
Traders named	Total	NA	41	38	NA	NA	NA
“Orders to remedy” defects	Motor Vehicle Laws	NA	102	87	NA	NA	NA
Notice to remedy breach	Trade Measure Laws	NA	NA	NA	NA	NA	NA
Rectification notices	Water Services Licensing Act ²²⁸	NA	84	NA	NA	NA	NA
Warning letters ²²⁹	Credit (Administration) Act	12	6	11	4	NR	NR

²²⁸ Issued by the Plumbers Licensing Board.

²²⁹ This list is not comprehensive as information on warning letters was not easily available. It includes warning letters, administrative warnings, cautions, education or advice issued under some of the Acts.

Financial Year		06/07	07/08	08/09	09/10	10/11	11/12
Warning letters	Debt Collectors Licensing Act	14	8	2	3	0	1
	Land Valuers Licensing Act	7	3	2	0	0	6
	Motor vehicle laws	NA	NA	NA	NA	NA	45
	Real Estate & Business Agents Act	NA	NA	NA	NA	NA	84
	Settlement Agents Act	NA	NA	NA	NA	72	20
	Total	NA	447 ²³⁰	NA	NA	NA	NA
Product bans	Total	NA	6	3	NA	NA	NA
Product recalls	Total	NA	10	11	NA	NA	NA

NR = not relevant

NA = not available

Notes:

Consumer protection was originally the responsibility of the Department of Consumer and Employment Protection. On 1 January 2009 the Department of Consumer and Employment Protection was merged with the Department

²³⁰ Includes administrative warning letters only. From *Year in Review* 2007/08.

of Industry and Resources to form the Department of Commerce. The information in the table is obtained from the Annual Reports of the Department of Consumer and Employment Protection and the Department of Commerce, and, where separate, the Annual Reports for the individual Boards (see below).

The Department of Commerce has responsibility for a wide range of issues including consumer protection, energy safety, labour relations, work safety, and science and innovation. In compiling the table only consumer protection matters dealt with by the Consumer Protection Division (and related Boards – see below) were included. As energy safety has generally not been included for other states it has not been included here. As some of this work done by the Energy Safety Division was of a consumer protection nature, this means that some consumer protection work of the DOC is not included in the table.

DOC also administered a number of Boards charged with responsibility for a particular piece of legislation. These Boards regulated specific industries and conducted enforcement work. Their work has been included in the table. By the end of August 2011 all of the Boards (except the Plumbers' Licensing Board) had been abolished and their work merged into the work of DOC. The Boards are:

- Builders Registration Board and Painters' Registration Board (these Boards were merged into

the Building Commission Division of DOC on 29 August 2011)

- Land Valuers Licensing Board, Motor Vehicle Industry Board, Real Estate and Business Agents Supervisory Board and the Settlement Agents Board (abolished on 30 June 2011 and merged into the Consumer Protection Division of DOC)
- Plumbers' Licensing Board (still exists, but is part of the Building Commission Division of DOC)
- Hairdressers Registration Board (ceased on 30 November 2010).

The consumer protection work done by DOC under the following Acts and their Regulations has been included in the table (note if a matter under one of these Acts does not appear to be of a consumer protection nature it isn't included):

- Builders Registration Act 1939 (repealed)
- Building Act 2011
- Builders' Registration Act 2011
- Consumer Credit (Western Australia) Code

- Credit (Administration) Act (responsibility for the regulation of credit was transferred to ASIC on 1 July 2010)
- Debt Collectors Licensing Act
- Door to Door Trading Act
- Employment Agents Act
- Fair Trading Act
- Finance Brokers Control Act
- Hairdressers Registration Act 1946
- Home Building Contracts Act 1991
- Land Valuers Act
- Motor Vehicle Dealers Act
- Painters' Registration Act 1961
- Petroleum Products Pricing Act
- Real Estate & Business Agents Act – it was difficult to tell whether the matters dealt with consumer or commercial real estate issues. Hence commercial real estate matters may be inadvertently included in the list.
- Settlement Agents Act

- Travel Agents Act
- Water Services Licensing Act
- Weights & Measures Act, replaced by the Trade Measurement Act 2006

The Australian Consumer Law commenced on 1 January 2011. The Commissioner for Consumer Protection has accepted four enforceable undertakings in settlement of or as alternatives to litigation since the commencement of the ACL.

The following issues arose when compiling the table:

- In calculating figures the following were not included: reviews of decisions made by the Commissioner or appeals, matters brought against the Commissioner, and applications for further and better particulars
- It appears that the Annual Reports provide the details of the matters which were finalised in the year or pending at the end of the year. To avoid double counting between years matters pending have been excluded from the table.
- Where a matter has been conducted and then follow up action is taken (for example a defendant breaches an undertaking or court order) the follow

up action is counted separately, contempt²³¹ proceedings included.

The Annual Reports of the Painters' Registration Board were for the calendar not financial year. The date of each prosecution was not provided, so it was not possible to convert the calendar year figures into financial year figures. The figures provided are therefore for the calendar year e.g. the 2006/07 entry is the 2006 figure. The Board was abolished on 29 August 2011, so its work for 2011/12 was included in the main DOC Annual Report.

Civil claims under the Real Estate and Business Agents Fidelity Guarantee Account and the Settlement Agents Fidelity Guarantee Account are not included in the civil litigation list.

Unlike the figures for other consumer regulators, due to the nature of the reporting prosecutions figures are for individuals (and companies) prosecuted rather than for number of prosecutions matters. Disciplinary action and civil litigation numbers are for overall actions.

In 2009/10 and 2010/11 DOC pursued Alwyn Healy in both the criminal and civil courts. He was convicted in 2009/10 for false and misleading representations in the Magistrates Court. He appealed that conviction unsuccessfully in the

²³¹ An error in our research method has meant that contempt proceedings were *excluded* for ACCC and NSW OFT but *included* for CAV and WA OCP. The number of contempt proceedings are not sufficiently large to significantly influence the results of the research.

Supreme Court. DOC also commenced a representative action against him for breach of contract. Nine matters were settled in 2009/10 for undisclosed amounts. 28 matters were settled in 2010/11 for \$73,794. Healey appealed unsuccessfully to the District Court against the civil judgements. DOC also sought a banning order and injunction in the Supreme Court in 2009/10 and Healy gave an undertaking during these proceedings. DOC then sought orders in the Supreme Court for contempt for breaches of the undertaking and was successful. An application seeking declarations and injunctions in the Supreme Court was also commenced in 2010/11 and was stayed in 2011/12 pending compliance with an undertaking signed by Healy. The matters against Alwyn Healy have been recorded as:

- One prosecution under the Fair Trading Act in 2009/10
- Two civil matters in 2009/10 – one for the initial injunctions application in the Supreme Court and one for the representative action (for undisclosed sum)
- Two civil matters in 2010/11 – one for the contempt proceedings and one for the representative action (for \$73,794)
- One civil matter for 2011/12 for the second injunction application that resulted in an undertaking.

In 2009/10 and 2010/11 DOC pursued Bon Levi, Colin Burton and Leigh Currie trading as 'Bikini Girls Massage'. There were three prosecutions under the Fair Trading Act, one being finalised in 2009/10 and two finalised in 2010/11. There were also prosecutions under the Business Names Act. DOC also applied to the Supreme Court for an injunction that was finalised in 2010/11. The matters against Bikini Massage Girls have been recorded as:

- One prosecution under the Fair Trading Act in 2009/10
- Two prosecutions under the Fair Trading Act in 2010/11
- No record was made for the Business Names Act prosecutions as these have not been classified as consumer protection issues
- One civil matter in 2010/11 for the Supreme Court injunction.

There was a list of consumer alerts' on the DOC website however it only contained consumer alerts from 2011 onwards.²³²

²³² See

http://www.commerce.wa.gov.au/consumerprotection/Content/Consumers/consumer_alerts.html. Accessed 1 December 2012.

Other indicators compiled by WA Department of Commerce for 2006-2012

Financial Year	06/07	07/08	08/09	09/10	10/11	11/12
The extent to which traders comply with regulatory requirements ²³³	97%	93%	97%	95%	95%	95%
The extent of consumer confidence in Western Australia's trading environment	NA	NA	71%	68%	73%	75.5%
The extent to which consumers believe businesses generally act fairly towards consumer ²³⁴	77%	78%	77%	75%	75%	79%

²³³ DOC calculated these figures by looking at the percentage of compliant traders identified during routine and proactive inspections.

²³⁴ DOC obtained these figures through surveying a selection of consumers.



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