Submission to Productivity Commission on behalf of NSW Government

Review of Australia's Consumer Policy Framework

May 2007

Introduction

On 11 December 2006 the Commonwealth Treasurer announced that the Productivity Commission would undertake an inquiry into Australia's consumer policy framework and its administration.

The Commission is required to make a report to the Government by 11 December 2007. An Issues Paper was released in January 2007, with public hearings scheduled for March/early April and submissions due by 11 May 2007. A Draft Report will be released in late July/early August and further public hearings held in September/early October 2007.

Terms of Reference

Australia's consumer policy framework

The Australian Government and the State and Territory governments share responsibility for consumer policy in Australia. Australia's consumer policy framework includes policy-making, regulatory and non-regulatory activities. Regulation consists of a combination of self-regulatory, co-regulatory, regulatory and enforcement responses to assist consumers to meet the challenges they face in the market for consumer goods and services.

Within the framework, the principal legislative provisions are those contained in Parts IVA, V (with the exception of Division 1AA (country of origin representations)), VA and VC of the Trade Practices Act 1974 (TPA) and equivalent provisions in state and territory Fair Trading Acts. Australia's consumer policy framework also includes a range of other industry-specific legislation administered by the Australian Competition and Consumer Commission or state and territory fair trading agencies.

The Ministerial Council on Consumer Affairs (MCCA) and its supporting bodies are responsible for considering consumer and fair trading matters and, where possible, developing a consistent approach to these issues. The membership of MCCA consists of the Australian Government, the governments of the States and Territories, and the New Zealand Government.

Key considerations

In conducting the inquiry and making recommendations, the Commission is to have particular regard to:

1. the need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity, while recognising the benefits, including the contribution to consumer wellbeing, market efficiency and productivity, of well-targeted consumer policy;

2. the need for consumer policy to be based on evidence from the operation of consumer product markets, including the behaviour of market participants;
3. the impacts of its recommendations on consumers, businesses and governments, including on small businesses and families, in light of the need to avoid unnecessary increases in regulation;
4. the shared responsibility of the Australian Government and the State and Territory governments for consumer policy; and
5. the importance of promoting certainty and consistency for businesses and consumers in the operation of Australia's consumer protection laws.

Scope of Inquiry

The Commission is to report on:

1. ways to improve the consumer policy framework so as to assist and empower consumers, including disadvantaged and vulnerable consumers, to meet current and future challenges, including the information and other challenges posed by an increasing variety of more complex product offerings and methods of transacting;
2. any barriers to, and ways to improve, the harmonisation and coordination of consumer policy and its development and administration across jurisdictions in Australia, including ways to improve institutional arrangements and to avoid duplication of effort;
3. any areas of consumer regulation which are unlikely to provide net benefits to Australia and which could be revised or repealed;
4. the scope for avoiding regulatory duplication and inconsistency through reducing reliance on industry-specific consumer regulation and making greater use of general consumer regulation;
5. the extent to which more effective use may be made of self-regulatory, co-regulatory, consumer education and consumer information approaches and principles-based regulation in addressing consumer issues; and
6. ways in which the consumer policy framework may be improved so as to facilitate greater economic integration between Australia and New Zealand and ways to remove any barriers to international trade in consumer goods and services created by the current consumer policy framework.

Considerations

In conducting the inquiry and making recommendations, the Commission is to have particular regard to:

1. the complementarities between Australia's competition and consumer protection laws;
2. the shared responsibility of consumers, businesses and governments for responding to consumer issues;
3. the nature of consumer markets, including regional, national and international dimensions;
4. the implications of its recommendations for the consumer policy framework of New Zealand;

5. recent developments in consumer policy overseas; and
6. the need to maintain consistency between the consumer protection provisions of the TPA and the mirror consumer protection provisions applying to financial services in the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

The Commission is further requested to:

1. take into account but not replicate significant current and recent review activity relating to the Taskforce on Reducing the Regulatory Burden on Business, the National Competition Policy reforms, Australian and New Zealand competition and consumer protection regimes, and the Australian consumer product safety system, as well as any other relevant reviews, including those undertaken under the auspices of MCCA; and
2. advertise nationally inviting submissions, hold public hearings, and consult with relevant Australian Government and state and territory government agencies, other key interest groups and affected parties.

The Issues Paper

The Productivity Commission's Issues Paper puts the inquiry into context. The paper refers to the benefits provided to consumers as a result of competition policy reforms, including lower real prices, enhanced product quality and access to a wider range of goods and services. It points out that in seeking to improve the operation of markets, the role of consumers in their own right cannot be ignored (the demand side). Policies that facilitate effective participation in markets by consumers are an integral complement to competition among suppliers.

The Commonwealth, State and Territory Governments share responsibility for consumer policy in Australia. The main legislative provisions are contained in the *Trade Practices Act 1974* and the Fair Trading Acts in each State and Territory. In addition to this generic legislation there is a wide array of industry-specific regulation covering, for example, telecommunications, food safety, retail energy suppliers, and vehicle sales. The consumer policy framework also encompasses various self-regulatory and co-regulatory schemes and non-regulatory approaches such education and information strategies.

The Issues Paper says that the policy framework has been evolving in response to marketplace changes, but in an incremental and often reactive way, which can lead to policy fragmentation across jurisdictions.

The Issues Paper says that the Commission does not intend to conduct a detailed review of each existing statute and policy. Rather, it considers it can add most value by focusing on high level institutional, procedural and policy issues, with the objective of identifying the framework that will deliver the best outcomes for consumers, families, businesses and the wiser community.

Issues for discussion

The objectives of consumer policy

The New South Wales submission is made in the context of the dual objectives of consumer policy, which are to promote economic efficiency and social equity.

The economic objective is concerned with ensuring that markets function effectively, whereas the social objective is concerned with ensuring that consumers, particularly vulnerable and disadvantaged consumers, do not suffer unacceptable levels of harm as a result of purchasing, or seeking to purchase, goods and services.

Generally the economic and social objectives work together so that improving market efficiency benefits all consumers. However, there are cases where certain groups or individuals can suffer unacceptable levels of detriment, even if the market is efficient. In these instances the social objectives of consumer policy are relevant.

Consumer policy links economic and social policy. The NSW Government is committed to reducing the regulatory burden on business and to promoting fairness and opportunity for all members of the community.

The role of government in markets

It is important to recognise that no sophisticated market could exist without a level of government intervention. The fundamental role of government is to establish the institutions and framework within which markets may operate. The secondary role is the regulation of interactions between participants in the markets it has created. A critical issue for consumer policy is determining the threshold at which government action to regulate market interactions is appropriate.

The rationale for consumer policy

1. *What are the key rationales for government intervention to empower and protect consumers? What should be the balance between seeking to ensure that consumers' decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)?*

The United Nations Guidelines for Consumer Protection[1] set out general principles to guide the development of consumer policy. They note that 'each Government should set its own priorities for the protection of consumers in accordance with economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of the proposed measures'. The Guidelines cover:

[1] Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection (as expanded in 1999),* United Nations, New York, 2003.

- the protection of consumers from hazards to their health and safety;
- the promotion and protection of the economic interests of consumers;
- access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- consumer education, including education on the environmental, social and economic impacts of consumer choice;
- availability of effective consumer redress;
- freedom to form consumer and other relevant organisations and the opportunity for such organisations to present their views in decision-making processes affecting them; and
- the promotion of sustainable consumption patterns.

The goal of economic activity is to enhance community welfare. The NSW Government believes this is best achieved through a fair and competitive marketplace. Competitive markets for goods and services efficiently allocate the economy's available resources. However, not all markets work competitively. It is when markets fail to produce a competitive (and therefore economically efficient) outcome that a case may be made out for government intervention. Furthermore, a competitive outcome will not necessarily guarantee consumer protection, so that intervention may be justified in order to meet social justice or equity goals.

Competition policy (for example, to address price fixing by cartels) and consumer policy often complement each other. For example, the central tenet of consumer policy in the Trade Practices Act and Fair Trading Acts is the prohibition on misleading and deceptive conduct in trade and commerce. This protects both consumers and honest traders, who would otherwise be disadvantaged by such anti-competitive conduct.

Consumer empowerment is generally achieved by providing consumers with information on which to base their purchasing decisions and by giving them access to remedies and redress mechanisms if their purchase proves unsatisfactory because, for example, the goods were not of merchantable quality or they were misled about the nature of the services supplied.

Consumer protection measures include prohibitions on misleading, deceptive and unconscionable conduct; on pyramid selling and other forms of marketing where the risk of financial loss is unacceptably high; and on selling products which do not meet a safety standard.

Consumer policy also encompasses a range of measures which could be said to include elements of both empowerment and protection. Licensing schemes, for example, protect consumers by prohibiting traders from entering the market unless they can demonstrate compliance with certain standards (of qualifications, competence, financial capacity, probity etc). Such schemes also empower consumers by giving them information (about licensing status, disciplinary action etc) and access to redress (statutory warranties, compensation funds, professional indemnity insurance,

alternative dispute resolution, cooling off periods, industry ombudsmen etc). Licensing also allows the regulatory agency to be aware of those who are in the marketplace, and to have access to information if market failure occurs.

The balance between empowerment and protection is fluid, is determined on a case-by-case basis, and depends on factors such as the level of risk (to physical and financial well-being) and the extent to which the market distributes costs and benefits equitably.

2. *What are the implications of developments in theory (eg behavioural economics) for consumer policy? Do they render some traditional views of the role for government in this area less relevant, or do they simply require more sophistication in the analytical framework and policy toolkit?*

Developments in theory reinforce the need for policy-makers to consider whether there is evidence available to support or refute the assumptions made about the behaviour of markets and consumers.

The major implication of behavioural economics is its challenge to the assumptions of neo-classical economics, including that consumers make rational, welfare-maximising choices that suit their needs or their interests. In many circumstances they clearly do not. Those theories of regulation such as disclosure based regulation as the primary regulatory tool must therefore be reconsidered.

Developments in theory do not make the role of government less relevant, they require more sophistication in the analytical framework and policy toolkit. In particular they require an examination of how consumers' decision-making processes are being affected by either marketing or trader behaviour, and what is the most appropriate regulatory tool for targeting any inappropriate marketing or trading behaviour.

The European Union Consumer Policy Strategy 2007-2013[2], makes reference to the need to increase understanding of consumer behaviour, 'by bringing together disciplines such as economics, social and cognitive sciences. The strengthening of this discipline on its own will help the Commission to make better policies and regulation on the basis of a more empirical understanding of consumer behaviour across a range of EU policies'.

3. *Under what conditions are markets most likely to develop responses to the various impediments to the effective participation of consumers? To what extent will the actions of well-informed consumers drive outcomes across markets as a whole?*

Governments look to the marketplace to ensure that the goods and services produced are appropriate to the demands of consumers. Markets can be an effective mechanism for resource and product allocation provided that consumers are armed with adequate,

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[2]*Empowering consumers, enhancing their welfare, effectively protecting them* EU Consumer Policy strategy 2007-2013, Commission of the European Communities, p.9

knowledge about the nature of goods and services and the terms of the transaction with the supplier, and traders compete fairly with each other.

The provision of information, through advertising, product labelling, ratings schemes etc, is an obvious market response. However, mere provision of information will be insufficient if consumers do not have the skills or knowledge to use the information or they are unwilling to use it because they think it is irrelevant to their decision. Studies into behavioural economics indicate that even where consumers have access to adequate information, they may make poor purchasing decisions owing to biases in their decision making processes. See also response to issue 6 below.

The available research suggests that well informed consumers can drive outcomes where the issue is very simple and the action is immediate. For example, a US study[3] identifies a notice on the door of a restaurant which has failed a health test to be very effective in consumers avoiding that restaurant. The authors state: 'Potential customers get information they care about and could not otherwise obtain in a form that makes comparison shopping easy and at the time and place they most need it. Restaurant managers have a powerful incentive to improve their hygiene. Research suggests that overall restaurant hygiene has measurably increased, and the number of hospitalisations due to food related illnesses has significantly dropped'.

Another market response is the growth of intermediaries, for example insurance brokers, financial planners and mortgage brokers, to provide advice to consumers on complex products and services. While consumers can benefit from this assistance, there is also the risk of conflict of interest because of a remuneration structure based on commissions or other payments by the supplier.

New South Wales has had particular experience with finance brokers. The use of brokers as intermediaries to access credit for both personal and business use has increased considerably over the last seven years. Estimates of the percentage of broker originated home mortgage loans range from 30% to close to 50%, however there is no reliable source on which to base an accurate measure. This should theoretically benefit the consumer seeking to access credit by reducing search and information costs. In view of the 'time poorness' of consumers, it is unlikely that the consumer would have sufficient resources or capacity to research the whole market, and they may not therefore source the most appropriate loan for their circumstances. It should also reduce the opportunity cost to a consumer who might, if left to conduct their own searches, choose or accept a less than optimal product.

However, the use of brokers may not be without costs to the consumer, for the following reasons:

- the range of functions offered by brokers, the number and type of lenders to which the broker has access, and the differing quality of services, is not generally known to the consumer

[3] Fung, Graham, Weil and Fagotto, *From Food to Finance: What Makes Disclosure Policies Effective?* Harvard University 2005

- the consumer may not be aware of the potential conflict of interest to which the broker is subject because of commission structures
- the complexity of the credit market means that the consumer generally does not have the expertise to judge the quality of advice provided by the broker.

To date the experience with intermediaries in the financial services sector has not been encouraging. Both Commonwealth and State Governments have found it necessary to regulate their conduct because the costs (such as those outlined above) outweigh the benefits. The essential problem is the conflict between acting as an agent of the supplier or an agent of the consumer. Consumers must be able to trust the independence of intermediaries if the benefits of using them are to be realised.

A market response designed to address the issue of traders competing fairly with each other is self-regulation. Further information on self-regulation is contained in the response to issue 25 below.

4. *What are the important costs of intervention? How significant are the hidden costs of intervention? How do these compare to the costs of not intervening?*

The NSW Government believes that the general provisions of a consumer policy framework should promote fairness in dealings between all parties and should not impose unnecessary regulatory burden. In this respect, it is important to emphasise the relative costs and benefits for all stakeholders when considering any regulation.

The regulatory impact process requires costs to be identified and, where possible, quantified. The cost to business of intervention is clearly an important cost and such costs may be passed through to the consumer in the form of higher prices. Considerable effort has gone into developing costing models to estimate costs to business.[4] However, it is not always possible to accurately calculate costs because business regards the information as 'commercial-in-confidence'.

Measuring the significance of the hidden costs of intervention is, by definition, problematic. One such cost is the loss of allocative efficiency that results when intervention causes individuals to alter their decisions. Allocative efficiency is achieved when resources are used to produce the goods and services most valued by society. However, if price signals are distorted as a result of regulatory intervention, consumers may make purchasing decisions they would otherwise reject as not being in their best interests.

The costs of not intervening should be identified in the impact assessment of the status quo or 'do nothing' option. Where intervention is warranted, the most significant are the costs to consumers of the current situation; in other words, the consumer detriment that has given rise to the regulatory approach. These include health costs attributed to, for example, the use or consumption of unsafe consumer products, food, therapeutic goods or alternative medical procedures; financial costs, such as the loss of money entrusted to the supplier of professional or other services; search costs arising from the

[4] For example, the Business Cost Calculator is an IT-based tool developed by the Commonwealth Government to assist policy officers to estimate the business compliance costs of various policy options.

need to obtain information to avoid making a sub-optimal choices and social costs, where the market outcome is inequitable, resulting in some consumers being denied access to products and services at fair prices. Because of the difficulties in assigning costs to consumer detriment, the Australian Securities and Investments Commission has commissioned research on consumer costs and benefits for Commonwealth and State and Territory government regulatory impact statements.

Market trends and developments

5. *How have recent market trends changed the requirements for Australia's consumer policy framework? For example, has the growth in e-commerce made it more difficult to enforce regulation, thereby reducing its effectiveness? Or has the internet empowered a greater proportion of consumers?*

The growth in e-commerce has made it difficult to enforce regulation and pursue consumer remedies across borders. At the same time it has provided an opportunity for greater collaboration between regulatory agencies on a national and international level.

A major problem is the proliferation of internet scams, which are one of the targets of the Australasian Consumer Fraud Taskforce, a group of 18 government regulatory agencies and departments with responsibility for consumer protection regarding frauds and scams. The work of the Taskforce is assisted by a growing number of business and community group partners.

There is also the potential for confusion. For example, the growth of Internet shopping by auction has raised the question of whether statutory warranties apply. The terms and conditions of one online auction site[5] state that: "Anything bought in Australia from an online auction isn't covered by statutory warranties under the Trade Practices Act'.

The Australian Competition and Consumer Commission[6] provides a more comprehensive description of consumers' rights when engaging in internet auctions:

'Like traditional auction houses, internet auction websites offer places for people to buy and sell merchandise through a bidding process. There are two main internet auction styles:

- The 'person to person' or 'marketplace' style where the auction site is not directly involved in the auction process. These sites provide the forum and the tools for buyers and sellers to deal with each other through a bidding process.
- The more traditional style where the auction house, in this case through the website, acts on behalf of the vendor.

The statutory warranties under the Trade Practices Act do not normally cover goods bought at a traditional style auction where the auction house is acting for the vendor. The seller is obliged to give clear title, quiet possession and a warranty that the goods are free from encumbrances.

[5] See www.mybid.com.au

[6] See www.accc.gov.au

However, when the auction site is an internet marketplace, any individual business operating through that site is covered by the Trade Practices Act and a consumer's statutory rights do apply.'

As stated in the European Union Consumer Policy Strategy 2007-2013[7], 'e-commerce has great potential to improve consumer welfare, by making a greater range of products available, boosting price competition and developing new markets. It also brings significant new challenges for consumers, business and consumer protection. In particular it weakens the grip of traditional advertising and retail mediums over consumer markets. SMEs [small and medium size enterprises] will have more direct access to consumers and goods and services will be increasingly tailored to the individual. But consumer rights will be less and less adapted to the digital age'.

Access to information over the internet can empower consumers by allowing them to compare products and services more easily. Consumers have access to information regarding product specifications, prices offered by different suppliers, and in some cases product reviews by other consumers. In cases of one-off or infrequent purchases, this can be particularly useful for consumers, although the reliability and accuracy of information provided by other consumers may need to treated with caution.

The internet also gives consumers the ability to affect the reputation of particular products or suppliers, in both a positive and negative manner. Internet forums and product reviews give consumers the ability to share information with others.

6. *Has greater product complexity made it more difficult for consumers to participate effectively in markets? What are the impacts of the greater use of product bundling and standard form contracts?*

Greater product complexity makes it far more difficult for consumers to compare costs and features, or to identify those hidden costs or terms/features which might impact after the choice is made. This is especially true of "one off" or infrequently made purchases, or where consumers are entering the market for the first time.

Complexity of contract terms makes it more difficult for consumers to participate effectively in markets. Imperfect information provided to consumers will impair the ability of consumers to make effective purchasing choices.

Complex contracts may contain terms which may be considered 'unfair', buried within a lengthy document, for example, terms that permit the supplier to unilaterally change the price or other conditions on which it was agreed a service would be supplied, or penalise the consumer for seeking to terminate the contract in response to a breach by the supplier.

Standard form contracts tend to be non-negotiable and offered on a 'take it or leave it' basis. Standard form contracts may not be uniformly helpful when the product is

[7] *Empowering consumers, enhancing their welfare, effectively protecting them* EU Consumer Policy strategy 2007-2013, Commission of the European Communities, p.4

complex. The complexity of the product is likely to be reflected in the length and detail of the contract, which is then unlikely to be read before a choice is made.

The introduction of a statutory standard-form residential tenancy agreement, however, has provided a greater degree of consistency and certainty for parties establishing a tenancy business relationship; at the same time allowing for the insertion of customised additional terms into individual contracts provided they do not contravene the thrust of the legislation. If a standard-form contract did not exist, tenants may otherwise be required to seek expert legal assistance, thereby incurring significant additional tenancy entry costs.

Product bundling confuses consumers because of the complexity involved in comparing different packages. Product bundling may be used by suppliers of a homogenous product (such as electricity and gas) as the only means of differentiating themselves from other suppliers. Where complexity becomes confusion, the outcome may be counter-productive, for consumers may withdraw from the market.

7. *What other new developments are likely to have material implications for the policy framework over the next decade?*

Examples of new developments are:

- Mobile commerce or 'm-commerce', which is part of the shift of technology into mainstream business and everyday life. It involves the use of handheld wireless devices such as mobile phones and palm pilots to communicate, interact and transact via high-speed connection to the internet. While these technologies may provide benefits and new opportunities for consumers they may also give rise to sharp practices that can affect vulnerable consumers in particular. Some of the likely problems include:
    - the lack of experience of some consumers with online purchasing.
    - inadequate disclosure of basic information and disclaimers. The memory and screen size limitations of mobile devices using wireless application protocol in particular may prove a problem in the short term.
    - the ability of mobile devices to display important terms and conditions. For example customers may be simply presented with 'click-wrap' agreements and may not have access to, or be provided with, a full version copy of the contract, comprehensive terms and conditions or details of complaint handling mechanisms before entering into the agreement.
    - a new platform for scams and spam.

- 'Credence goods', which have attributes which are important to a growing number of consumers. Claims made about these credence attributes, which may concern social responsibility or qualities related to health, the environment, animal welfare, cannot reasonably be checked by consumers.

Michael Jenkin, Director General of the Office of Consumer Affairs at Industry Canada, in his speech at the 2007 National Consumer Congress in Melbourne on the topic of 'What's Hot and What's Not – Consumer Policy on the Global Stage', described the way that new technologies, the growth of services and more open markets have brought benefits but also challenges to consumers, in particular greater

difficulties for consumers to determine value and weigh risk. Similar factors may have influenced the results of a recent research project commissioned by the Office of Fair Trading[8], which found that: 'A wide range of problems were identified by the NSW residents in dealing with the providers of goods. Lack of trust in the supplier (29%) and the quality of the goods or services (25%) are high on the list of perceived consumer problems'.

How well is the current framework and suite of measures performing?

Overall framework and approach

8. *Is the current consumer framework fundamentally sound? Does it simply require fine-tuning or are more comprehensive changes required? What measures could be used to assess whether it is delivering for consumers?*

New South Wales considers that the current framework is fundamentally sound and that comprehensive changes are not required. The importance of the national market is reflected in the operation of the Trade Practices Act, whereas the State and Territory Fair Trading Acts contribute to the effective functioning of local and regional markets. Institutional mechanisms, both formal and informal, promote cooperation between agencies and levels of government and there is growing emphasis on the importance of stakeholder consultation and partnerships in achieving consumer policy objectives.

(See also response to issues 9 and 12 below.)

Measures of confidence in the marketplace.

In 1999 the Office of Fair Trading introduced five surveys to track performance against key organisational objectives. Two, the Consumer Confidence survey and Trader Confidence survey, measure the general public's and traders' confidence in the fair operation of the marketplace. Independent research firms are used to ensure objectivity.

The surveys have been developed with specialist in-house expertise in survey design/analysis and were validated in the first year by external contractors. They are based on private and public sector good practices and designed to meet central agency requirements. The surveys provide industry standard levels of accuracy and are considered to demonstrate good practice and a high degree of cost-effectiveness.

The survey measures the degree to which respondents agree, or disagree with the statement: 'In NSW consumers can safely buy products and services knowing that most businesses and traders are fair and ethical'. The results for the years 2000 to 2006 range between 69% - 74% for consumers, and 80% - 90% for traders, who agree or strongly agree with the statement.

The main purpose of these surveys is to build up data on what constitutes a "normal" level of confidence so that any significant drop, either in the trend line or in comparison to similar jurisdictions, would be recognised. The results show confidence

[8] *Service Delivery Research Report,* Ipsos Australia Pty Ltd, 2007

remaining steady over several years within a bandwidth of about 8-10%, with higher levels for traders than for consumers.

Allowing for a 5% margin of error, the individual levels for both consumers and traders, and the gap between them, are broadly consistent with results in Western Australia and Queensland, which conduct similar surveys.

9. *Does the current framework focus on the right issues and areas? Are there significant gaps or imbalances in coverage, or particular objectives that are not well catered for? Is there any significant duplication of policy effort?*

New South Wales considers that the current framework generally focuses on the right issues and areas, but recognises that issues will emerge which require a policy response. Two issues which have been on the Strategic National Agenda of the Ministerial Council of Consumer Affairs without, to date, resolution, are unfair terms in consumer contracts and property investment advice. In both cases a consensus has not been reached on the preferred option (regulatory or non-regulatory).

To date, a significant gap has been the lack of national regulation of finance brokers. However, considerable work has been done by New South Wales to develop a regulatory regime based on principles agreed to by government, business and consumers in a rare example of consensus. A consultation Bill is currently being drafted by the NSW Parliamentary Counsel's Office.

10. *Has the inclusion of new objectives, such as strengthening the position of small businesses in their dealings with larger enterprises, impacted on the effectiveness of the framework? Should consumer policy be further extended to cover small businesses as consumers?*

The position of small business highlights differences in the ways in which 'consumer' is defined by the Commonwealth, States and Territories. The definition of consumer determines whether the provisions of the legislation will cover particular types of transactions. In New South Wales, for example, section 5 of the *Fair Trading Act 1987* defines a consumer as a person who acquires goods or services from a supplier, or acquires an interest in land. The land must not be for an industrial or commercial purpose, the goods or services must not be for re-supply and the goods must not be acquired in the course of a business (unless the business is a farming undertaking) for the purpose of using them up or transforming them in trade or commerce. This means that in New South Wales, a small business purchasing a microwave for its staff kitchen is entitled to the same protection under the Act as a private individual purchasing a microwave for their home.

Generally, strengthening the position of small businesses in their dealings with larger enterprises is not an aspect of the consumer policy framework but rather of the broader competition policy framework, which covers conduct such as predatory pricing behaviour and abuse of market power. Unconscionable conduct, however, is part of the consumer policy framework. In 1998 the Trade Practices Act was amended to prohibit unconscionable conduct in business transactions. In 2003 New South Wales

followed suit by amending section 43 of the Fair Trading Act so that the remedies available to consumers affected by unconscionable conduct are able to be accessed by small businesses in relation to their dealings with their suppliers.

11. *Is the balance of responsibility between governments, business and consumers broadly appropriate? Does the framework pay sufficient regard to the costs of intervention for consumers and businesses? Does it promote certainty and clarity for consumers and businesses and is it sufficiently evidence-based? How well has it coped with the changing circumstances identified earlier?*

The balance of responsibility between government, business and consumers is broadly appropriate, although there will always be differences of opinion about degree. For example, there is currently a debate around the appropriate allocation of risk, characterised on the one hand by suggestions that the community demands government action to eliminate risk in a way that is out of proportion to the potential damage, and on the other hand by claims that government has adopted policies that explicitly shift risk from government and/or corporations to consumers. [9]

It is the task of government to determine how responsibility is allocated, in the interests of the community as a whole. The regulatory impact assessment process aims to facilitate this decision-making, although there are problems, as outlined above in issue 4.

There is a need for consumer policy to be evidence-based, but it must be cognisant of the complexities in the economic and social problems that are being addressed. A perfunctory approach to collecting and applying evidence carries risks. Preconceptions about consumer markets and consumer problems can result in biases in the information collected and how it is analysed.

Australia's consumer policy does have regard to 'evidence' as broadly defined, by reference to consumer agency complaint statistics, case studies from legal and consumer advocacy groups, commissioned research, industry and other stakeholder consultation, international experience, surveys and economic and social modelling.

For consumer agencies there are also practical constraints on the use of evidence-based policy development as the policy process is affected by the pragmatics and contingencies of political life. For some consumer problems urgent responses are needed, judgements must be made about future risks, and decisions made in the absence of reliable evidence.

One of the strengths of the consumer policy framework is its flexibility. For example, provisions in Trade Practices/Fair Trading Acts apply to new marketplaces (such as the Internet) in the same way as they do to traditional marketplaces. As stated in the Australian Guidelines for Electronic Commerce[10]:

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[9] See, for example, ACA Submission to the Taskforce on Reducing Regulatory Burden on Business, December 2005.

[10] Issued by the Commonwealth Government in March 2006.

- Businesses should adopt fair business practices when engaging in business-to-consumer electronic commerce.

- In particular, the *Trade Practices Act 1974*, the *Australian Securities and Investments Commission Act 2001* (in relation to financial services) and state and territory fair trading legislation require that businesses:

    - not engage in conduct that is misleading or deceptive or is likely to mislead or deceive;
    - not make false or misleading representations about the goods or services they supply;
    - not harass or coerce consumers either when seeking to sell goods and services or when seeking to obtain payment;
    - not engage in unconscionable conduct, including ensuring that contractual terms are reasonably necessary to protect the supplier's legitimate interests;
    - make sure that the goods supplied correspond with the description of the goods;
    - ensure that the goods supplied are of merchantable quality and fit for any purpose made known to the supplier by the consumer; and
    - ensure that services supplied are rendered with due care and skill and are reasonably fit for any purpose made known to the supplier by the consumer.

12. What broad changes to the framework could be made to deliver greater benefits or more cost effective outcomes for the community? In this regard, what can Australia learn from the experience of other countries?

NSW considers that regulatory efficiency can be achieved in a federal system. The development and implementation of a uniform, or harmonised, legislative approach can benefit from innovation in different jurisdictions to find solutions to problems, leading to better public policy and service delivery.

A federal system can also take account of local and regional needs and interests. Decisions made at the local level tend to be more customised and responsive to local requirements and conditions. The current enforcement and redress framework, in which the Australian Competition and Consumer Commission generally deals with systemic issues of national significance causing widespread detriment to consumers and State and Territory fair trading agencies deal with more local and individual issues, should continue to operate. In this regard, it is important that New South Wales, Australia's most populous state with the largest economy, is able to influence the decision-making process when national action is contemplated.

The European Union Directive on Unfair Commercial Practices[11]

[11] *The Unfair Commercial Practices Directive,* Health & Consumer Protection Directorate-General, European Commission (2006)

The Directive on Unfair Commercial Practices was signed by the European Parliament and Council in May 2005 and must be applied across the Member States by December 2007. The Directive aims at enhancing consumers' rights and boosting cross-border trading by harmonising divergent national rules on business-to-consumer commercial practices.

The Directive contains a general ban on unfair commercial practices. The two main categories of unfair practices – misleading practices and aggressive practices – are described in more detail. The unfair practices are essentially equivalent to the prohibitions on misleading and deceptive conduct, false representations, unconscionable conduct and harassment and coercion and in the Trade Practices Act and Fair Trading Acts.

The Directive requires that unfair practices are assessed in light of the effect they have, or are likely to have, on the average consumer in the particular market to which the practices are directed. This is similar to the tests of the 'reasonable person' and the relevant section of the public which are applied by Australian courts when ruling on misleading and deceptive conduct.

The Directive bans certain practices outright – the so-called 'Black List'. This includes practices also banned in Australia, such as pyramid selling and bait advertising. The Black List practices are unfair in all circumstances and do not require the application of the 'average consumer' test.

As the Directive has not yet been fully implemented it is too early to evaluate its effectiveness. Of particular interest is the general prohibition on unfair commercial practices, which is intended to deal with practices that may emerge in the future but do not fall under the criteria of misleading or aggressive practices. A commercial practice is regarded as unfair and prohibited if it is contrary to the requirement of professional diligence and materially distorts or is likely to materially distort the average consumer's economic behaviour. One question is whether this provision will, in practice, operate in the same way as Australia's unconscionable conduct provisions.

Policy tools

13. *Are the right tools being used to meet the objectives of consumer policy? Is the current range of tools sufficiently diverse?*

As stated earlier, the objectives of consumer policy are to promote economic efficiency and social equity.

To date, there has been little in the way of research to identify which regulatory tool is the most appropriate in any particular circumstance. Neither is there significant post regulatory research into the effectiveness of a particular approach and who benefits and who does not. The "one size fits all" phenomenon may provide satisfactory outcomes for a proportion of consumers and traders and not others and is generally based on theories of regulation rather than on empirical studies.

The current range of tools is probably sufficiently diverse but may need to be more carefully targeted and crafted to the problem. For example, as outlined in the response to issue 14 below, there is currently an emphasis on disclosure-based regulation which may not be the most appropriate regulatory measure in some circumstances.

14. *What sort of considerations should guide choices between different instruments? How well do current choices reflect such considerations? Is there too much emphasis on particular approaches and, if so, why? Are there examples of where the use of an inappropriate instrument has either given rise to significant net costs or led to ineffectual intervention?*

The various guidelines for best practice regulation issued by Australian governments list the considerations which should guide choices between different instruments. The overriding consideration is whether the chosen instrument will provide the greatest net public benefit.

Considerations include the nature of the problem (e.g. a market failure); the extent of the problem; is it all traders or an identifiable group; are all consumers affected or an identifiable group; can a particular regulatory approach benefit those affected consumers while not disadvantaging the rest, and can it affect the behaviour of the problem traders while not disadvantaging the rest; what is the cost to the government agency and the cost to the trader; whether the approach means that only the problem trader bears the cost; is the approach enforceable and is it likely to be enforced sufficiently for it to be successful.

The impact of National Competition Policy and the growing emphasis on regulatory reform and minimal government intervention mean that disclosure is increasingly regarded as a tool which can meet the objectives of consumer policy without the need for prescriptive regulation. Disclosure-based regulation is easily explained and is supported by classical economics, where the market failure (of consumers not choosing appropriate products or encountering problems post-contractually with the trader or product) is attributed to information asymmetry. Classical economics concludes that specified disclosures will assist consumers make rational choices of products that best suit their needs, without restricting product development or innovation. This approach also allows enforcement agencies to use a "checklist" in determining whether the trader is complying with the legislation.

Significant net costs may be experienced by traders in providing the information, both in ensuring it is correct and in keeping the information up to date. Where there is uncertainty, a trader is likely to supply too much information rather than too little to avoid breaching the requirements. This has been the case, for example, with the Consumer Credit Code and the requirement to disclose all fees and charges that will be or may be charged. What was expected to be a table of costs that the consumer could take in easily before entering into a contract, became in some cases, several pages of possible charges. This can be counterproductive in assisting consumer choice and can the vulnerable consumer from attempting to read the contract.

Also, for simplicity of regulation, the assumption is that all products should be treated equally, whereas subsequent research has demonstrated that credit choices made at

point of sale were secondary to the goods purchased and the credit contract was given little if any consideration. As well, the timing of the disclosures has not been sufficiently taken into account. It is questionable whether most consumers will read all or any of the disclosures while they are in the presence of the credit provider who may be urging them to sign the contract, or whether a consumer, having been granted a credit card, will read the terms and conditions before using it, or will ask for the card limit to be reduced.

Apart from these issues, information provided by suppliers may not be the defining factor in consumer choice. Research indicates that credit provider choices are likely to be made on the basis of previous experience with a financial institution or on the recommendation of friends or family. The Consumer Credit Code model of regulation was based on the 'truth-in-lending' model used in the United States and was adopted without there being any research into its effectiveness in improving the effectiveness of consumer decision making.

Another example, again using the Consumer Credit Code, is the requirement that credit providers disclose a mandatory comparison rate. This aimed to give consumers a means of comparing the costs of products through advertised rates which provided a single rate, and also a schedule of comparison rates for different amounts and terms that would be available at point of sale. Maintaining the accuracy and currency of the information is a continuing cost to industry. In practice, it appears that the comparison rate has not been understood and used by consumers and some industry members have changed their advertisements to escape the requirement for a comparison rate to be disclosed. Again, this was adopted from overseas models. It can be speculated that one reason for the lack of success of this initiative is the absence of a long term and concentrated campaign to educate consumers about its use. The cost of any such campaign might have been prohibitive if this had been factored into considerations before the requirements were introduced.

Disadvantaged and vulnerable consumers

15. *What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy? Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms?*

The Consumer Affairs Victoria Discussion Paper *What do we mean by 'vulnerable' and 'disadvantaged' consumers?* (2004) proposes definitions for 'consumer detriment', 'consumer vulnerability' and 'consumer disadvantage' which are generally accepted by the Standing Committee of Officials of Consumer Affairs. They are:

'Consumer detriment includes, in addition to physical harm and monetary loss, a level of satisfaction less than was reasonably expected from a purchase and the denial of a transaction sought by a consumer.'

'Consumer vulnerability is exposure to a risk of detriment in consumption due to the interaction of market, product and supply characteristics and personal attributes and circumstances. The main cause of vulnerability is this interaction resulting in

inadequate information, poor access to information and/or ineffective use of information by a consumer or in the deterrence of complaint or the pursuit of redress by a consumer.'

'Consumer disadvantage is a persisting susceptibility to detriment in consumption. A disadvantaged consumer is a person in persistent circumstances and/or with ongoing attributes that adversely affect consumption thereby causing a continuing susceptibility to detriment in consumption. As a result, a disadvantaged consumer repeatedly suffers consumer detriments or, alternatively expressed, generally obtains below-average satisfaction from consumption.'

The paper concludes that not all vulnerable consumers are disadvantaged consumers. Some consumers will be vulnerable only because of either temporary personal circumstances that adversely affect them in consumption; or adverse market, product or transaction characteristics specific to a particular purchase, rather than their purchases generally.

On the basis of these definitions, it could be said that most consumers are vulnerable at some stage of their lives and/or in relation to some purchases, and consequently generic consumer policy is designed to meet the needs of vulnerable consumers. In many respects generic consumer policy will also meet the needs of disadvantaged consumers, but in order to be effective it may be supplemented by other more targeted mechanisms.

For example, the National Indigenous Consumer Strategy, launched by the Ministerial Council on Consumer Affairs in 2005, has three objectives:

- to improve Indigenous consumers' knowledge of their rights and obligations under consumer protection laws and achieve greater Indigenous access to consumer protection programs;
- to improve the behaviour of traders, through education and compliance activity, to reduce detriment experienced by Indigenous consumers; and
- to promote effective engagement and partnership between consumer protection agencies, Indigenous organisations, business and other consumer agencies to improve consumer outcomes for Indigenous people.

In the case of residential tenancy regulation, a mechanism targeted at disadvantaged consumers is the funding granted to community-based Tenants Advice and Advocacy Services to provide advice, information, advocacy and community education to tenants and tenant representatives.

It is not possible to generalise on whether generic approaches are better than targeted mechanisms. Each situation would need to be assessed against the considerations listed in issue 14 above.

The EU Directive on Unfair Commercial Practices, referred to in issue 12 above, is a generic law which contains provisions that aim at preventing exploitation of vulnerable consumers. The definition of a vulnerable consumer depends on the commercial practice in question. According to the guidelines issued by the Health & Consumer Protection Directorate-General of the European Commission, 'vulnerable consumers

can benefit from the average consumer benchmark test. Commercial practices which are likely to materially distort the economic behaviour of only one clearly identifiable group of consumers who are particularly vulnerable to the practice or the product because of their mental or physical infirmity, age or credulity in a way which the trader could be reasonably expected to foresee, shall be assessed from the perspective of the average member of that group.

As the Directive is not yet fully operational, it is too early to judge its effectiveness.

16. *What are the examples of policies that are very effective in targeting vulnerable and disadvantaged consumers? Are there instances where a desire to protect these groups has imposed significant net costs on the wider community?*

In New South Wales, legislation which regulates consumer credit, residential tenancies, retirement villages, residential parks and funeral funds are all examples of policies which target consumers who are vulnerable in that particular consumption situation. Where these regulatory schemes were subject to National Competition Policy reviews, it was demonstrated that the benefits to the community outweighed the costs.

Disadvantaged consumers also benefit from the legislation, but may need other forms of assistance to take full advantage of it. For example, government funding of financial counsellors and tenancy advice and advocacy services is particularly targeted at disadvantaged consumers.

The regulation of the energy retail market is a particular example of consumer policy which targets vulnerable and disadvantaged consumers. The fact that the competitive market is newly established and supplies an essential service makes it a special case. One provision targeted at disadvantaged consumers is the requirement that suppliers develop hardship policies (as in Victoria, and NSW) to assist customers in danger of being disconnected. Such provisions do not impose significant costs on the wider community.

Laws that regulate door-to-door selling and telemarketing (referred to as direct commerce in the NSW Fair Trading Act) apply generally but are particularly relevant to vulnerable and disadvantaged consumers. Direct selling practices are sophisticated and widespread across a range of industries and products, including new growth markets such as pay television, telecommunications and retail energy supply.

Some of the most vulnerable groups in the community continue to be subjected to highly undesirable direct selling practices. These include the elderly (especially older women living alone), consumers with poor understanding of English and the disadvantaged. Many direct selling firms will target particular suburbs or areas, including those with a high percentage of public housing.

Unsolicited telemarketing is a sub-set of direct selling that has had a growing negative impact in the marketplace, to the point where the Commonwealth Government accepted an argument that it is 'appropriate to respond to community concern with an assurance that effective action is being taken to address the intrusiveness and

inconvenience of telemarketing calls'.[12] While any consumer may find telemarketing intrusive and inconvenient, vulnerable consumers are also likely to suffer financial detriment by responding to scam calls and other high pressure sales tactics. Although the Do Not Call Register legislation is not specifically targeted at vulnerable or disadvantaged consumers, they have the potential to be the main beneficiaries.

The Financial Impact Statement for the Do Not Call Register Bill estimated the impact on government to be $17.2 million over four years ($33.1 million, less $15.9 million recovered from industry through payment of fees to access the register). Despite these costs, the benefits of providing a more consistent and efficient operating environment for the telemarketing industry, enabling consumers to opt-out of unwanted telemarketing calls and establishing an effective complaints handling mechanism to deal with poor telemarketing practices were considered more significant.

Generic v industry-specific regulation

17. *How effective are the generic provisions in the TPA and Fair Trading Acts in meeting their intended objectives? What, if any, changes are required to deliver better outcomes?*

New South Wales considers that overall, the generic consumer protection provisions have proved to be very effective in meeting their objectives. One of the reasons for this is that they provide for private remedies as well as enforcement by regulators. Section 52 (the prohibition on misleading and deceptive conduct) is one of the most utilised sections of the Trade Practices Act.

Although the penalties for contravention of the consumer protection provisions of the Trade Practices Act are not as significant as the penalties for contravention of the anti-competitive conduct provisions, they set a benchmark for the States and Territories and are a deterrent to non-compliance.

The fact that the Trade Practices and Fair Trading Acts contain similar enforcement and redress provisions has been of assistance in fostering a relatively vigorous enforcement culture among the States and Territories.

The generic provisions are concerned with ensuring that market transactions are based on truthful information and ethical conduct, and that businesses do not unfairly exploit an imbalance in bargaining power. Although the NSW Government does not have a position on the issue, it is noted that some consumer advocates suggest the generic provisions could also meet a third objective of promoting fairness in contractual obligations by the introduction of a prohibition on unfair terms in consumer contracts.

18. *What principles should guide the choice between generic and industry-specific regulation? How well does current mix of regulation accord with these principles?*

Generic regulation establishes rights and obligations that apply across all industries. The main generic legislation in the consumer policy framework is the Trade Practices

[12] Do Not Call Register Bill 2006 - Explanatory Memorandum.

Act 1974 and the State and Territory Fair Trading Acts. Industry-specific regulation targets particular sectors. It may impose licensing or registration on traders or businesses (the NSW *Motor Dealers Act 1974*), prescribe rules of disclosure and/or conduct (the Consumer Credit Code), set standards for relationships between parties (the *Retirement Villages Act 1999*), provide indemnity against consumer loss (*Property, Stock and Business Agents Act 2002*) or mandate a code of conduct (the Motor Vehicle Insurance and Repair Industry Code of Conduct).

Generic regulation should be the preferred option when the policy objectives will be achieved through:

- use of broad standards or principles to guide acceptable behaviour, with the flexibility to address emerging problems;
- universal coverage which avoids boundary problems and has the capacity to accommodate diverse and changing industries;
- minimal government intervention, with industry taking responsibility for compliance;
- consistent regulation, so that consumers who face the same risks receive the same protection and traders who engage in the same types of behaviour face the same consequences; and
- availability of effective consumer redress mechanisms.

Industry-specific regulation is likely to be the preferred option when:

- effective enforcement of generic regulation has not achieved the policy objectives (such as cessation or modification of trader behaviour, protection of consumers from financial loss etc)
- a targeted solution can address issues such as:
    - high risks to consumers eg: health, safety, financial
    - practitioners requiring a level of competency/qualification that is difficult for consumers to judge
    - the product or service is so complex/technical that making a choice in the consumer's best interests is difficult
    - vulnerable and disadvantaged consumers being disproportionately affected adversely by industry practices
    - industry members seeking a high degree of certainty and predictability in compliance.
- the product or service is an essential service – that is, to do without that product would place a consumer at considerable disadvantage.

As briefly noted in the response to issue 17 above, a general prohibition on unfair terms in consumer contracts could be regarded as an example of generic regulation. In 2003 Victoria amended the *Fair Trading Act 1999* to prohibit unfair terms in consumer contracts. These provisions generally meet the principles of generic regulation, as they:

- use broad standards of contractual unfairness to guide drafting of acceptable contract terms;
- have universal coverage (the Victorian Government is on record as supporting the repeal of the exemption currently applying to consumer credit contracts);
- involve minimal government interference (the regulatory authority, Consumer Affairs Victoria, follows an implementation policy of education and negotiation ahead of litigation);
- apply consistent regulation; and
- make available effective consumer redress mechanisms (through Consumer Affairs Victoria's complaint handling procedures and access to the Victorian Civil and Administrative Tribunal and, where appropriate, the courts).

It has been argued that a potential benefit of such generic regulation is that there would be less demand for industry-specific regulation in some areas. For example, many consumer problems in two industries, vehicle hire and fitness services, stem from contract terms and could be addressed through unfair contract terms legislation without further intervention.

In 2006 the NSW Legislative Council Standing Committee on Law and Justice held an inquiry into unfair terms in consumer contracts which recommended that the NSW Government seek an amendment to the *Fair Trading Act 1987* modelled on the Victorian unfair terms in consumer contracts provisions. The NSW Government is preparing a response to the inquiry report.

19. Is industry-specific regulation particularly well suited to some areas? Are there examples where specific regulation has been helpful in putting a particular sector on notice? To what extent has the growth in specific regulation reflected inadequacies in generic regulation or its enforcement?

Most industry-specific regulation in NSW pre-dates the introduction of the Fair Trading Act in 1987, including property agents, residential building work, consumer credit, motor dealers, motor vehicle repairers, pawnbrokers and second-hand dealers, travel agents and valuers. All were subject to National Competition Policy reviews and it was demonstrated that the net benefits to the community of the regulation outweighed the costs. Each statute that was re-enacted after an NCP review contains a five-year review clause that requires the Minister for Fair Trading to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

These processes provide an opportunity for stakeholders to make a case in favour of generic rather than industry-specific regulation. In NSW, industry stakeholders have consistently preferred industry-specific regulation.

Retail energy market regulation

An industry-specific consumer protection regime was introduced to NSW in 2001 to complement the opening of the energy market to full retail competition. This built upon existing protections for energy consumers, recognising that an essential service

would now be available from competing retail suppliers under negotiated contract terms. The industry-specific regulation provides a single reference point for access to information about rights and obligations, including about making complaints, for residential and small business customers who are willing to test the benefits of choice and/or are unexpectedly exposed to marketing practices for a product or service. The industry-specific regime also assists in minimising the jurisdictional regulatory burden for an industry generally made up by corporations that operate across several jurisdictional borders, by drawing relevant consumer protection obligations into a single instrument and relieving participants from having to interpret generic laws to fit the circumstances.

The energy consumer protection framework recognises and consciously duplicates some provisions of the Trade Practices/Fair Trading legislation. Duplication does not, in itself, create an additional burden: provisions that are inconsistent with the generic legislation may do so. However, any burden is thought to be outweighed by the benefits of a single industry-specific instrument, particularly as energy is considered to be an essential service. Areas that are not covered by generic fair trading legislation include protection against unfair disconnection, requirements to reconnect and hardship policies.

In addition, a core set of terms and conditions must be incorporated into small customers' supply contracts to ensure small customers do not lose basic customer rights when entering into non-standard supply arrangements. The inclusion of minimum terms and conditions in supply contracts is designed to allow small customers to concentrate on key aspects of their supply agreement, such as seeking the best energy price, contract length and the ability to pay bills at regular intervals in equal amounts (bill smoothing).

It should also be noted that the consumer protection regime for small energy customers includes access to the Energy and Water Ombudsman of NSW. This provides an expert dispute resolution service for matters that can be complex and technical.

It would appear that the industry-specific regulation continues to be necessary in NSW. A national framework for the regulation of the retail energy market is presently being developed by a working group under the Ministerial Council on Energy (MCE), including consideration of consumer protection issues. Options being considered include:

- relying on existing applicable national and jurisdictional laws;
- relying on existing applicable national and jurisdictional laws where they are nationally-consistent, and applying energy-specific laws where they are inconsistent or additional laws are necessary; and
- developing a comprehensive energy-specific marketing regime.

The MCE Retail Policy Working Group is still in the process of public consultation on these and other issues, and will be putting its recommendations to the Ministerial Council later in 2007 for decision.

Legal and other professional regulation

Professional standards legislation has been enacted in all States and Territories to improve occupational standards, protect consumers and enable Professional Standards Councils to approve schemes which cap the occupational liability of their members. The Commonwealth has enacted complementary legislation which allows schemes to be prescribed under Commonwealth law.

Professionals covered by a capped liability scheme are required to:

- hold professional indemnity insurance;
- implement risk management strategies, such as undertaking continuing professional development; and
- be subject to a complaints and disciplinary system.

In NSW, there are currently capped liability schemes covering solicitors, barristers, accountants, engineers, surveyors and valuers

Legal practitioners are also subject to unique ethical obligations intended to protect the interests of consumers. The Legal Profession Act 2004 (LPA 2004), which is based on national model legislation, contains provisions regulating practitioners' conduct in relation to costs disclosure and trust accounts. Legal practice and conduct rules also apply to legal practitioners in NSW. The rules set out the ethical obligations owed by practitioners to their clients, other practitioners, the courts and third parties.

A co-regulatory disciplinary regime specifically regulates the conduct of legal practitioners. Under the LPA 2004, the professional associations have certain prescribed regulatory functions. Their powers to investigate complaints about legal practitioners are overseen by an independent statutory appointee, the Legal Services Commissioner, who may also conduct his/her own investigations. The co-regulators may take some disciplinary action against practitioners. However, cases involving allegations of serious professional misconduct must be taken to the Legal Services Division of the Administrative Decisions Tribunal.

Consumers who are unhappy with a legal practitioner's costs may seek to have their dispute mediated by the Legal Services Commissioner, or they may apply for assessment of their costs under a separate regime administered by the Supreme Court of NSW.

<u>Tenancy and other housing related regulation</u>

A considerable proportion of the resources committed to consumer policy in NSW are focused on those sectors that are not well catered for by the generic provisions enshrined in the Fair Trading Act, namely residential tenancies, residential parks, strata schemes and retirement villages. Transactions in these areas tend to be more complex than in most other trader/consumer interactions, may not allow as much leeway for the consumer in contracting with the trader of their choice and may involve circumstances in which the parties are relatively inexperienced in their roles as consumer or trader. In addition, because the transaction relates to a basic human need for shelter, regulation

provides a level of protection, for reasons of social justice, beyond that given in a more standard contractual relationship between a trader and consumer.

20. *Are there significant areas of industry-specific regulation that do not provide a net benefit to the community? To what extent does this reflect the pursuit of redundant objectives or objectives that could be adequately addressed using the available generic regulatory instruments? Are there any substantial inconsistencies between industry-specific regulation and the generic regime and, if so, with what consequences?*

See answer to issue 19 (above),

21. *Are there ways that the costs of industry-specific regulation could be reduced without reducing its effectiveness? For example, would more emphasis on principles-based regulation be helpful?*

In general terms, principles-based regulation means moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or principles to set the standards by which regulated firms must conduct business.[13] It is linked to outcomes-based regulation which reflects the view that businesses are better placed than regulators to determine what processes and actions are required within their businesses to achieve a particular regulatory objective. Adopting this form of regulation is regarded as 'best practice'; in simple terms, it regulates ends not means.[14]

In NSW, the Fair Trading Act is an example of principles-based regulation. Its main provision states: A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive (section 42).

The advantages of principles-based regulation are said to include the following:

- it provides flexibility for both business and regulators;
- it facilitates innovation, in both business and regulation;
- it enhances competitiveness;
- it is easier to comply with;
- it encourages behaviour which fulfils the regulatory objectives, and this benefits other stakeholders such as consumers; and
- it allows the regulator to respond to new issues as they arise without having to create new rules.

All of these advantages apply in some degree to the Fair Trading Act (and the legislation which it mirrors, the Trade Practices Act).

The disadvantages of principles-based regulation are said to include:

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[13] *Principles Based Regulation: Risks, Challenges and Opportunities.* Presentation by Professor Julia Black at the Banco Court, Sydney on 27 March 2007.

[14] *From Red Tape to Results,* NSW Government.

- it does not provide certainty;
- it is unpredictable, with the potential for enforcement to be applied inconsistently;
- it permits a minimum level of acceptable conduct, which may be inadequate to protect the interests of stakeholders such as consumers, particularly in areas carrying significant potential risks, such as to health.

It is when these disadvantages appear to outweigh the advantages that more detailed regulation may be preferred. It is in these circumstances that industry-specific regulation is adopted. One of the problems is that this can lead to what Professor Black refers to as 'the ratchet syndrome' – more rules are created to address new problems in the industry or close new gaps, creating more gaps, and so on. However, the solution is not necessarily to turn to principles-based regulation. In order to deal with the criticism of lack of certainty in this form of regulation, regulators provide guidance about what the principles mean, and the proliferation of guidance (rules, guidelines, directives, speeches etc) becomes a problem in itself.

Enforcement and redress issues

22. *Are there significant enforcement gaps in the current framework? If so, do they mainly reflect the level of resourcing for those entities responsible for enforcement or are there other factors at work? To what extent has more regulation been substituted for better or more timely enforcement?*

The Chairman of the Australian Competition and Consumer Commission has identified three potential areas for improvement:[15]

- Civil pecuniary penalties. Under the Trade Practices and Fair Trading Acts, monetary penalties for wrongdoing can only be obtained through criminal proceedings. Such actions are slow, resource-intensive and must meet a very high standard of proof to achieve a result. More frequently, civil penalties are sought – injunctions, corrective advertising, compensation. If pecuniary penalties were added to the suite of civil penalties already available, more effective outcomes and a higher degree of deterrence would be available.
- Consumer redress. Although the Trade Practices/Fair Trading Acts provide for the courts to order consumer compensation, orders can only be sought in relation to consumers who provide written consent. This limits the ability of consumer agencies to obtain redress for large numbers of consumers over a broad geographic region.
- Uniformity of fair trading laws. Since the 1983 Ministerial agreement to mirror the consumer protection provisions of the Trade Practices Act, some inconsistency has emerged, including:
    - unfair contract terms provisions
    - door-to-door and telemarketing provisions
    - different definitions of pyramid selling

[15] Graeme Samuel, *The foundations of good consumer protection policy: strong law, vigorous enforcement and the educated consumer* Speech to the 2007 National Consumer Congress

- different enforcement powers (public warning statements, substantiation requirements).

The Ministerial Council on Consumer Affairs currently has the issue of civil pecuniary penalties under consideration. The issue of consumer redress is relevant to New South Wales because the Fair Trading Act provisions mirror those in the Trade Practices Act. With respect to inconsistencies in fair trading laws, see the response to issue 12 above.

New South Wales considers there is a blurring of responsibility between the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, particularly in relation to financial services regulation. This can make Commonwealth/State cooperation difficult and hinder the achievement of efficient and effective enforcement outcomes.

One area where the ACCC has taken a strong lead in establishing a cohesive Commonwealth/State/New Zealand enforcement mechanism is the Australasian Consumer Fraud Taskforce. Eighteen government agencies comprise the Taskforce, which participates in a month of fraud prevention activities each year to raise awareness of the problem of mass-marketed consumer frauds and scams.

23. *Are current redress and penalty provisions appropriate and effective? Would changes to these provisions in the TPA, Fair Trading Acts and other generic regulation reduce the incentive to employ specific regulation?*

Access to redress and enforcement under the NSW Fair Trading Act ranges from the provision of information to consumers, to civil remedies and criminal offences. Redress is accessible to consumers through either the Consumer, Trader and Tenancy Tribunal or the courts, depending on the type of breach. Claims may be made for compensation for loss or damage through the forum designated by the Act. In the case of unconscionable conduct, the application can only be made to the Supreme Court.

Consumer redress can also be achieved by the Office of Fair Trading investigating complaints and negotiating on the consumer's behalf without recourse, in the first instance, to a court or Tribunal. The Office of Fair Trading can also refer complaints to other authorities or bodies. The Office has arrangements with industry-based alternative dispute resolution bodies, such as the Energy and Water Ombudsman and the Telecommunications Industry Ombudsman, to refer complaints where those bodies have specialist expertise and jurisdiction.

As well as achieving redress for the individual, the Act empowers the Commissioner for Fair Trading to take enforcement action either as an administrative action, or through the courts. Administrative actions include the power to issue penalty notices for minor contraventions of the Act and to suspend a licence where there are reasonable grounds to believe the conduct of a licensee is such that the Act authorises suspension or cancellation. The Commissioner may accept written undertakings in connection with a matter in relation to which the Commissioner has a function under the Act.

For other contraventions of a serious nature the Commissioner can apply to the Supreme Court to grant an injunction restraining a person from trading, or to put conditions on the person's ability to trade. If the contravention is in respect of advertising, the Court can require corrective advertising to correct offending material and to advise consumers of their rights. The Commissioner can apply to the Court to freeze the bank accounts and other assets of people who breach the legislation to prevent the transfer of assets outside New South Wales and to appoint a receiver or Trustee.

The Commissioner may, in addition, prosecute breaches of the legislation. The Supreme Court can impose a maximum penalty of $110,000 for corporations and $22,000 for a person other than a body corporate. Most actions, however, take place in the Local Court where there is a maximum penalty of $5500.

The Act gives shared power to the Minister for Fair Trading and the Commissioner to name persons who supply unsatisfactory or dangerous goods or services, or who engage in unfair practices. The Act also empowers the Minister to intervene in court proceedings under the *Fair Trading Act* or any other legislation administered by the Minister. The Minister thereby becomes a party to the proceedings.

The current generic provisions already reduce the incentive to employ specific regulation where it can be demonstrated that there is an effective remedy for marketplace misconduct. In some instances, however, the cost to the community of trying to remedy particular misconduct outweighs the benefit of not imposing specific regulatory requirements. Two examples where a decision was made to introduce industry-specific provisions are described below.

Fitness industry

A voluntary Code of Practice for Fitness Centres in NSW was developed and implemented in July 1998 to give an assurance to consumers that they were protected physically and financially when choosing to purchase the services offered by fitness centres. The Code's introduction was in response to a number of gym closures and industry concern about the lack of industry standards.

However, an independent review found there were a number of operators who did not comply with important aspects of the Code. The Code limited long-term membership pre-payments and a segment of the industry, arguing that the clause was too restrictive, chose not to become signatories to the Code. These operators continued to sell low-cost, long-term, pre-paid membership plans. For example, memberships of five years were sold for $1,500, often before the centre had opened. The risk was that operators selling long term memberships may not remain viable for the duration of the memberships and could go out of business, with resultant losses to consumers and decreased industry confidence.

The *Fitness Services (Pre-paid Fees) Act 2000* was enacted to reduce the risk of consumer loss by limiting fitness centre membership pre-payments to a period of 12 months and requiring operators to hold pre-payments in a trust account until the fitness centre commenced operation.

Funeral industry

In 2005 the NSW Legislative Council Standing Committee on Social Issues conducted an inquiry into the funeral industry. The inquiry was particularly concerned with transparency of funeral costs and concluded that clearly displayed prices for regular products and services used in funerals, including itemisation of the components of the funeral director's professional fee, would be beneficial to consumers.

The Government has accepted the inquiry's recommendation that an information standard for funerals be introduced under the Fair Trading Act.[16] It can be argued that people organising a funeral are vulnerable consumers and clear information on the products and services they are purchasing, including pricing information, will assist them to make an informed choice.

24. Are the current dispute resolution mechanisms and arbitration processes, including consumer tribunals, readily accessible and effective?

Dispute resolution – Office of Fair Trading

Through its 24 Fair Trading Centres and the Fair Trading Information Centre, the NSW Office of Fair Trading provides information to consumers and traders on their rights and responsibilities to assist them resolve disputes. Where consumers and traders have not been able to resolve a dispute, a complaint may be lodged with Fair Trading and officers then attempt to informally negotiate between the two parties.

When a complaint is received, it is assessed to determine:

- the issues in dispute and options available to help resolve them
- if a breach of law has occurred and whether enforcement action is appropriate
- if the matter should in fact be dealt with by another organisation.

Fair Trading contacts each party and attempts to negotiate a resolution that is mutually acceptable to both parties. These attempts to resolve consumer disputes may involve the use of specialist inspectors, as is the case for home building and motor vehicle repair disputes, to carry out onsite inspections and mediations and in some instances determine an enforceable outcome to the dispute.

If a resolution is not reached both parties are advised of other options which are available to assist in resolving the dispute. These may include an industry-based dispute resolution body (see response to issue 23 above) or an application to the Consumer, Trader and Tenancy Tribunal.

Fair Trading aims to resolve general complaints within 30 days of receiving the complaint. During 2005-2006 the Office finalised 95% of general complaints within 30 days of receipt with 81% of complaints being successfully resolved.

The Office of Fair Trading also promotes the idea that it makes good business sense to have a system for dealing with customer complaints. A dissatisfied customer is not a good advertisement for any business. While a company should try to resolve complaints with its customers, there are some situations where this is not possible.

[16] See Media release dated 5 February 2007 on www.fairtrading .nsw.gov.au

Subscribing to a dispute scheme, which can deal with unresolved complaints, is an equally important part of dealing with customer concerns.

Dispute resolution – non-government sector

In New South Wales there are community legal centres and tenancy advice and advocacy services, funded by government, which are effective in assisting consumers to resolve disputes. These services particularly target vulnerable and disadvantaged consumers.

External dispute resolution

Dispute schemes also serve as an alternative to the court system. The Government and the courts have recognised that costs and delays have reduced access to the court system by the average consumer. Where possible the courts are using alternative dispute resolution within the court system itself. There is also a place for alternative dispute resolution outside the court system.

The Commonwealth Government has published Benchmarks for Industry-Based Customer Dispute Resolution Schemes and those schemes which comply fulfil a need for cost-free, accessible and effective resolution of disputes.

Consumers have access to a range of external dispute resolution bodies, including the Energy and Water Ombudsman of New South Wales, the Telecommunications Industry Ombudsman and the Banking and Financial Services Industry Ombudsman.

Consumer, Trader and Tenancy Tribunal

Tribunals have an important role in the legal system in providing an informal, flexible, accessible, cost effective and fair means of dealing with disputes. Although tribunals are not courts and not bound by the rules of evidence, they have features in common with courts. They must operate within a legal framework determined by the relevant statute, ensure parties are afforded procedural fairness and assess and evaluate evidence, make decisions and provide reasons. At the same time they are different from courts: more flexible in operation, more accessible to the parties, less likely to permit legal representation and sometimes staffed by members with expertise in areas other than law. These factors pose significant challenges for tribunals in meeting their statutory obligations in the most efficient and effective way.

The New South Wales Consumer, Trader and Tenancy Tribunal is established under the *Consumer Trader and Tenancy Tribunal Act 2001*. The objects of the Act require the Tribunal to be accessible, efficient, effective, informal, expeditious and inexpensive. Additionally the Tribunal must produce quality, fair and consistent decisions.

The Consumer, Trader and Tenancy Tribunal Act was subject to a statutory review, which concluded that the legislation that provides the framework for the Tribunal is fundamentally sound and that the policy objectives of the Act remain valid. The review further concluded that the legislation could be improved with some refinements in several areas to help meet the Act's objectives.[17] A separate independent operational

[17] The report was tabled in Parliament on 28 March 2006 and can be found at www.fairtrading.nsw.gov.au

review was also conducted and proposals for legislative amendment will be submitted for consideration by government.

The Tribunal has eight jurisdictional Divisions, namely:

- Tenancy Division
- Home Building Division
- Motor Vehicles Division
- General (Consumer) Division
- Strata and Community Titles Division
- Retirement Villages Division
- Consumer Credit Division
- Residential Parks Division

The Tribunal has proved to be an effective low-cost service for the settlement of a wide range of consumer problems. The majority of applications lodged at the Tribunal cost $31.00. Pensioners and students pay only $5.00.

In 2005-06 the Consumer, Trader and Tenancy Tribunal received 61,089 applications, conducted, 74,647 hearings and finalised 68,125 matters.

- In 2005-06 85% of Tribunal applications were listed for the first hearing within 28 days of lodgement.
- In 2005-06 77% of Tribunal applications were determined prior to or at the first hearing.
- 85% applications were listed for hearing within 28 days of lodgement.
- 91% Tenancy Division applications (approximately 78% of the Tribunal's workload) were listed for hearing within 28 days of lodgement.

The Consumer, Trader and Tenancy Tribunal Act enables the Commissioner for Fair Trading to request the Tribunal to provide information relating to any investigation or disciplinary action that is being carried out under any legislation in the Fair Trading portfolio. The Tribunal must comply unless doing so would compromise proceedings.

Self and non-regulatory approaches

25. *What principles and considerations should guide the use of self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework? What are the best examples of effective self-regulation, co-regulation and non-regulatory approaches and why have they worked well in these cases? Is enough use currently made of such measures? If not, where are the main opportunities for further uptake?*

Self-regulation

A considerable amount of work has been done on self-regulation. One comprehensive study is *Grey-Letter Law,* the report of the Commonwealth Interdepartmental Committee on Quasi-regulation (December 1997). This report defines self-regulation as 'any regulatory regime which has generally been developed and funded by industry, and is enforced exclusively by industry'. The report contains very useful checklists for the selection of regulatory options, which are replicated in the Best Practice Regulation Handbook issued by the Commonwealth Office of Best Practice Regulation. In the case of self-regulation, the checklist suggests it should be considered where:

- there is no strong public interest concern, in particular, no major public health and safety concern;
- the problem is a low risk event, of low impact/significance;
- the problem can be fixed by the market itself, ie there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements (industry survival, market advantage).

In addition, for self-regulatory industry schemes, success factors include:

- presence of a viable industry association
- adequate coverage of industry concerned
- cohesive industry with like minded/motivated participants committed to achieve the goals
- voluntary participation can work – effective sanctions and incentives can be applied, with low scope for the benefits being shared by non-participants
- cost advantages from tailor made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanism. (p55)

The Best Practice Regulation Handbook (p.4-7) adds that 'care must be taken to ensure any proposed self-regulatory approaches are not anti-competitive, for example, by restricting the entry of new market participants or discouraging the adoption of new technology'.

Both Commonwealth and State regulatory impact assessment procedures require consideration of self-regulation as a regulatory option. As a general rule, when an issue causing consumer detriment has become of sufficient concern that regulatory intervention is being considered, it has already passed the threshold set by this checklist.

Co-regulation

The Best Practice Regulation Handbook (p.4-8) defines co-regulation as typically referring to 'the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced'.

One common example of co-regulation is the provision for mandatory codes of practice in State Fair Trading Acts. The Report of the National Competition Policy Review of the NSW *Fair Trading Act 1987* (2002) described this form of co-regulation as follows:

'The Fair Trading Act enables the prescription of mandatory codes of practice by regulation (Part 7). To create greater certainty within the consumer-trader relationship,

these codes outline minimum standards of legal behaviour in respect of industry-specific practices of direct concern to consumers by clarifying rights, obligations and expectations. In particular, such mandatory codes offer dispute resolution procedures as an alternative to redress through the courts and describe code administration arrangements. They are expressed in plain language. Development of codes under these provisions involves consultation with interested parties and requires an indication that associated traders will abide by the proposed code in their dealings with consumers. Once approved, the code becomes a regulation under law, so all members of the industry are required to comply with it.'

In 2003 the NSW Government amended the Fair Trading Act to repeal Part 7. The Steering Committee which conducted the National Competition Policy review of the legislation found that mandatory codes of practice were anti-competitive in effect. Restrictions within a mandatory code on how a trader may operate can be compared to restrictions within specific purpose legislation. Accordingly, a mandatory code that prevents certain practices or establishes minimum standards of trading will impact on competition by potentially restricting entry to the marketplace to those who can comply with the standards and by limiting product innovation by the minimum standards imposed.

The review also noted that the legal standing of mandatory codes prescribed under the Fair Trading Act has been questioned in a 1998 judgment by the NSW Court of Appeal in respect of the case of *Murphy v Overton Investments* concerning the Retirement Village Industry Code of Practice. The judgment raised doubts about the effectiveness of prescribed codes of practice as regulatory mechanisms, due mainly to difficulties in enforcement. It highlighted the conflict between the adoption of an instrument set in a broad framework, employing a flexible format to set guidelines for good practice (a code), and the setting of rules that require mandatory compliance.

The Court found that, in so far as the code had the effect of overriding express agreements between parties, it was ineffectual. In the result, the terms of the code were subsequently codified in the *Retirement Villages Act 1999*. Of the three mandatory codes once prescribed under the Fair Trading Act, all have been absorbed into specific purpose legislation.

The NSW Government accepted the argument that, as a matter of regulatory policy and practice, mandatory codes do not justify their anti-competitive effect. The Government considered that any marketplace failure is best addressed by relevant legislative prescription rather than the making of a potentially unenforceable code of practice.

In 2006 the NSW Fair Trading Act was amended to provide for the prescription of a mandatory code of conduct for the motor vehicle insurance and repair industries. Unlike the repealed code provisions, which dealt with the relationship between industry and consumers, the amendment relates to an industry code of practice designed to regulate the conduct of participants in an industry in their dealings with each other.

The Industry Code for Motor Vehicle Repairers and Insurers was initially developed as a voluntary national code in response to a recommendation by the Productivity

Commission in 2005 that the Australian Government should facilitate and promote the development and implementation of an industry-wide code of conduct in respect of the relationship between insurers and repairers as soon as practicable.

In 2006 the dispute between insurers and smash repairers highlighted the need to put rules into place that would ensure a fair deal for consumers and a sustainable industry for both repairers and insurers.

The NSW Government believed that the best way that this could be done was by making the voluntary national Motor Vehicle Insurance and Repair Industry Code, released on 1 June 2006, enforceable under NSW legislation.

Adoption of the national code assists national consistency in the standards adopted and avoids the confusion which could arise from having different rules applied in NSW, particularly if the code is mandated at national level sometime in the future.

The NSW Government believes that the code needs to be mandated to ensure that the standards it puts into place can be enforced. Essentially, the enforcement and remedies provisions of the Fair Trading Act will be triggered if a dispute between the insurer and repairer has not been resolved by dispute resolution procedures specified under the code or if the insurer or repairer refuses to take part in those procedures. The legislation is intended to provide for fair, timely and transparent conduct between insurers and repairers so that consumers are not unduly inconvenienced or unfairly treated due to the business practices in or disputes between the insurance and repair industries.

Because of the emphasis on specific industry solutions, co-regulation is more appropriate when industry-specific, not generic, regulation is being considered.

Non-regulatory approaches.

Information and education strategies are non-regulatory approaches which aim to improve markets by giving consumers the means to make better informed decisions and/or by persuading businesses to alter their behaviour so as to increase customer satisfaction, enhance reputation and improve performance by giving them a competitive edge.

Both Commonwealth and State regulatory impact assessment procedures require consideration of non-regulatory options such as information and education campaigns.[18] Such approaches are considered to empower consumers without restricting their choices or imposing a 'one-size fits all' solution on them. As far as business is concerned, there are no legally binding rules or government-imposed sanctions to encourage good behaviour.

The limitations of disclosure as a regulatory option (see response to issue 14 above)

[18] See, for example, the Best Practice Regulation Handbook, pB-14

also apply to information strategies. Deborah Cope[19] identified four problems:

- consumers who have access to information still make poor choices;
- consumers faced with complex information often use proxies and shortcuts to assist decision-making, which may result in them ignoring important relevant facts;
- raising awareness and changing attitudes does not automatically lead to behavioural change; and
- consumers need the skills to access and understand information before its provision will be effective.

As with any regulatory or non-regulatory option, the choice of instrument will vary depending on the nature of the problem, the industry involved and the characteristics of the consumers most affected.

For example, in 2003 New South Wales raised the issue of the funeral industry with the Standing Committee of Officials of Consumers Affairs. At that time there had been consistent media interest in the operation and regulation of the funeral industry at both the state/territory and national level during the previous 12 months. This included a report on the conduct of funeral directors in Australia on the ABC's TV program, *Four Corners* and newspaper articles and radio commentaries on the rising cost of funerals.

NSW reported to SCOCA on its decision to undertake a consumer education campaign to improve consumer understanding of funeral issues. This was to include the development of a guide to assist consumers make decisions about the purchase of funeral goods and services at a time of bereavement, when they may not be inclined to 'shop around'. SCOCA found that raising education and awareness about the funeral industry was the most appropriate policy response and agreed to adapt the content of the NSW publication, *A consumer guide to funerals,* for use in other jurisdictions.

One example of the use of information and education strategies for business is the publication of material such as the Good business matters kit, available from the NSW Office of Fair Trading website. Apart from guidelines to explain fair trading legislation, the kit contains a fact sheet on *Building customer relationships and handling complaints.* The message it contains, that good customer service is good business, is one that is reinforced by Fair Trading officers attempting to negotiate a resolution to consumer complaints.

26. *Would there be benefits from government support for a consumer advocacy body and would they outweigh the funding and other costs involved? Should such a body's role be limited to advocacy, or should it also be responsible for bringing forward consumer complaints? Do consumer advocacy bodies adequately represent the interests of all consumers? If not, what other means could be used to elicit the views of consumers? Is there a need for greater research into consumer and market behaviour to inform policy development? If so, who should be responsible for carrying out and resourcing such work?*

[19] Deborah Cope, PIAC Economics, *Information and education strategies for modern consumer policy,* Presentation to Third National Consumer Congress, Melbourne 15-17 March 2006.

One of the principles set out in the United Nations Guidelines for Consumer Protection refers to the '*Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them'*. The Productivity Commission highlighted the importance of consumer advocates to the development of a competitive market in a recent report, stating that: 'In a reform-specific context, it is the role of consumer advocates in providing a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to higher prices, reduced service quality or less market innovation, that is most relevant.' [20]

Consumer groups argue that they cannot carry out these functions effectively without government funding. Following the National Consumer Congress in Sydney in March 2005, the Consumers' Federation of Australia made representations to the Standing Committee of Officials of Consumer Affairs indicating its belief that there is a need for further research into consumer issues and for a stronger consumer voice in Australia. The CFA argued that Australian consumer organisations are not sufficiently resourced to undertake the level of consumer services and advocacy they are currently expected to provide. To respond to these concerns, the CFA proposed that a national consumer research and advocacy body be established, citing the UK's National Consumer Council as an example.

The UK National Consumer Council is a non-departmental government body. Its board is appointed by the Secretary of State for Trade and Industry and about 81 per cent of the Council's income is from a grant-in-aid from the Department of Trade and Industry. The National Consumer Council's role is to promote the interests of consumers through research, supporting consumer representatives and working with decision-makers to campaign for change. The Council has no statutory powers and does not give advice, nor intervene in individual cases or consumer complaints against providers of goods and services.[21]

At its meeting in April 2005, the Ministerial Council on Consumer Affairs discussed the importance of consumer focussed research to the development of consumer policy and asked officials to develop a structure for undertaking greater research into consumer concerns and trade practices, so as to assist in the development of the policy agenda. Although Ministers agreed to fund consumer research, there was no agreement to fund consumer advocacy. The first research project, a baseline study of consumer product-related accidents, is due to be completed in October 2007.

In Australia, consumer organisations tend to have a specific, rather than a broad based, approach to consumer issues and they often focus on service delivery. In market sectors such as consumer credit and tenancy there are a wide range of non-government consumer organisations operating at State and regional levels, whereas other market

[20] Productivity Commission, *Review of National Competition Policy Reforms – Discussion Draft*, Canberra, 2004, p301

[21] www.ncc.org.au

sectors, such as building, real estate and motor vehicles, have a poor level of representation. Government funding models tend to link funding of the community-based organisations to service delivery, with fewer resources available for general policy research and advocacy. Nevertheless, organisations such as the Tenants' Union of NSW and the NSW Consumer Credit Legal Centre are active and effective advocates on behalf of their constituents.

If consumer advocacy on a more general basis is to be funded, the Commonwealth Government would have to make a major contribution. Under the formula used by the Ministerial Council on Consumer Affairs when funding contributions by members are determined, for projects involving the Commonwealth and all States and Territories the Commonwealth meets thirty per cent of the cost. To date, the Ministerial Council has not embraced the idea of a body like the UK National Consumer Council. It may be preferable to consider a model which takes account of Australia's federal system.

The UK *Enterprise Act 2002* makes provision for designated consumer bodies, such as the National Consumer Council, to make super-complaints. A super-complaint, as defined by section 11(1) of the Act, is a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the UK for goods and services is or appears to be significantly harming the interests of consumers'. Within 90 days after the day on which a super-complaint is received the UK Office of Fair Trading must say publicly how it proposes to deal with it.

Under the NSW Fair Trading Act, one of the functions of the Commissioner for Fair Trading is to receive complaints from persons on matters (including fraudulent or unfair practices) relating to the supply of goods or services, or the acquisition of interests in land, and deal with any such complaints in an appropriate manner, including investigating the complaint, referring the complaint to any other body that the Commissioner considers to be best able to take action, or providing advice in relation to the complaint.

A complaint may concern an individual consumer's transaction or it may be made by a consumer advocacy group on behalf of many consumers. In either case, if there is evidence of a breach of legislation or a systemic problem within an industry sector, complaints will be dealt with in accordance with the Office of Fair Trading's compliance and enforcement procedures. The concept of the 'super-complaint' institutionalises what is, in fact, a common practice in Australian fair trading/consumer protection agencies.

Jurisdictional responsibilities

27. *What are the main areas of duplication, overlap and inconsistency in consumer regulation across jurisdictions (and with New Zealand)? How significant are the costs of this inconsistency, overlap and duplication relative to any benefits provided?*

Previous reviews (such as the Commonwealth Government's Taskforce on Reducing the Regulatory Burden on Business) have identified the areas of duplication, overlap and inconsistency in consumer regulation. These include product safety, trade

measurement, business registration, occupational licensing, direct selling (particularly telemarketing), financial services and the non-core provisions of the Trade Practices/Fair Trading Acts. Considerable progress has been made in most areas to harmonise or otherwise minimise the impact of differences, where considered necessary and appropriate to do so.

In January 2007 the Commonwealth Government announced an independent review (the Bethwaite Review) to examine ways to streamline Australia's food regulations and make them more nationally consistent. The Australian Competition and Consumer Commission, through the Trade Practices Act, has a national role in addressing misleading conduct generally. In November 2006 the ACCC published the *Food and beverage industry: food descriptors guideline to the Trade Practices Act,* which aims to help the food industry comply with and consumers understand the relevant provisions of the Act. State and Territory Food Acts, based on the Model Food Provisions, contain sections which address misleading conduct relating to the sale of food and false description of food. The Bethwaite Review will consider such issues as the appropriate role, if any, for the ACCC in relation to enforcement of the expanding area of food product claims (such as organic, free range, natural etc). NSW has made a submission to the Bethwaite review.

In its report, *Investigation into the burden of regulation and improving regulatory efficiency* (October 2006), the NSW Independent Pricing and Regulatory Tribunal recommended that the Government continue working with other jurisdictions, through continued active participation in Council of Australian Governments and Ministerial Council on Consumer Affairs, to identify opportunities where greater national harmonisation of consumer protection regulation provides net benefits to the community. IPART listed unfair contracts as one such opportunity and noted that reforms should remove unnecessary regulatory burdens and address ineffective protection created by jurisdictional differences, while achieving consumer protection outcomes for the net benefit of the community.

In 2006 the NSW Legislative Council Standing Committee on Law and Justice held an inquiry into unfair terms in consumer contracts. The Final Report was tabled in Parliament on 23 November 2006 and recommended that the NSW Government seek an amendment to the *Fair Trading Act 1987* to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts. The report also recommended that the Government model its amendment on Part 2B – Unfair terms in consumer contracts - of the *Fair Trading Act 1999* (Vic). The NSW Government is preparing a response to the Report.

There is little duplication between Commonwealth and State legislation in relation to the tenancy sector, which is primarily a State responsibility. There is some inconsistency between State jurisdictions, which to date has not been identified as a major problem because of the nature of a tenancy market dominated by 'mum and dad' investors operating within State borders. There would be practical difficulties for Commonwealth bodies enforcing regulation on a local or regional level.

28. Are there areas of regulatory responsibility that could readily be consolidated

within one level of government? Are there areas which could be harmonised across jurisdictions? What particular considerations arise in relation to facilitating greater integration with New Zealand and international trade more generally?

See response to issue 27 above.

Gate-keeping and review arrangements

29. *How effective are the current regulation making and review processes (at both the Commonwealth and State and Territory level) in facilitating the development of best practice consumer regulation? Are there ways to ameliorate some of the difficulties in measuring the benefits and costs of consumer regulation without compromising the integrity of the assessment process?*

State level

In 2006 the Independent Pricing and Regulatory Tribunal of NSW undertook an overarching review of the regulation that affects the NSW community, at the request of the NSW Government. The Tribunal's review identified stakeholder concern that the current processes exhibit systemic failure to adopt good regulatory practice, imposing unnecessary burdens on business and the community. The Tribunal's assessment was that the current NSW framework for regulatory process includes the core elements of accepted good regulatory practice, but that regulators did not consistently apply the existing rules. The Tribunal therefore recommended that the Government take immediate steps to strengthen and enforce NSW processes for regulatory design, development, implementation and monitoring.

Cutting red-tape and improving the quality of regulation is a priority of the NSW State Plan and the NSW Government has announced a number of reforms to the regulatory process. These reforms include:

- development of a new best practice guide to be followed by policy makers and regulators in the development of all proposals;
- enhanced requirements for the preparation of formal Regulatory Impact Statements for significant proposals;
- strengthening the role of the Minister for Regulatory Reform as a champion for better regulation making in Cabinet; and
- the establishment of a Better Regulation Office to be an advocate for, and source of assistance for, best practice regulation making across government.

Commonwealth level

The Ministerial Council on Consumer Affairs considers consumer matters of strategic national significance and develops policy and legislative responses, where appropriate. Under the Council of Australian Governments' *Principles and Guidelines on National Standard Setting by Ministerial Councils and National Regulatory Bodies,* a Regulatory Impact Statement must be prepared for all regulatory proposals which would affect business or impact on competition. Draft Regulatory Impact Statements

must be referred to the Commonwealth Office of Best Practice Regulation (formerly the Office of Regulation Review) for assessment and advice as to whether the draft meets the requirements set out in the COAG Principles and Guidelines.

On 10 February 2006, COAG agreed that enhanced best practice regulation making arrangements would apply to Ministerial Councils. Revised guidelines on best practice regulation making for Ministerial Councils and National Standard Setting Bodies are currently being developed by jurisdictions for COAG's consideration.

The NSW Office of Fair Trading has been involved, either as lead agency or member of a working party, in the development of several regulatory proposals that require assessment of a Regulatory Impact Statement by the Office of Best Practice Regulation. In those instances where the Office of Best Practice Regulation considers that the Regulatory Impact Statement does not meet COAG requirements and this opinion conflicts with opinions held by State Government agencies, a stalemate can develop. Progress can become impeded and an incentive develop for States to act on a state-by-state basis.

The cost/benefit approach underlying the RIS process requires that both sides of the equation are quantified. To date the focus of debate has been on quantifying business costs. It is very difficult to quantify the costs to consumers or the benefits (to business and consumers) of regulatory and non-regulatory options. (See also response to issue 30.) In an attempt to remedy this problem, the Australian Securities and Investments Commission recently commissioned research to develop practical and realistic techniques for quantifying consumer costs and benefits.

30. *Beyond procedural inertia, and/or delays in modifying regulations to take account of changed market circumstances, are there institutional factors that have helped to sustain regulation that does not provide a net benefit to the community? How could these be addressed? What other improvements could be made to current gatekeeping and review arrangements?*

The Office of Fair Trading, when lead agency on national projects under the auspices of the Ministerial Council on Consumer Affairs, has had considerable experience with the Commonwealth Government gatekeeping and review arrangements. The following comments are made on the basis of this experience:

- arrangements need to have the flexibility to deal with the realities of consumer and trader behaviour and accessible data rather than a theoretic construct of how the system should work. They should also take into consideration available government resources and the need for a timely response to market circumstances;
- consideration may need to be given to an appeal or review mechanism, in the event of a stalemate between the agency certifying the regulatory impact statement and the agency proposing regulation;
- the use of the Business Cost Calculator as a tool for costing proposals is problematic. This model requires intimate knowledge of business practices and costings and is impractical as other than a guide to the kind of costs that should be

considered. Industry is reluctant to supply such details and governments are not in a position to verify any costings given.

Regulatory and oversighting bodies

31. *Do consumer regulators have the appropriate structure, resources, skills and powers? Is there scope to consolidate industry regulators, or to subsume their functions within generic bodies? Are there tensions or problems where regulators are involved in both policy making and enforcement, and/or in enforcement and advocacy, and how might these be addressed? Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?*

The structure and scope of consumer affairs agencies varies considerably between jurisdictions. As a consequence of the broad scope of consumer policy issues, several institutions contribute to the administration of Australia's consumer policy framework. Together, these institutions are responsible for developing, implementing and reviewing policy and regulation, monitoring and enforcing compliance with regulation, and providing dispute resolution services and advice to consumers and traders.

The Australian Competition and Consumer Commission is an independent statutory authority. While it is responsible for administering the Trade Practices Act, the Competition and Consumer Policy Division of the Commonwealth Treasury takes responsibility for developing and reviewing consumer policy. In contrast, none of the State consumer agencies is a statutory authority; rather they are parts of broader government departments. However, each of the heads of the State agencies holds a statutory position (in New South Wales, the Commissioner for Fair Trading).

The responses to issues 8, 12, 17 and 22 address aspects of the shared responsibility of Commonwealth and State agencies. A major advantage of the arrangements is the capacity to respond quickly and effectively to market conduct. State agencies deal with individual consumer problems and localised trader behaviour through a combination of information and education, complaint handling and inspection services. Systemic market misconduct and fraudulent behaviour may occur on a state-wide, cross-border, national or international basis. There are inter-agency protocols to assist in determining whether enforcement action is taken at Commonwealth or State level.

New South Wales does not recommend any changes to the current institutional framework for consumer protection in this state.

The Australian Competition and Consumer Commission was established with the express intention of reflecting the synergies between competition and consumer policy. Although this is a matter for the Commonwealth Government, New South Wales does not recommend any change.

32. *Are the Ministerial Council arrangements working well? If not, what changes are required? Would changes to other policy oversighting arrangements help to deliver better outcomes for consumers?*

Under the auspices of MCCA the network of Fair Trading agencies, including the Commonwealth's ACCC and ASIC as well as the Commonwealth Treasury and NZ Commerce Commission and Ministry of Consumer Affairs, strives to address the need for national consistency of legislation and administration in its shared work in policy development and increasingly in operational activities. Relatively recently MCCA issued a directive that in their compliance work these agencies should look to achieving nationally beneficial outcomes and collaborative approaches wherever possible. NSW was a strong advocate of this.

MCCA's procedures and strategic agenda were reviewed by Ministers during 2006 with the aim of expediting decision making and achieving tangible benefits for consumers. The main change was to adopt a more streamlined project management approach in place of multi-jurisdictional project teams. As a result, jurisdictions are expected to accord national projects higher priority in their agency business plans. It is too early to say whether this approach will have the desired outcome.

Stakeholders are critical of the delays experienced between the identification of a consumer issue, its adoption as a strategic national project and the implementation of a regulatory (or non-regulatory) solution. One of the contributory factors is the requirement for Ministerial Councils to operate in accordance with the *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* issued by the Council of Australian Governments. (See issue 29 above.) Overlaid on these requirements are the regulatory assessment, Cabinet and Parliamentary procedures of each jurisdiction. Add to these the differing levels of resourcing and expertise in each jurisdiction, variable electoral cycles and a lack of alignment in political platforms.

The rationalisation of aspects of the policy oversighting arrangements has the potential to improve outcomes. For example, once agreement has been reached that a particular issue has the status of a national project, one option would be for the Council to also agree on which jurisdiction's regulatory assessment procedures are to apply. In effect, this would mean mutual recognition of procedures between the Commonwealth, States and Territories and the amendment of the COAG Principles and Guidelines to provide for the change. (See also the response to issue 30 above.)

33. *Is there a need for improved policy and enforcement arrangements between Australia and New Zealand?*

This is a matter for the Commonwealth and New Zealand Governments.