Ministerial Council on Consumer Affairs

Working Party on Consumer Policy

Information Paper on Consumer Policy Issues

May 2007

This Information Paper is intended to provide information to the Productivity Commission. The Paper does not represent the policy position of the Ministerial Council on Consumer Affairs or the individual members of the Council.

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Overview

The Ministerial Council on Consumer Affairs established a Working Party on Consumer Policy in May 2006 to consider the current state of consumer policy and to develop options for improvement. This followed the 2006 National Consumer Congress, which highlighted that improvements are needed in the design and implementation of consumer policy if Australia is to achieve world's best practice.

The establishment of the Working Party also recognises that consumer policy will be a significant focus of other reform activities being undertaken in Australia, including a Productivity Commission Inquiry, COAG reforms and regulatory burden reduction projects across the country.

In line with its Terms of Reference (appendix 1), the Working Party has developed a series of information papers that identify and analyse issues relevant to developing options for the reform of Australia's consumer policy framework. While the papers do not comprehensively analyse all consumer policy issues, they highlight issues that are critical to understanding the current consumer policy environment, particularly the role of consumer policy and to analysing whether consumer agencies, consumers and businesses are maximising their contribution to achieving consumer policy objectives. They are intended to inform the current policy debate rather than draw policy conclusions and do not represent the policy position of the Ministerial Council on Consumer Affairs or the individual members of the Council.

To put these papers in context, this overview outlines the regulatory and institutional framework that establishes Australian and New Zealand consumer policy, and summarises key themes that emerge from the papers.

Consumer policy in Australia has not been comprehensively reviewed for some time. In 1976, the Swanson Review[1] looked at the operation and effectiveness of the *Trade Practices Act 1974 (Cwth)* (TPA), including its consumer protection measures. The review supported consumer protection laws that are "administered on a local basis as far as possible"[2], but noted the need for greater cooperation among the states and between the states and the Commonwealth. It recommended uniform laws on prohibitions of unfair practices and implied conditions and warranties[3]. The comments of the Swanson Review were heeded but it was several years before substantive action was taken.

In 1983, a meeting of the Standing Committee of Consumer Affairs Ministers (later renamed the Ministerial Council on Consumer Affairs) reflected a strong commitment to nationally uniform consumer protection legislation, noting that

[1] Trade Practices Act Review Committee '*Report to The Minister for Business and Consumer Affairs*', Published by Australian Government Publishing Service, Canberra, 1976
[2] Ibid p. 58
[3] Ibid p. 59

uniformity was "prima facie desirable." This view, which seemed to provide the impetus for action, was largely based on the 1982 report of the Victorian Consumer Affairs Council[4]. The Council's inquiry into deceptive trade practices was the first to recommend States adopt the whole of Part V of the Commonwealth TPA.

Between 1985 and 1992 each state and territory passed its own Fair Trading Act or equivalent. Each of these Acts borrowed heavily from the consumer provisions in the TPA.

Since these reforms, consumer markets have become broader and more complex. Our understanding of consumer decision making and the problems arising in consumer markets is also more comprehensive, and we are more aware of the impacts of poorly designed and unnecessarily costly regulation.

Arguably, society's expectations have also changed. The community expects governments to take action to protect consumers against products that could cause significant harm, and to include consumers in policy development and implementation processes. In addition, there is an increasing expectation that businesses will be socially responsible. Accommodating these changes requires new approaches to designing and implementing consumer policy. While consumer policy has adapted, addressing new issues as they arose, it is timely to take stock and consider whether the current framework and use of policy tools represents best practice.

Consumer policy's regulatory and institutional framework

Demands for systemic consumer protection laws grew after the 2nd World War. In the 1960s, basic consumer rights were articulated and in the 1980s were adopted under the United Nations Guidelines for Consumer Protection, including the right to safety, to be informed, to choose, to be heard and to redress, with recognition that consumers often face imbalances in economic strength, education levels and bargaining power.

Australian jurisdictions now have substantial consumer policy regimes. The main pieces of general consumer legislation are the Commonwealth's TPA and the state and territory Fair Trading Acts[5]. The TPA is administered by the Australian Competition and Consumer Commission (ACCC) and the Fair Trading Acts are administered by state or territory fair trading agencies.

There is significant consistency between the TPA and the state Acts. The TPA's coverage is limited by constitutional constraints. It applies to the sale of goods and services by corporations and within the Territories, to interstate trade, and to trade conducted through the telecommunications and postal systems. The state and territory Fair Trading Acts, however, apply to all

[4] Victorian Consumer Affairs Council, '*Inquiry into Deceptive Trade Practices Law*' Report to the Minister of Consumer Affairs, 03/1983, p. 48

[5] *Fair Trading Act 1999* (Vic); *Fair Trading Act 1987* (NSW); *Fair Trading Act 1987* (SA); *Fair Trading Act 1987* (WA); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1990* (NT); *Fair Trading Act 1992* (ACT).

persons, including individuals, partnerships and corporations. The TPA prevails if there is inconsistency, and each state and territory generally has a Memorandum of Understanding with the ACCC to avoid duplication of enforcement.

The structure and scope of consumer affairs agencies varies considerably between jurisdictions, reflecting in part the difficulty in defining what is consumer policy, and which aspects of consumer policy should rest with specific consumer affairs agencies.

As a consequence of the broad scope of consumer policy issues, a large number of 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 ACCC is an independent statutory authority within the Australian Government. While it is responsible for administering the TPA, the Competition and Consumer Policy Division of the Australian 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 is a position provided for in the relevant consumer protection legislation. Also in contrast to the ACCC, each of the state and territory consumer agencies is responsible for administering multiple pieces of consumer regulation — for example, Queensland's Office of Fair Trading administers 70 Acts and Consumer Affairs Victoria administers 48. Although some of these Acts regulate policy concerns outside the scope of consumer affairs.

In addition to the main consumer agencies, many other agencies separately pursue consumer policy objectives or have consumer protection as part of the rationale for some of their activities. At the Commonwealth level, such agencies include the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), Food Standards Australia and New Zealand, the Australian Communications and Media Authority (ACMA), and the Therapeutic Goods Administration (TGA).

Taking Victoria as illustrative of the States, in addition to Consumer Affairs Victoria, approximately 40 other regulators undertake some activities that could be characterized as consumer protection related activities. For example, they undertake activities or administer regulation to redress problems in the relationship between consumers and those supplying goods and services to consumers. These agencies are generally industry-specific regulators, covering sectors such as utility services, health and legal professionals, transport and education services. In the health services sector alone there are 11 regulatory agencies in Victoria, mainly administering occupational registration schemes.

The New Zealand regulatory environment is somewhat different. Without a system of states, there is only one level of regulation. The Ministry of Consumer Affairs is a semi-autonomous Ministry that sits within the Ministry of Economic Development. The Ministry develops consumer policy and regulation and facilitates accurate information flows between suppliers and consumers. The New Zealand Commerce Commission, an Independent Crown Entity, enforces consumer protection legislation, including the Fair Trading Act 1986 (NZ) and the Credit Contracts and Consumer Finance Act 2003 (NZ).

The work of the various state jurisdictions, the Commonwealth and New Zealand is co-ordinated through the Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Officials of Consumer Affairs (SCOCA). MCCA considers consumer affairs and fair trading matters of strategic national significance and, where appropriate, develops a consistent approach to those issues. SCOCA supports the role of MCCA but also considers operational issues. The structures, roles and priorities of MCCA and SCOCA are discussed at attachment 2.

The role of consumer policy

Several of the attached papers raise issues related to the role of consumer policy. They recognise that recent competition policy initiatives have focussed on improving competition and therefore the efficiency of the supply side of markets. However, they also highlight that the benefits of greater competition will not be realised unless consumers are empowered to participate actively in markets and are able to clearly signal to traders the products and services they want.

The papers also discuss the dual objectives of consumer policy — promoting economic efficiency and social equity. In addition to ensuring markets function effectively, consumer policy has a role in ensuring that consumers, particularly vulnerable and disadvantaged consumers, do not suffer unacceptable levels of harm as a result of purchasing goods and services. Often, but not always, economic and social objectives work together, and improving market efficiency will benefit all consumers. But there are cases where certain groups or individuals can suffer unacceptable levels of detriment, even if the market is efficient. The community expects consumer policy to address such problems.

A further issue is the contribution that consumer policy can and should make to achieving social, economic and environmental sustainability. This issue is emerging in line with the increasing emphasis on policy-makers to recognise the interactions between policies and encourage coordination so that the overall benefits to society are maximised. The attached paper on consumer policy's role in achieving sustainable economic and social goals (attachment 3) notes that society's interest in broader social and environmental concerns is growing and more consumers, if they have the necessary skills and information, are willing to take both personal and social benefits into account when they choose products and services.

Ultimately all stakeholders, consumers, government and business, contribute to achieving consumer policy objectives. But with changing markets and community expectations the scope and nature of each sector's role, and the systems and structures necessary for them to take on that role effectively, need to be reconsidered.

The paper on the need for government, business and consumers to share responsibility for achieving consumer policy outcomes (attachment 4) notes that responsibility for well functioning ethical markets is shared. Governments not only have a legitimate role implementing regulation but also in assisting consumers to be aware of their rights and protect their interests, and an obligation not to undermine the incentives for traders to act in the interest of consumers.

Where possible, consumers should be encouraged to take responsibility for gathering information and making well-considered choices that are in their interest. Consumers, however, often have unequal bargaining power and lack the information or skills to ensure they make good choices. They may need help from government to maximise their ability to protect their interests. Strategies, such as consumer education, facilitate consumer empowerment, raising awareness of pitfalls and potential problems and expanding consumers' capacity to deal with those problems.

Traders also have a responsibility to know their legal obligations, abide by the law and trade in a fair and ethical manner. Beyond this business often engages in activities that benefit consumers. Codes of practice, industry dispute resolution schemes and business involvement in consumer education are examples of ways business can recognise and respond to the social consequences of their actions. While such strategies benefit business by improving their reputation, increasing consumer confidence and giving ethical businesses an advantage over their competitors, business may not always respond to these benefits because they are not aware of or have difficulty capturing the financial gains. There is a role for government to assist business to be aware of their obligations to consumers and the potential financial benefits of good customer service, to respond quickly and effectively to consumer complaints and to recognise the problems faced by vulnerable and disadvantaged consumers.

It is important, however, to recognise the limitations of these policies. While strategies that focus on influencing consumers' and traders' behaviour can improve outcomes they will not always guarantee knowledgeable, confident, assertive and self-reliant consumers. The community, therefore, expects the government to take action when market based responses are not enough, and to take a firm hand against fraudulent and unfair practices.

For each sector to maximise their contribution to achieving consumer policy objectives it is necessary that they have the right skills, tools, incentives and supporting structures.

- Business needs a predictable and clear regulatory environment that does not impose excessive costs.
- Consumers need to be empowered to participate in regulatory processes.
- Consumer agencies need access to the right regulatory tools and to work within efficient institutional structures that reinforce the development, implementation and enforcement of effective regulation.

Facilitating consumer-focussed business practices

All governments are concerned about reducing the regulatory costs on business. The attached papers discuss two key issues regarding the business regulatory costs that stem from consumer policy. First, the need to achieve an appropriate balance between consumer empowerment and ensuring consumers and businesses are not burdened by unnecessary regulation or complexity (attachment 5). For governments to achieve a good balance between consumer empowerment and the cost of regulation they need to have a good understanding of the economic and social problems that arise in consumer markets. Consumer policy is not intrinsically detrimental to markets, as insufficient or ineffective market regulation can undermine consumer confidence and weaken consumer's ability to drive competition by being discerning and demanding in their dealings with business.

But the tools used to empower consumers and regulate markets are important and care is needed to ensure that regulation is not unnecessary, overly complex or burdensome. Achieving balance depends on having effective policy development processes that recognise the costs of regulation and can weigh those costs against all the benefits, economic and social, including benefits that are difficult to measure quantitatively. It is also important to have a coherent and strategic rationale for intervention, which reduces reliance on reactive policy making and accounts for economic and social government objectives.

Second, an issue, particularly for large businesses (as well as consumers), is the cost of regulatory duplication between Australia and New Zealand and within Australia. These concerns have been reflected in the Productivity Commission report on national competition policy reforms and the report of the Taskforce on reducing the regulatory burden on business. Both inquiries raised inconsistencies in consumer policy regulation as an issue and recommended a review of the consumer policy framework.

The paper on the benefits and challenges from greater national and international trade in consumer products (attachment 6) notes that, while trade can bring considerable benefits for consumers and traders it also carries challenges. Because consumers are buying more goods and services produced or sold in other jurisdictions, they can have more difficulty protecting their rights and seeking redress if something does go wrong. These challenges are compounded by new technology, which, while bringing many benefits to consumers, also brings new problems (for example maintaining the security of personal information) and can provide a convenient medium for

unscrupulous operators to exploit consumers through scams. New strategies may be needed to help consumers avoid these new problems. But care is also needed to ensure that the approaches chosen do not undermine the benefits to business and consumers of greater trade, or unnecessarily increase business costs.

In addition, growing national and international trade increases the costs to business of incompatibility among the regulations in different jurisdictions. The paper on enhanced integration between the Australian and New Zealand economies and consumer policy (attachment 7) discusses inter-country issues, noting that there are already initiatives that promote consistency and integration but there are still areas where better integration, could be explored, such as better information sharing, progressing processes in areas where more integration has been identified as a priority, and looking at ways to improve co-ordination in enforcement activities between Australia and New Zealand. The past success of specific initiatives in areas like food standards and labelling, and accrediting product safety assessment bodies, indicate that further analysis in specific areas of consumer regulation could also be very useful in improving the integration of consumer policy.

Within Australia, the benefits and costs of greater consistency are also important to understand and recognise. The paper on national consistency and uniformity (attachment 8) recognises that there are potential benefits that could be achieved through greater consistency or national harmonisation in some areas. It discusses the various approaches to improving harmonisation, recognising that there are significant barriers to overcome to get governments to agree on an appropriate harmonisation model. Models often involve trade-offs between the degree of uniformity and the flexibility to change the legislation in response to emerging issues or problems that are specific to particular regional markets.

There are also costs and benefits of the legislative reforms that accompany harmonisation. The benefits are concentrated with those businesses that bear the costs of any inconsistencies, including businesses that trade or operate interstate or could potentially trade interstate if there was greater harmonisation. The costs of understanding and adapting to new legislation are borne by all businesses, including those (often small businesses) who do not operate interstate. Again, regional market issues may be significant if the costs and benefits of reform are unevenly distributed across consumers and businesses in different regions.

Empowering consumers

There is already considerable literature about the benefits and impediments to empowering consumers to protect their own interests in consumer markets. As markets and products become more complex, policies must respond to help consumers deal with a more complex environment. For example, as noted previously, the paper on the benefits and challenges from greater national and international trade in consumer products (attachment 6) notes that such trade combined with the evolution of online markets poses

challenges for consumers such as access to redress and susceptibility to scams.

Several of the information papers also identify the importance of understanding how consumers make decisions and deal with risk and uncertainty. Traditional approaches to consumer regulation, which take a narrow view of the problems consumers face obtaining and using information, can often generate unsuccessful policies that do not overcome the underlying information problems. The use of information disclosure is a good example. While access to information is essential for consumers to make informed decisions it is important to recognise that sometimes consumers ignore or misinterpret the information provided. In such cases simply providing information may be insufficient to solve information problems in consumer markets. In addition, providing too much information can be counter productive. When faced with large amounts of complex and confusing information consumers often walk away form the market or stay with their current product or supplier, in effect choosing not to make a choice. The Working Party has identified the use and effectiveness of information disclosure as an area requiring further research.

Behavioural economics provides a more sophisticated framework for analysing consumers' decision making, recognising that problems not only arise from the availability of information but also because natural biases or short-cuts in decision making cause consumers to ignore or misinterpret information. Such problems require innovative solutions.

It is not only desirable to empower consumers to protect their own interests in consumer markets but also to participate in the processes for developing, implementing and enforcing consumer regulation. The paper on the role of consumers and consumer organisations in relation to consumer policy, research and advocacy (attachment 9) notes that consumer involvement in government decision making ensures that policies are better informed and gain trust and legitimacy.

While consumer's participation in policy development is recognised as desirable in Australia and overseas, the paper notes that individual consumers may not have the capacity or interest for sustained or organised involvement in policy processes. The development of good policy is, therefore, assisted by input from consumer organisations. However, consumer organisations must have sufficient capacity if they are to fulfil this role. In the UK, concerns regarding capacity have been addressed by enhancing the role of the National Consumer Council, an independent government subsidised body, answerable to a government appointed board, which researches and analyses consumer policy and advocates on behalf of consumers. The National Consumer Council was strengthened recently by combining it with Energywatch and Postwatch. The UK has also changed its complaint handling procedures to introduce a 'super-complaint' mechanism. Designated consumer bodies can raise with regulators problems in markets that appear to be significantly harming consumer's interests. The regulators must investigate

'super-complaints' in a prescribed timeframe and report on the outcomes of their investigations.

In Australia, recent state initiatives have established new organisations to facilitate consumer advocacy and input into policy processes. The Western Australian Government, in partnership with the University of Western Australia, supported the creation of the Centre for Advanced Consumer Research, for example. To strengthen specialist consumer legal services and advocacy in Victoria, the Victorian Government announced the merger of the Victorian Consumer Credit Legal Service and the Consumer Law Centre of Victoria to form the Consumer Action Law Centre. In 2005, MCCA also included the issue of consumer research on its strategic agenda (see attachment 1).

Despite these improvements, there is scope to consider whether consumers' and consumer agencies' involvement in consumer policy, research and advocacy is sufficient to facilitate good policy formation, and whether the format and funding of consumer organisations needs to change to provide more effective consumer advocacy and better coordinated research.

A related issue is to ensure that consumers have access to effective legal processes to enforce their rights, when this proves necessary. In Australia, two mechanisms facilitate consumers' access to the courts. First, it is relatively easy for consumers to pursue class actions when there are multiple related claims against the same person. There may be situations, however, in which class actions are not possible or practicable. Second, several Australian jurisdictions give the consumer regulator the power to bring or fund actions on behalf of consumers.

The UK is considering a further avenue to assist consumers to access the courts, by allowing designated bodies to bring actions on behalf of consumers, subject to constraints to avoid spurious or vexatious claims or unwittingly creating a compensation culture.

Regulatory tools and Institutional structures

The effectiveness of consumer agencies depends on their:

- Having a good understanding of the problems they are trying to ameliorate so that policies are well targeted and effective,
- Applying the right policy tools in response to those problems, and
- Working within institutional structures that support effective and responsive administration and enforcement of consumer regulation, avoid conflicts of interest and encourage good governance.

Overall, policy development should recognise the need for consumer policy to be based on evidence on the operation of markets, including the behaviour of market participants. But the application of an evidence based approach to developing and implementing policies and programs needs to recognise the complexities in the economic and social problems they are trying to redress

(paper at attachment 10). 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 considered and how it is analysed.

Difficulty in getting comprehensive, useable information can mean that policy falls back on traditional approaches, without recognising the shortcomings in those processes or the potential alternatives. Overcoming these risks requires a more expansive approach to the sources of information used. Policy-makers should take into account the views of a broad range of stakeholders to gain an understanding of the values, beliefs and social norms that affect the way individuals respond to policies and how they are implemented. Further, concrete and measurable data should be combined with the experience and judgement of regulators.

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 and perfect information is never available. Judgements need to be made about future risks and how consumers will respond to those risks.

In implementing consumer policy a broad range of tools is available to government. The attached papers do not attempt to canvas all of these tools but do discuss two fundamental issues — the role of industry specific regulation and its relationship to general regulation and the regulation of contract terms. The paper on industry specific and general regulation (attachment 11) notes that both industry specific and general regulation have a role to play in consumer policy, each is suited to different types of consumer policy problems. The strengths of general regulation include its universal and consistent coverage, lower business administration and compliance costs, and a reduced risk of industry capture. Industry specific regulation, on the other hand, provides targeted solutions to problems, is sometimes easier to enforce and can be better suited to addressing problems before they occur. It is important for policy makers to carefully analyse the regulatory approach they choose. Resorting to industry specific regulation when general regulation would be sufficient, significantly increases the cost of regulation, but not introducing industry specific regulation when general regulation is inadequate, would potentially lead to significant levels of consumer detriment.

The paper on unfair contract terms (attachment 12) notes that consumer contracts are rarely negotiated on an individual basis, which provides traders an opportunity to include terms that are to the disadvantage of the consumer or unfair. In 2004, following the inclusion of unfair contract term provisions in the Victorian Fair Trading Act, SCOCA released a discussion paper examining options for addressing unfair contract terms on a national basis. One important aspect of this examination is the effectiveness of existing legal regimes, including that of unconscionability, in dealing with both procedural and substantive unfairness in contracts.

The effectiveness of consumer agencies also depends on their institutional environment. One factor affecting that environment is the split in responsibility for consumer policy between the Australian and the State and Territory governments. This split is driven by Australia's federal system of government, but it creates challenges for developing and implementing consistent and clear regulation.

Within each jurisdiction, institutional factors can either reinforce the incentives to develop and implement effective, efficient consumer policy or undermine these incentives through poor transparency and accountability, potentials for conflicts of interest and risks of regulatory capture (attachment 13). In designing institutional arrangements key questions include:

- Should the regulator have responsibilities relating to a single industry or cover similar regulation across a range of industries?
- Should the regulator have statutory independence, separating it from government or be an administrative unit of a department of government?
- How much of the regulatory process should the regulator be responsible for, should the tasks of dispute resolution and complaint handling, education, information and advisory services, policy development, administration of regulation and enforcement be separated?
- Should State and Territory regulators be established or should responsibility rest with a national regulator or some combination of national state or territory regulators?

It is not clear whether current institutional arrangements for consumer policy constitute best practice or not.

Appendix 1

MCCA WORKING PARTY ON CONSUMER POLICY

TERMS OF REFERENCE

Context

The Ministerial Council of Consumer Affairs (MCCA) is the primary collective decision making body of the Australian and State and Territory governments in relation to consumer policy. MCCA has established a Working Party to assist it in reviewing the current framework of consumer policy in Australia and the extent to which this reflects world best practice. The Australian Government has also proposed that the Productivity Commission (PC) review consumer policy. If requested, the Working Party may be able to contribute to the PC review and assist MCCA to assess the PC's recommendations.

The framework for consumer policy in Australia is well established. In Australia, the first general government consumer agency was established in 1965. The Commonwealth Trade Practices Act was introduced in 1974 and State and Territory governments introduced mirror fair trading laws in the 1980s, which operated alongside existing industry specific laws and the Commonwealth law. New Zealand also adopted similar fair trading laws in 1986. Since then, changes to the law and administrative practices in one jurisdiction have not necessarily been adopted by the other jurisdictions, resulting in some areas where the laws are no longer uniform or consistent.

Whilst many aspects of consumer policy have been reviewed in the past, there has not been for many years a comprehensive general review of the adequacy of the consumer policy framework from a national perspective. Changed economic, social and environmental circumstances suggest that a general review is now timely.

Terms of Reference

The Working Party on Consumer Policy will:

1. Develop options for reform of Australia's consumer policy framework.

   Matters that the Working Party should have particular regard to include:

   a. the benefits and challenges from greater national and international trade in consumer products;
   b. the need for consumer policy to be based on evidence from the operation of markets, including the behaviour of market participants;
   c. the appropriate balance between consumer empowerment and the need to ensure that consumers and businesses are not burdened by unnecessary regulation or complexity when governments intervene in markets;
   d. the benefits and costs of achieving greater consistency of market conduct and entry regulation of the Australian, State and Territory governments;

e. the role of industry specific regulation, including codes of conduct, and its relationship to general regulation;
f. the shared responsibility of the Australian, State and Territory governments in consumer policy;
g. the contribution of consumer policy to the development of sustainable economic and social outcomes;
h. the role of consumers and consumer organisations in relation to consumer policy research and advocacy;
i. the need for governments, businesses and consumers to share responsibility for achieving consumer policy outcomes; and
j. implications for enhanced integration between the Australian and New Zealand economies.

2. Examine current developments in consumer policy, consumer protection frameworks and institutions in comparable economies to inform the work set out above.
3. Contribute, as requested, to the Productivity Commission review of consumer policy proposed by the Australian Government.

Attachment 1: Data on the scope and activities of consumer agencies

Table 2.1 Queensland Office of Fair Trading

	Notes	2001-02	2002-03	2003-04	2004-05	2005-06
Office of Fair Trading						
Department of Tourism, Fair Trading and Wine Industry Development (DTFTWID)						
Description						
Total Number of FTE Staff	The FTE figure for 2005/06 is an estimate only				284	292
Total Expenditure	This was the budget not Actuals for the Brisbane Office				$19.621m	$19.762m
Enquiries						
Phone calls received						
Emails and letters received						
Counter visits						
Total enquiries						
Complaints	QLD OFT broad industry categories combined to best fit where possible (industry coding scheme change mid 2005 will influence breakdowns)					
Residential tenancy	Complaints are handled by the Residential Tenancies Authority					
Household goods	*'personal and household goods'*				2,384	2,446
Building and construction	includes *'general construction'* and *'construction trade services' [Most complaints are received and investigated by the Qld Building Services Authority]*				281	339
Motor vehicles and other transport equipment	*'motor vehicle retailing and services'*				1,315	1,294

Table 2.1 continued

Real estate	*'property services'*				1,922	1,386
Credit, finance and investment	includes '*finance' & 'services to finance and insurance'*				245	204
Sport and recreation	OFT category - predominantly scams				1,565	1,124
Personal services	OFT category				287	610
Business services	"				371	438
Accommodation, cafes, restaurants	"				341	409
Printing, publishing and recorded media	OFT category - includes a substantial amount of invoice fraud				426	349
Communication services	OFT category				422	292
Community services	"				178	238
Road transport	"				132	197
Metal product manufacturing	"				33	185
Services to transport	"				182	158
Other manufacturing	"				73	110
Food retailing	"				88	108
Water transport	"				23	99
Machinery and equipment manufacturing	"				153	90
Other					2,312	584
Total complaints received					**12,733**	**10,660**
Complaints (Alternative categorisation using Top 20 QLD OFT specific level industries categories)	finest detail level used for complaint industry (industry coding scheme change mid 2005 will influence breakdowns)					
Personal and household goods nec					1,896	2,061
Real estate agents (excl resident letting)					1,329	1,056
Gambling, scams, schemes					1,323	976
Motor vehicles sales					908	840

Table 2.1 continued

Motor vehicle service, repairs, parts, accessories & wreckers					368	408
Printing, publishing and recorded media					426	349
Personal and household services					193	510
Telephone, communication services					400	275
Accommodation, hotels, motels, holiday and short term					303	362
Household equipment repair services					203	224
Resident letting agents					199	157
Residential services inc supported accommodation in hostels and boarding houses					146	192
Building trade services (eg plumbers, electricians)					165	160
Travel agents					163	150
Building and construction					116	179
Computer services					127	145
Equipment hiring and leasing					203	66
Machinery and equipment manufacturing					153	90
Metal product manufacturing					33	185
Gym, fitness centres					130	79
Other					3,949	2,196
Total complaints received					**12,733**	**10,660**
Business Registrations						
Business names on register at end of financial year					235,951	242,794
- New business names registered during financial year					46,055	44,409

Table 2.1 continued

Associations on register at end of financial year					20,188	20,518
- New associations incorporated during financial year					869	766
Co-operatives on register at end of financial year					196	200
- New co-operatives incorporated during financial year					11	6
Limited partnerships on register at end of financial year	Number of current registered limited partnerships at the end of the financial year is not available					
- New limited partnerships registered during financial year					45	39
New retirement villages registered during financial year					18	15
Total business registrations						
Occupational Licences						
Credit providers	Credit Providers are not licensed in Queensland					
Estate agents					26,781	29,899
Introduction agents					46	49
Motor car traders					6,823	7,292
Prostitution service providers	Prostitution Service Providers are not regulated by the Office of Fair Trading in Queensland					
Second-hand dealers and pawnbrokers					1,880	1,881

Table 2.1 continued

Travel agents					571	599
Security Providers					14964	16619
Resident Letting Agents					3353	3600
Auctioneers					2123	2169
Commercial Agents					690	686
Property Developers					1030	1191
Total occupation licences					**58,261**	**63,985**
Liquor licence applications	Administered by Liquor Licensing Division of the Department					
Compliance and Enforcement						
Number of criminal proceedings completed (does not include Tribunal actions)	# Court prosecutions completed, includes withdrawn & dismissed matters				81	94
Value of fines issued	$ Court fines				$809, 550	$378,900
Value of Court Fund and Tribunal penalties imposed	In QLD, the relevant Tribunal is the Commercial and Consumer Tribunal (CCT). $ CCT Fines				$250,500	$37,350
Number of civil actions completed	# Injunctions				0	0
Number of parties signing enforceable undertakings					246	35
Number of infringement notices served	includes withdrawn notices after served				988	968
Value of costs orders obtained	Court & CCT				**COURT** **$20,639.95** CCT $160,354	**COURT** **$15,555.18** CCT $23,235

Table 2.1 continued

Compensation for consumers obtained through court action					$65,786.25	$1,180
Legislation administered (Acts of Parliament)	Qld OFT administers approx. 70 Acts (which includes about 20 Acts providing legal status to religious orders)					

Table 2.2 New South Wales Office of Fair Trading (*Any comment on or interpretation of any fluctuations in results should be subject to clarification by the NSW Office of Fair Trading*)

	Notes	2001-02	2002-03	2003-04	2004-05	2005-06
Office of Fair Trading						
Portfolio: Minister for Fair Trading						
Description: The Office of Fair Trading within the Department of Commerce serves the consumers and traders of NSW. We aim to achieve fairness for all in the marketplace by safeguarding consumer rights and advising business and traders on fair and ethical practice in the areas of consumer goods and services, residential accommodation and home building.						
Total Number of FTE Staff		1,197	1,129	1,090	1,029	1,076
Total Expenditure	Make up of OFT not consistent during period	$136m	$158m	$154m	$151m	$160m
Enquiries						
Phone enquiries		1,676,182	1,614,666	1,584,948	1,434,507	1,216,846
Emails and letters received		*	*	*	8,091	8,360
Counter enquiries		309,300	208,426	248,166	249,160	238,752
REVS enquiries	Register of Encumbered Vehicles - incl NT and ACT	1,168,000	1,212,535	1,352,873	1,480,895	1,525,748
Website visitor sessions	Unique visits by individual customers	269,000	808,000	1,300,000	1,568,000	2,031,565
BLIS enquiries	Business Licensing Information Service (additional to website)	n/a	n/a	98,600	179,049	233,397
RBIS enquiries	Rental Bond Internet Service for agents (additional to website)	21,040	37,797	69,000	89,626	113,544
Motor vehicle repairs' enquiries	Through Motor Vehicle Repair Industry Authority	17,000	15,000	15,000	15,000	14,200
Total enquiries		**3,460,522**	**3,896,424**	**4,668,587**	**5,024,328**	**5,382,412**
Rental Bonds	Figures do not include retail bonds administered on behalf of other agency					
Rental bond transactions	Lodgements and refunds	578,525	571,314	568,052	560,569	559,319
Rental Bonds held in trust		532,393	551,777	577,023	598,008	614,833
Value of bonds held in trust ($m)			529.5	569.3	606.9	647.8

Table 2.2 continued

Complaints						
Real Estate	All including Business Agents and Stock & Station Agents	2,100	808	1,436	1,756	2,181
Home building	Residential home building only	1,450	1,732	6,275	6,313	5,891
Fair trading	Includes Motor vehicles (generally purchase/warranty issues), credit, goods, services, scams etc	22,450	21,918	22,047	22,236	23,005
Motor vehicle repairs	Formal disputes handled by Motor Vehicle Repair Industry Authority (now part of OFT)	1,861	1,405	1,626	1,528	1,238
Total complaints		27,861	25,863	31,384	31,833	32,315
Tribunal applications	Consumer, Trader & Tenancy Tribunal administered by OFT					
Tenancy applications to CTTT		46,239	45,306	46,150	46,125	47,286
All other applications to CTTT	Including home building, retirement villages, general, motor vehicles, commercial, strata, residential parks divisions	15,077	16,391	13,786	13,989	13,714
Total applications to Tribunal		61,316	61,697	59,936	60,114	61,000
Business Registrations						
Business names on register at end of financial year		482,771	479,725	484,665	496,789	503,713
- New business names registered during financial year		79,884	80,372	83,517	80,600	76,930
Associations on register at end of financial year		31,203	33,084	34,780	35,825	37,963
- New associations incorporated during financial year		1,638	2,093	1,920	1,964	1,841
Co-operatives on register at end of financial year		846	818	811	785	764
- New co-operatives incorporated during financial year		16	25	15	7	15
Limited partnerships on register at end of financial year		not available	429	570	674	753

Table 2.2 continued

- New limited partnerships registered during financial year		not available	82	149	126	97
Incorporated Limited Partnerships on Register at end of financial year		not available	0	6	9	16
- New Incorporated limited partnerships registered during financial year		not available	0	6	3	8
Solicitor Corporations on Register at end of financial year		not available	125	124	125	124
- New Solicitor Corporations registered during financial year	Solicitor Corporations no longer being registered but those on register will remain until dissolved	not available	0	2	0	0
Total business registrations	*Not appropriate to total these mixed measures*					
Occupational Licences						
Builders		155,806	162,043	165,282	166,928	165,482
Conveyancers		298	423	522	589	660
Motor dealers		4,152	4,007	3,989	3,924	3,762
Motor vehicle repairers		16,942	17,074	16,815	17,256	17,319
Pawnbrokers & Second-hand Dealers		1,479	1,253	1,203	1,098	990
Property, Stock & Business Agents		23,986	25,393	26,533	26,980	26,441
Public Weighbridge		86	83	83	82	79
Real Estate Certificates		10,339	13,671	15,378	15,482	15,711
Trade Measurement Services		201	187	196	204	198
Travel Agents		1,519	1,465	1,471	1,464	1,471
Valuers		4,622	4,935[a]	5,065[b]	2,955[c]	2,870[d]
Total occupation licences		**219,430**	**230,534**	**236,537**	**236,962**	**234,983**
Compliance and Enforcement						
Successful prosecutions (# matters)		735	576	779	408	373
Civil Proceedings		153	154	119	104	138
Investigations		1,985	2,406	2,288	2,222	2,410
Inspections		4,849	5,259	5,056	5,291	4,333

Table notes: [a] includes 1,717 non-practising Valuers. [b] includes 1,720 non-practising Valuers. [c] On 30 Mar 2005 licence for non-Practising Valuers was abolished. Figures represent only Practicing Valuers. [d] On 30 Mar 2005 licence for non-Practising Valuers was abolished. Figures represent only Practicing Valuers.

Table 2.2 continued

Other compliance related activities		5,740	7,091	7,101	6,434	7,761
$ Value of fines and penalties		$644,552	$715,940	$557,942	$892,753	$587,876
Civil litigation matters		154	154	119	104	138
Penalty Notices issues		994	817	1054	1520	822
$ Value of penalty notices		$208,110	$324,870	$478,830	$903,070	$449,420
Legislation administered (Acts of Parliament)		46	46	43	44	43

Table 2.3 Consumer Affairs Victoria

	Notes	2001-02	2002-03	2003-04	2004-05	2005-06
Consumer Affairs Victoria						
Portfolio: Minister for Consumer Affairs						
Description: Consumer Affairs Victoria is Victoria's leading consumer protection agency. By engaging with consumers and businesses in various ways, Consumer Affairs Victoria helps to protect and promote the interests of consumers and make markets work better.						
Total Number of FTE Staff	Actual FTE at end June 2006 : 412.8 (versus a budget of 423 FTE)	254	334	335	353	413
Total Expenditure	Core business of CAV varies from year to year. Expenditure includes grants and service provision contracts also varies from year to year. See Endnote 1.	$47.0m	$50.3m	$51.4m	$54.0m	$64.4m
Enquiries						
Telephone enquiries	Telephone enquiries to the CAV call centre	454,000	536,500	540,000	550,000	570,000
Emails and letters received	Email and written enquiries	3,700	NA	7,800	12,800	12,400
Counter visits	Face-to-face enquiries at CAV Melbourne Office and 8 Regional Locations	7,000	6,300	7,300	6,700	6,400
Total enquiries		**464,700**	**542,800**	**555,100**	**569,500**	**588,800**
Website visits	Website sessions at the CAV and BLA websites	305,463	441,602	674,566	980,329	1,119,785
Complaints	Section 104 of the Fair Trading Act 1999 provides the legislative authority for the Director of Consumer Affairs to conciliate complaints.					
Residential tenancy & accommodation	Includes CAV inspectors conducting residential tenancy inspections. For 2001-02 includes Real Estate.	4,610	4,754	6,877	7,039	6,986
Household goods	Includes whitegoods, introduction agencies, contact or door-to-door sales, clothing and footwear, and travel.	2,979	3,083	4,450	4,875	6,241
Building and construction	Building Advice and Conciliation Victoria provides an advice, information and dispute resolution service offered jointly by CAV and the Victorian Building Commission.	899	1,423	1,992	2,010	1,890
Motor vehicles and other transport equipment		956	986	1,462	1,637	1,829

Table 2.3 continued

Real estate	Estate Agents Resolution Service provides advice, information, mediation and dispute resolution on all types of estate agency matters	Included in RT & accomm	537	1,060	1,106	927
Credit, finance and investment		337	374	225	389	554
Other complaints		1,462	1,323	-	-	40
Total complaints		**11,243**	**12,480**	**16,066**	**17,056**	**18,467**
Business Registrations						
Business names on register at end of financial year		339,678	336,356	336,356	354,992	365,469
- New business names registered during financial year		57,782	60,036	60,036	65,951	64,136
Associations on register at end of financial year		30,162	29,982	29,982	31,616	32,552
- New associations incorporated during financial year		1,403	1,568	1,568	1,439	1,507
Co-operatives on register at end of financial year		809	772	759	755	748
- New co-operatives incorporated during financial year		29	29	20	22	10
Limited partnerships on register at end of financial year		37	NA	64	82	94
- New limited partnerships registered during financial year		NA	NA	NA	17	21
New retirement villages registered during financial year	Registration scheme implemented in 2005-06	-	-	-	-	323
Total entities on registers		**370,686**	**367,110**	**367,161**	**387,445**	**399,186**
Total new applications processed		59,214	61,633	61,624	67,429	65,997
Occupational Licences	CAV provides administrative services to the Business Licensing Authority (BLA) which is a statutory authority responsible for the licensing and registration of these occupations.					
Credit providers		641	697	777	887	931
Estate agents		6,094	6,458	6,888	7,266	7,480
Introduction agents		64	73	60	62	50
Motor car traders		2,196	2,200	2,205	2,230	2,198
Prostitution service providers		170	179	180	171	151
Second-hand dealers and pawnbrokers		6,862	6,930	6,797	6,531	6,270
Travel agents		962	954	948	938	925
Total occupational licences on Register		**16,989**	**17,491**	**17,855**	**18,085**	**18,005**
Total occupational licence applications received		1,947	1,926	1,937	1,817	1,627
Total occupational licence applications granted		1,640	1,817	1,802	1,686	1,441

Table 2.3 continued

Liquor licence applications	Transferred to CAV Dec 2002. Administered by CAV under delegation from the Director of liquor licensing, a statutory appointee.	**-**	**14,574**	**16,628**	**16,782**	**18,186**
Residential Tenancy Bond Authority Transactions						
Rental bond transactions	Lodgements and reimbursements	310,426	311,486	333,286	333,605	332,463
Value of bonds held in trust ($m)		$239.4m	$265.5m	$295m	$323.3m	$353.1m
Rental Bonds held in trust	Number of bonds	NA	311,787	338,535	356,707	375,339
Compliance and Enforcement	Amendments to the FTA in 2003 provided an increase to the range of civil and administrative measures used to address non-compliance					
Number of criminal proceedings completed		79	76	47	72	47
Value of fines issued		$669,905	$387,500	$503,600	$371,550	$287,550
Value of Court Fund and Tribunal penalties imposed	In Victoria, the relevant Tribunal is the Victorian Civil & Administrative Tribunal (VCAT).	$12,900	$4,150	$30,469	$5,150	$10,500
Number of civil actions completed		11	95	74	72	88
Number of parties signing enforceable undertakings		106	102	34	60	43
Number of infringement notices served		378	463	189	347	386
Value of costs orders obtained		$69,285	$52,731	$48,284	$33,434	$43,840
Compensation for consumers obtained through court action		$133,176	NA	$5,175	$35,742	$143,589
Legislation administered (Acts of Parliament)		43	48	48	45	46

Attachment 2

Ministerial Council on Consumer Affairs

Background

The Ministerial Council on Consumer Affairs (MCCA) is established by the Council of Australian Governments (COAG). MCCA comprises Commonwealth, State and Territory and New Zealand Ministers responsible for consumer affairs and fair trading matters. It considers consumer affairs and fair trading matters of strategic national significance and, where appropriate, develops a consistent approach to issues within the framework of an agreed Strategic National Consumer Affairs Agenda.

The Council is also responsible for trade measurement, product safety, credit and travel industry regulation.

MCCA's Mission Statement is as follows:

The Ministerial Council will advance consumer affairs and fair trading matters of strategic national significance, and where appropriate, will facilitate and encourage:

- *The coordination of policy development and implementation by all Jurisdictions to provide the best and most consistent protection for consumers;*
- *Consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace;*
- *National legislative consistency of major elements of consumer protection policy;*
- *Access to education and information for all consumers;*
- *Co-operation and consultation on consumer policy development and implementation between Australia and New Zealand;*
- *Proactive research and development strategies to ensure the readiness of fair trading agencies, consumers and business for the challenges beyond 2000; and*
- *Consultation with government departments, the consumer movement, industry groups and interested parties, to ensure and maintain currency of the work of the Council.*

The MCCA Strategic National Consumer Affairs Agenda identifies MCCA's projects for the next twelve months and foreshadows future work. The Agenda is not exhaustive, and MCCA can discuss or undertake work as new issues as they arise. The Agenda is built on the following principal strategies:

Policy and Legislative Harmonisation – nationally coordinated and consistent policy development and implementation by all jurisdictions, including

legislative consistency of major elements of consumer protection law and emerging policy issues;

Consistent enforcement – consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace;

Education – access to education and information for consumers and suppliers;

Australia/New Zealand Cooperation – cooperation and consultation on consumer policy between Australia and New Zealand;

Research – research into consumer concerns and trade practices.

The official site of the Ministerial Council at www.consumer.gov.au details the work program and key initiatives of the Council from time to time.

The Council's procedures are guided by *Ministerial Council on Consumer Affairs: Protocols and Procedures of Operation September 2006* (Appendix 2.1)

MCCA's procedures and Strategic Agenda were reviewed by Ministers during 2006 with the aim of expediting decision making and achieving tangible outcomes for Australian consumers. Ministers confirmed the benefit of consensus decision making in adding or removing items on the Strategic Agenda, but agreed to a new streamlined project management approach. Rather than rely on multi-jurisdictional project teams to advance work, Ministers decided that after agreement on a project's terms of reference and key milestones, individual jurisdictions should produce final reports for the Standing Committee of Officials of Consumer Affairs (SCOCA) and MCCA. This approach enables jurisdictions to accord national projects higher priority to in their agency business plans.

Another significant guideline by which the Council operates is the *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* issued by COAG.

Since 2005, the Ministerial Council has met twice a year, and its chairmanship changes annually.

Standing Committee of Officials of Consumer Affairs

MCCA is supported by SCOCA, which comprises the Directors/Commissioners of consumer affairs or fair trading in the States and Territories; the General Manager of the Competition and Consumer Policy Division of the Commonwealth Treasury, the Deputy Chair of the ACCC, the Executive Director, Consumer Protection, Australian Securities and Investment Commission, the General Manager of the Ministry of Consumer Affairs, New Zealand and a representative of the National Measurement Institute. The same jurisdiction that chairs MCCA also chairs SCOCA.

SCOCA generally meets about three times a year – twice in conjunction with MCCA and once separately. SCOCA's Agenda and work program supports MCCA but it also considers a broader range of operational issues. Recently, SCOCA has made it a practice to meet annually with representatives of Choice and the Consumers Federation of Australia.

There are four advisory committees under SCOCA that deal with different aspects of consumer protection:

- The Fair Trading Operations Advisory Committee (FTOAC) is made up of consumer protection agency compliance officers and advises on the enforcement of consumer laws and fair trading operational issues.

- The Consumer Products Advisory Committee (CPAC) consists of consumer product safety officers and advises on product safety standards, bans and recalls.

- The Trade Measurement Advisory Committee (TMAC) is made up of consumer trade measurement officers and advises on technical and enforcement issues associated with trade measurement.

- The Uniform Consumer Credit Code Management Committee (UCCMC) consists of credit and policy officers from consumer agencies and deals with matters relating to the management of the Uniform Consumer Credit Code (the nationally-consistent law that regulates consumer credit in Australia).

Further information on these advisory committees is in Appendix 2.2.

MCCA, SCOCA and the advisory committees are supported by a Secretariat in the Commonwealth Department of the Treasury. The Secretariat is funded jointly by the members of MCCA according to an agreed formula[6].

MCCA's Strategic Agenda

MCCA's current strategic agenda is at Appendix 2.3, which picks up, among other things, areas of COAG's national reform agenda, that relate to consumer affairs issues. Currently, there are two such hot spot areas, consumer product safety and trade measurement. MCCA is also integrally involved in a third hot spot area, personal property securities reform, through work developing a national register of encumbered vehicles. A fourth hot spot area, business registration, which is an integral operational area of all consumer affairs or fair trading agencies, is not on the MCCA strategic agenda and is being led by the Small Business Ministerial Council.

[6] The Commonwealth pays 30% of the total cost with the remainder split using estimated population as the basis of cost sharing between the States and Territories.

In addition to the work on consumer product safety and trade measurement, another priority area for MCCA review is consumer credit policy and legislation. Development of a research program on consumer matters was also recently added to MCCA's strategic agenda. The first research project funded is to a baseline study into product safety.

The Review of Australia's Consumer Policy Framework is not currently on MCCA's strategic agenda. Victoria, as chair of MCCA's Working Party on this issue, will propose that this matter be added at the May 2007 meeting of Ministers.

Appendix 2.1

MINISTERIAL COUNCIL ON CONSUMER AFFAIRS

(MCCA)

PROTOCOLS AND PROCEDURES

September 2006

MCCA WORKING PARTY ON CONSUMER POLICY
INFORMATION PAPER ON CONSUMER POLICY ISSUES

For more information about the Ministerial Council on Consumer Affairs, please contact:

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PROTOCOLS AND PROCEDURES FOR THE OPERATION OF

THE MINISTERIAL COUNCIL ON CONSUMER AFFAIRS

The Council of Australian Governments (COAG) has established a Ministerial Council on Consumer Affairs (MCCA). MCCA is supported by the Standing Committee of Officials of Consumer Affairs (SCOCA) and the following four advisory committees:

1. Consumer Products Advisory Committee (CPAC)
2. Fair Trading Operations Advisory Committee (FTOAC)
3. Trade Measurement Advisory Committee (TMAC); and
4. Uniform Consumer Credit Code Management Committee (UCCCMC)

The Ministerial Council on Consumer Affairs comprises Commonwealth, State, Territory and New Zealand Ministers responsible for consumer affairs and fair trading matters. The role of the Council is to consider consumer affairs and fair trading matters of strategic national significance and, where appropriate, develop a consistent approach within the framework of an agreed Strategic National Consumer Affairs Agenda.

MCCA collaborates on and makes decisions in relation to the Strategic National Consumer Affairs Agenda and, where appropriate, implements and monitors the impact of those decisions. MCCA also approves a National Work Plan to further the implementation of the Strategic National Consumer Affairs Agenda.

MCCA acts as the meetings of Ministers responsible for trade measurement, product safety and credit and Ministers responsible for travel industry regulation.

The following protocols and procedures are intended to ensure the efficient and effective operation of the MCCA, its supporting Committees and the permanent MCCA Secretariat, which has been established to service the needs of MCCA, SCOCA and the four advisory committees. The protocols uphold and reflect the protocols and principles endorsed by the COAG.

In addition to the following protocols MCCA adheres to COAG's principles for National Standards Setting and Regulatory Action when fulfilling its standards setting responsibilities.

1. Membership

1.1. Membership of the MCCA consists of all Commonwealth, State and Territory Ministers responsible for consumer policy and weights and measures.

1.2. Membership of SCOCA consists of the heads of Commonwealth, State and Territory government agencies responsible for consumer affairs or fair trading policy.

1.3. The lead Commonwealth agency on SCOCA, CPAC, FTOAC, and UCCCMC is the Competition and Consumer Policy Division, Department of the Treasury. However, the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission will be entitled to be present and participate fully at all meetings of those Committees. The National Standards Commission will be entitled to be present and to participate fully in SCOCA agenda items relating to trade measurement issues. Which Commonwealth agency leads the discussion for the Commonwealth on a particular issue is a matter for the Commonwealth to determine, but only one may vote on any particular issue.

2. Membership of New Zealand

2.1. The New Zealand Minister for Consumer Affairs shall be a member of MCCA and the Head of New Zealand's consumer affairs policy making agency, and the Head of the New Zealand enforcement and compliance agency, shall be members of SCOCA. The lead New Zealand agency on SCOCA, FTOAC, CPAC and TMAC is the Ministry of Consumer Affairs.

3. MCCA Secretariat

3.1. The secretariat functions for MCCA, SCOCA and the four advisory committees, will be permanently located in the Competition and Consumer Policy Division, Department of the Treasury

3.2. The MCCA Secretariat will be funded by the Commonwealth, States and Territories. Contributions will be based on the Commonwealth accepting 30% of the total cost and using estimated population as the basis for cost sharing between the States and Territories. The budget for the MCCA Secretariat shall be set by SCOCA.

3.3. The MCCA Secretariat shall be reviewed annually and SCOCA shall review the MCCA Secretariat's expenditure at each meeting of SCOCA.

4. Chairing of Meetings

4.1. The Chair of MCCA shall be responsible for:

4.1.1. within eight weeks of a proposed meeting, advising members of the date and location of the meeting;

4.1.2. calling for agenda items for the meeting;

4.1.3. approving the agenda for the meeting;

4.1.4. ensuring that the meeting is chaired in accordance with the agenda

4.2. The Chair of MCCA shall rotate annually. The term of the new Chair shall commence on 1 September and end on 31 August the following year.

4.3. The Chair of SCOCA shall rotate annually and will be the Head of the Agency whose Minister is currently Chair of MCCA. The term shall be the same as that for MCCA.

4.4. In general, the chairs of MCCA and SCOCA shall rotate in the following order (this is based on the order in which jurisdictions have hosted meetings since 1974):

Tasmania; Western Australia; Australian Capital Territory; South Australia; New South Wales; Queensland; Commonwealth; Northern Territory; Victoria; New Zealand.

4.5. In the absence of a Chair, those members present at meetings of MCCA and SCOCA shall appoint a Chair for the purposes of the meeting.

5. Meetings

5.1. MCCA shall normally hold a face-to-face meeting twice each year.

5.2. SCOCA shall meet a sufficient number of times each year for the purpose of ensuring that adequate progress is given to the development of the national strategy. The number of such meetings would not usually exceed 3 per years including one meeting six weeks prior to the meetings of MCCA. The purpose of the meeting six weeks prior to MCCA's meeting is to discuss the MCCA agenda - other items should be kept to a minimum.

5.3. Both MCCA and SCOCA may hold additional meetings at their discretion.

5.4. MCCA and SCOCA shall make full use of available technology to increase the efficiency of their operations and reduce the need for face-to-face meetings in excess of those mentioned in 5.1 and 5.2. This may include the use of teleconferences, electronic mail and video conferencing.

5.5. MCCA and SCOCA shall determine their own procedures for conducting meetings.

6. Arrangements for Meetings of MCCA

6.1. The MCCA Secretariat will liaise with the Chair and other Ministers to nominate dates for meetings of MCCA at least six months prior to any meeting. The dates for the meetings of MCCA should be confirmed by the Chair of MCCA at least three months prior to each meeting.

6.2. The Host Agency (that headed by the SCOCA Chair) will undertake all organisational arrangements for meetings of MCCA including provision of venue, secretarial support services and assistance with accommodation if required. Agenda papers shall be the responsibility of the MCCA Secretariat.

6.3. The Host Agency will liaise closely with the MCCA Secretariat to ensure the smooth operation of MCCA.

7. Arrangements for Meetings of SCOCA

7.1. Within three months following a meeting of MCCA or of SCOCA, the MCCA Secretariat will liaise with the Chair and members of SCOCA to arrange a date and location for the next SCOCA meeting.

7.2. The Host Agency will be responsible for all necessary organisational arrangements for meetings of SCOCA. Agenda papers and minutes shall be the responsibility of the MCCA Secretariat.

7.3. The Host Agency will liaise closely with the MCCA Secretariat to ensure the smooth operation of SCOCA.

8. Development of Agendas and Provision of Agenda Papers

8.1 MCCA Agendas and Agenda Papers

8.1.1. The structure of the MCCA meeting agenda will mirror the MCCA Strategic Agenda.

8.1.2. Matters will only be added to the Strategic Agenda where the matter is of clear national significance and where there is consensus support that the matter(s) should be added to the Strategic Agenda. Ministers wishing to add an item to the Strategic Agenda will be required to provide an Agenda Paper clearly describing the issue and proposing Terms of Reference and project management arrangements for taking the matter forward.

8.1.3. Matters can be added to the Strategic Agenda at either a MCCA meeting or out of session with the consent of all Ministers. Matters can also be added at the completion of existing items.

8.1.4. Strategic Agenda items can be progressed by either the jurisdiction proposing the matter; a national working party or by other arrangements as agreed by MCCA.

8.1.5. All lead agencies, including an individual State/Territory which has been appointed to advance an issue, will be required to report against progress to date on their Strategic Agenda projects including failure to meet agreed milestones.

8.1.6. To facilitate the expeditious progress of an issue, draft reports can be reviewed by SCOCA with final reports submitted to MCCA.

8.1.7. The MCCA meeting agenda will also provide an opportunity for Other Business and Noting Items. Noting Items will generally not be discussed at the MCCA meeting. Discussion of items under Other Business will be kept to a minimum. The MCCA Secretariat shall write to all Ministers, four months prior to the meeting

seeking items they wish to have placed on the meeting agenda under Other Business or Noting Items.

8.1.8. Items under 'Other Business' will generally be removed from the Agenda of the following meeting unless Ministers agree that the item should remain for a specified time.

8.1.9. The content of the MCCA meeting agenda will be finalised by the Chair of SCOCA in conjunction with SCOCA members at the SCOCA meeting preceding the MCCA meeting.

8.1.10. The MCCA Secretariat shall write to all Ministers circulating the draft agenda and seeking agenda papers three months prior to the meeting. Agenda items should identify whether they are a current project on the Strategic National Consumer Affairs Agenda, an item which is proposed for the Strategic Agenda or an item for Other Business or For Noting

8.1.11. The closing date for draft MCCA agenda papers is eight weeks prior to the meeting of MCCA (this will coincide with the deadline for SCOCA papers for the meeting six weeks prior to the MCCA meeting).

8.1.12. SCOCA will meet five weeks before MCCA to discuss the agenda, agenda papers and shape draft resolutions to promote the best chances for full agreement.

8.1.13. The MCCA Secretariat will send papers and draft resolutions to Ministers three weeks before the scheduled meeting of MCCA.

8.1.14. SCOCA will generally meet again two days prior to the meeting of MCCA to finalise resolutions and draft the MCCA Communiqué.

8.2. Sponsorship of Items on the MCCA Agenda

8.2.1. The Chair of MCCA may invite a SCOCA member to report to MCCA on any issue, including those addressed by SCOCA working parties.

8.3. SCOCA Agendas and Agenda Papers

8.3.1. The SCOCA meeting agenda will mirror the MCCA Strategic Agenda. All lead agencies will be required to report against progress to date on their Strategic Agenda projects including failure to meet agreed milestones.

8.3.2. The MCCA Secretariat shall call for additional SCOCA agenda items of strategic national significance, to be discussed under "Items proposed for Inclusion on the MCCA Strategic Agenda", by facsimile or email eight weeks prior to the meeting. Response within five working days is required.

8.3.3. The MCCA Secretariat will draft an agenda on the basis of items received and liaise with the Chair to finalise the agenda. Items proposed for the Strategic Agenda should establish an initial case for national consideration, proposed Terms of Reference and procedures for project management including key milestones and timelines. Such items can also be proposed at the completion of existing items on the MCCA agenda.

8.3.4. The MCCA Secretariat shall circulate the agenda and call for papers at least six weeks prior to the meeting. All papers shall be received by the MCCA Secretariat four weeks prior to meeting. Where papers are not finalised a draft will be accepted. The MCCA Secretariat shall circulate papers three weeks prior to the meeting.

8.3.5. Late papers received by the MCCA Secretariat after papers have been distributed will not be accepted without the agreement of the Chair.

8.3.6. Where papers requiring a decision are not received by the MCCA Secretariat in time to be circulated three weeks prior to the meeting, SCOCA will not be expected to reach a decision at that meeting.

8.3.7. Where a SCOCA member intends to provide an oral report at a meeting, the MCCA Secretariat should be notified four weeks prior to that meeting.

8.3.8. The agenda should include an opportunity for discussion of items under Other Business but this will be kept to a minimum.

8.3.9. Items for Noting or Standing Items should only be discussed by exception.

8.3.10. In accordance with COAG Principles and Guidelines on National Standard Setting by Ministerial Councils and National Regulatory Bodies, all papers should state whether the proposal will require the preparation of a Regulatory Impact Statement.

9. Location of Meetings

9.1. Meetings of MCCA shall be held in the State of the Chair and SCOCA meetings will generally be held in Sydney or Melbourne.

9.2. Meetings of SCOCA can be held in alternative venues with the agreement of all members.

9.3. Locations of meetings of both MCCA and SCOCA shall be generally restricted to the Australian and New Zealand capital cities and to Alice Springs.

10. Duration of Meetings

10.1. Wherever possible, meetings of MCCA and SCOCA shall be no longer than one day.

10.2. Meetings of MCCA and SCOCA can be extended with the agreement of the majority of members.

11. Attendance at Meetings

11.1. In cases where the field of policy covered by MCCA covers more than one portfolio in any jurisdiction, it is a matter for each jurisdiction to determine a Minister or Ministers to attend and to arrange appropriate liaison.

11.2. A member of the MCCA may appoint a person, where possible or convenient, to act as a member of the Ministerial Council in place of the member. Such an appointment may be limited to a particular meeting or period and may be revoked at any time.

11.3. A person who is so acting for a Minister who is a member of the MCCA may act as a member of the Council in place of the Minister.

11.4. Acting members may exercise the voting rights of the member for whom they are acting (refer also to protocols 12 and 14).

11.5. Ministers may bring sufficient advisers with them to MCCA as they deem necessary. Seating arrangements for two advisors for each Minister will be arranged, unless additional seating is requested in advance.

11.6. SCOCA shall be attended by heads of consumer affairs or fair trading policy making agencies or their nominee. SCOCA members may bring advisers with them to meetings of SCOCA as they deem necessary. The mid-term SCOCA meeting (usually November/December) will be attended by Advisory Committee Chairs.

12. Voting

12.1. MCCA anticipates that decisions will be unanimous and will be reached through consensus. However, MCCA may decide an issue by majority vote with the agreement of all members.

12.2. Should a vote be deemed necessary by MCCA, each member of MCCA shall have one vote and the Chair of MCCA shall not have a casting vote.

12.3. A consensus occurs when no votes are cast against a proposed resolution.

12.4. Items 12.1, 12.2 and 12.3 shall have equal effect for meetings of SCOCA.

12.5. Should a vote be necessary on issues concerning trade measurement, credit or Travel Agents issues, voting shall be in accordance with the

Ministerial Agreement on Uniform Trade Measurement, the Credit Laws Agreement, or the Participation Agreement and Trust Deed governing the operation of the Travel Compensation Fund, as appropriate.

13. Consideration of Matters Out of Session

13.1. Wherever possible, and particularly in relation to issues where agreement has been reached, business of both MCCA and SCOCA should be finalised out of session.

13.2. Items to be considered out of session will be circulated by the MCCA Secretariat.

13.3. In general, MCCA and/ or SCOCA members will be allowed four weeks to respond in writing to out of session papers. Verbal responses will not be accepted by the MCCA Secretariat. Where a decision is urgently required, the MCCA Secretariat may set a shorter deadline in consultation with the Chair of SCOCA.

13.4. Where a MCCA or SCOCA member does not respond in writing by the deadline and an extension has not been requested, it will be assumed that the member is abstaining (refer protocol 12.3 above).

13.5. Where an item has been considered out of session by MCCA and for which consensus has not been achieved, MCCA may attempt to reach a decision via the use of teleconferences etc. If a decision still cannot be made, the item will be placed on the agenda for the next ordinary meeting of MCCA.

13.6. Where an item has been considered out of session by SCOCA and for which consensus has not been achieved, SCOCA will attempt to reach a decision via the use of teleconferences etc. If a decision still cannot be made, the item will be placed on the agenda for the next meeting of SCOCA.

14. Voting Out of Meetings

14.1. A member of MCCA may circulate, via the Secretariat, a paper for decision out of session by the vote of members of MCCA.

14.2. When a vote is cast by a member of MCCA outside a meeting of MCCA:

(a) the vote should be cast at the earliest opportunity; and
(b) the vote may be cast by communicating by facsimile, email or by any other mode of communication approved by MCCA, to the MCCA Secretariat or other recipient approved by MCCA.

14.3. If a matter is considered at a meeting of MCCA and a vote is deemed necessary by MCCA, a member may reserve a vote until the member has taken further advice in respect of the matter.

14.4. When a vote is reserved by a member, the member may cast a vote after the meeting and the vote should be cast at the earliest opportunity but in any event within ten days after the meeting or such other period as the MCCA may from time to time determine. Where no vote is received, it will be assumed that the member is abstaining.

14.5. Procedures detailed in Items 14.1, 14.2, 14.3 and 14.4 shall have equal effect for members and meetings of SCOCA.

14.6. The Secretariat shall remind members at least twice that a deadline for an out-of-session decision is approaching and at the same time, seek advice as to each member's intention to state a position, abstain or reserve comment on the proposed resolution subject to taking advice but in any event within ten days. Where no position has been received by the Secretariat, the member will be deemed to have abstained. If this occurs, clauses 13.5 and 13.6 will take effect.

14.7. Prior to each MCCA meeting, the MCCA Secretariat will tabulate and list for Noting any out-of-session decisions reached since the previous MCCA meeting.

15. Record of Meetings

15.1. The meetings of MCCA shall not be transcribed verbatim. The MCCA Secretariat shall provide a record of each meeting to jurisdictions for comment at the earliest opportunity after having been cleared by the Chair. Final minutes will be confirmed by Ministers out of session.

15.2. Final Resolutions of MCCA shall be prepared by the MCCA Secretariat with the assistance of the Host Agency and confirmed at the meeting of MCCA.

15.3. MCCA may release communiqués or press releases at its discretion. In addition, MCCA's output can include correspondence to COAG, other Ministerial Councils and Premiers at MCCA's discretion.

15.4. The inclusion of material in Communiques shall be in accordance with Section 12 above.

15.5. The Chair of MCCA will undertake to forward communiqués released after meetings of MCCA to COAG for information, as well as any other material agreed by MCCA. The Chair will also forward the minutes of the meeting to the COAG Secretariat.

15.6. The MCCA Secretariat shall provide draft minutes of all meetings of SCOCA to jurisdictions for comment at the earliest opportunity after having been cleared by the Chair. Final minutes will be confirmed by members out of session.

16. Confidentiality

16.1. Communiqués released by MCCA following its meetings and the final resolutions of those meetings shall be considered to be public documents.

16.2. With the exception of those documents detailed in 16.1 above and unless otherwise agreed, all MCCA material (including material relating to SCOCA and its Advisory Committees) shall be treated as being in confidence and shall be used by members and officers with discretion. The status of agenda papers as “cleared for general circulation” or “not for general circulation” should be indicated on the paper.

17. Efficiency of Council Operations

17.1. Agenda items and out of session papers before both MCCA and SCOCA shall be numbered by the MCCA Secretariat, and be cross referenced to the National Work Plan wherever relevant.

17.2. The MCCA Secretariat shall keep a record of the decisions of SCOCA and MCCA and, in relation to out of session papers, the votes recorded by members.

17.3. The MCCA Secretariat will operate a clearing house for correspondence and other material. Material for distribution should include a covering page detailing correspondence enclosed and what action if any is required.

17.4. The MCCA Secretariat shall keep a record of the decisions of SCOCA and MCCA and, in relation to out of session papers, the votes recorded by members.

18. Standing Committees and Working Parties

18.1. All permanent sub-committees of SCOCA shall generally be named advisory committees. Thus the standing committees of SCOCA will be named as follows:

(a) Fair Trading Operations Advisory Committee (FTOAC);
(b) Consumer Products Advisory Committee (CPAC);
(c) Trade Measurement Advisory Committee (TMAC); and
(d) Uniform Consumer Credit Code Management Committee (UCCCMC)

18.2. SCOCA may refer matters of strategic national importance to advisory committees for consideration and/or action.

18.3. MCCA and SCOCA may establish permanent and ad hoc working parties to address particular issues. These working parties shall be provided with terms of reference and, where appropriate, a sunset clause. A chairing jurisdiction shall be nominated when a working party is established. Working parties will report through the Chair of SCOCA to SCOCA and MCCA.

18.4. The MCCA Secretariat will maintain a register of all advisory committees and working parties including their terms of reference, sunset clauses, membership, minutes and decisions of any meetings.

18.5. The Chairs of advisory committees shall, unless SCOCA decides otherwise, rotate every two years to the jurisdiction which has not held the Chair for the longest period of time. Permanent Chairs may be appointed by SCOCA where particular skills and/ or expertise are required.

18.6. Secretariat services for all advisory committees shall be the responsibility of the MCCA Secretariat. Secretariat services for working parties shall be the responsibility of the Chairing jurisdiction.

18.7. Agendas for meetings of SCOCA advisory committees must mirror their current Workplan and must be cleared by the MCCA Secretariat well in advance of meetings to ensure compatibility with the MCCA Strategic Agenda and the Commonwealth's responsibilities for trade measurement under the National Measurement Act.

19. Functions of Advisory Committees

19.1. Each of the Advisory Committees has two basic functions:

(a) to progress matters in the MCCA Strategic Agenda, under the direction of MCCA and SCOCA; and

(b) to bring to the attention of MCCA and SCOCA issues that need to be included in the MCCA Strategic Agenda, in order to head off possible emerging problems or to take advantage of opportunities for pro-active action.

19.2. Advisory committees of SCOCA are to build links with other regulators, consumer organisations, industry groups and interest groups. SCOCA may confer full membership of advisory committees to any of these groups if desired.

20. Rules of Operation for Advisory Committees

20.1. Meetings of Advisory Committees

20.1.1. Meetings of the advisory committees shall take place in Melbourne or Sydney except with the prior approval of the Chair of SCOCA.

20.1.2. The Chair of SCOCA and the MCCA Secretariat should be advised of the dates and venues of forthcoming meetings of all Advisory Committees.

20.1.3. Advisory Committees should seek the advice of the MCCA Secretariat when determining dates for Advisory Committee meetings.

20.1.4. All jurisdictions are expected to attend the meetings fully prepared to participate in full, frank and open discussions on all agenda items.

20.2. The Role of the Advisory Committees in the Formulation of Policy

20.2.1. The Advisory Committees shall only work on policy issues, in respect of operational matters concerning current legislation, that are referred to them by, or through, the Chair of SCOCA.

20.2.2. The Advisory Committees may, with the approval of at least one member of SCOCA, identify issues for placement on the national workplan.

20.2.3. When an Advisory Committee identifies an issue for which a policy response may be required, it should then provide the Chair of SCOCA with a brief issues paper, detailing the issue and why a national response is needed. SCOCA will then determine whether the issue should be pursued and how best to pursue it. This may involve referring the issue back to the Advisory Committee requesting a paper on possible action.

20.2.4. Advisory Committees may refer issues to the Chair of SCOCA requesting SCOCA ' s advice out of session.

20.3. Reporting to SCOCA

20.3.1. The Terms of Reference/Objectives and workplans of Advisory Committees shall be cleared by SCOCA.

20.3.2. As well as providing copies of minutes and decisions of meetings to the MCCA Secretariat, the Chairs of Advisory Committees will, as a Standing Item, provide a brief written report at all meetings of SCOCA and MCCA.

20.3.3. In order to provide an appropriate focus on the MCCA Strategic Agenda and in order to facilitate an appropriate understanding of the issues, SCOCA expects that Advisory Committee reports to SCOCA be structured in a way that addresses the following 5 issues:

1. what the Committee has done since the last report against items in the Strategic Agenda (Agenda) - this part of the report should specifically identify relevant items in the Agenda, preferably in the order in which they appear in the Agenda;

2. the other activities that the Committee has undertaken since the last report, identifying in each case why it was appropriate to undertake that activity despite the absence of a relevant Agenda item;

3. what the Committee plans to do during the next 12 months against the items in the Agenda;

4. what else the Committee plans to do during the next 12 months, identifying in each case the justifications; and

5. any issues concerning the Committee's work (for example workload, possible need to amend the Agenda) which the Committee believes SCOCA needs to address.

20.3.4. The mid-term SCOCA meeting (usually November/December) will be attended by Advisory Committee Chairs. The Chair of SCOCA may also invite the Chair of an Advisory Committee to attend other meetings of SCOCA for the purpose of reporting to SCOCA members on the activities of the Advisory Committee, if appropriate.

20.4. Processes for compiling Advisory Committee Reports

20.4.1. Compilation of the reports are to include:

1. an initial draft prepared by the Committee Chair;

2. circulation by the Chair to other members of the Committee in sufficient time for members' comments and suggestions to be considered before the report is finalised for SCOCA; and

3. the final report to be received by the MCCA Secretariat in time for it to be included in the agenda papers circulated to SCOCA prior to the meeting in accordance with section 8.3.4 above.

20.5. Placing Items on the MCCA Agenda

20.5.1. Chairs of Advisory Committees which believe they have items which should be considered by MCCA should seek the approval of the Chair of SCOCA through their jurisdiction's SCOCA representative.

21. Review of Procedures

21.1. The above procedures are to be reviewed every two years and any changes deemed necessary to enhance the efficiency and effectiveness of the MCCA, its Standing Committee and MCCA Secretariat shall be considered by the MCCA.

APPENDIX 2.2

SCOCA ADVISORY COMMITTEES

Fair Trading Operations Advisory Committee (FTOAC)

Responsibilities

- Provides advice on enforcement co-ordination
- Provides advice on the implementation of a national approach to compliance issues
- Establishes uniform national reporting protocols
- Provides advice on fair trading operational issues

Membership

Officers responsible for compliance and/or enforcement of fair trading issues from all Commonwealth, State, Territory and New Zealand Consumer Affairs agencies.

Consumer Products Advisory Committee (CPAC)

Responsibilities

- Provides advice on consumer safety policy matters
- Conducts reviews of Australian products safety standards, bans and recalls

Membership

Officers responsible for product safety, product investigation and recall, product policy and standards. Members are from all Commonwealth, State, Territory and New Zealand Consumer Affairs agencies including a representative from Standards Australia.

Trade Measurement Advisory Committee (TMAC)

Responsibilities

- Provides advice on technical issues associated with trade measurement
- Review of the Uniform Trade Measurement Legislation
- Identifies and examines in-consistencies between Australian trade measurement legislation and other countries

Membership

Officers responsible for trade measurement issues from all members jurisdictions, including a representative from the National Standards Commission.

Uniform Consumer Credit Code Management Committee (UCCCMC)

Responsibilities

- Deals with matters relating to the implementation and management of the Uniform Credit Code
- Provides advice on requests for exemption

Membership

Credit Officer or Officer responsible for monitoring the implementation of the Uniform Credit Code from all member jurisdictions.

APPENDIX 2.3

MINISTERIAL COUNCIL ON CONSUMER AFFAIRS

STRATEGIC AGENDA

DECEMBER 2006

MCCA was established to advance fair trading and the protection of consumers in the marketplace. Its key objective is to provide the best and most consistent protection for consumers.

Its principal strategies to achieve this objective are to facilitate and encourage:

1. Nationally co-ordinated and consistent policy development and implementation by all jurisdictions, including legislative consistency of major elements of consumer protection law and emerging policy issues. (*Policy and Legislative Harmonisation);*

2. Consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace (*Consistent enforcement);*

3. Access to education and information for consumers and suppliers (*Education);*

4. Co-operation and consultation on consumer policy between Australia and New Zealand (*Australia/NZ Co-operation).*

5. Research into consumer concerns and trade practices *(Research)*.

KEY INITIATIVES

2006

Strategy 1 — Policy and Legislative Harmonisation

1.1 Review of Australia's Product Safety Framework

Sponsor: Commonwealth (Treasury).

Objective: To review Australia's consumer product safety system. The review will consider a uniform approach to achieving appropriate levels of safety for consumer products in Australia and New Zealand. Additionally, the review will focus on how the system can deal with potential safety hazards more swiftly, with a greater emphasis on the prevention of injury, rather than on reacting once consumers have suffered harm. Consideration will also be given to options to improve product safety information and research. The review will incorporate a Productivity Commission study that will examine the costs and benefits of reform options.

Milestones:	August 2005	• Productivity Commission Interim Report
	September 2005	• MCCA provides directions on reform options
	January 2006	• Productivity Commission Final Report
	March 2006	• SCOCA agrees on the reform measures to be put to MCCA
	May 2006	• MCCA discussed reform measures
	September 2006	• MCCA decides on reform measures
	November 2006	• MCCA write to COAG with preferred option for a national product safety system
	Early 2007	• COAG considers MCCA's proposal

Completion: 2007

1.2 National Trade Measurement System

Sponsor: Victoria

Objective: To review the national arrangement for administering trade measurement legislation in Australia. The review will identify and evaluate viable options for the future

administration of trade measurement in Australia. Consideration will also be given to Trans-Tasman harmonisation of trade measurement frameworks.

Milestones:	May 2006	•	Stakeholder consultations and options analysis
	August 2006	•	SCOCA considers findings and agrees on option to be put to MCCA
	September 2006	•	MCCA decides reform measures and advises COAG
	December 2006	•	COAG receives recommendations and decides on actions

1.3 National Credit Policy and Legislation

1.3.1 Uniform Consumer Credit Code

Sponsor: Victoria (as Chair of the Uniform Consumer Credit Code Management Committee)

Objective:
1. Develop legislation to amend the Code consequent upon NCP Review.
2. Develop legislation to amend the Code to allow e-commerce
3. Develop legislation to amend the Code to address fringe lending
4. Manage independent review of comparison rates.
5. Process exemption applications.

Milestones: Submission of Proposed amendments and final comparison rate RIS to MCCA for authorisation.

Completion: By June 2007, subject to Queensland election and Queensland Cabinet timetabling

Vendor terms Bill - consultation ended 31 December 2005. UCCCMC considered feedback on 2 March 2006. Intention is to submit the Bill without the solicitor lending provisions. The Bill is being fine tuned.

Pre-contractual disclosure - SCOCA has authorised funding to enable the proposed new disclosure scheme to be tested by simulation, survey etc and for options arising from same to be considered. New scheme not expected to be ready until 2008.

E-commerce amendments - have been enacted and commenced October 2006.

Comparison rates - Decision making RIS has been delayed - was due before the end of June 2006. The Decision making RIS is ready for submission to MCCA. 'Sunset' of comparison rates is now 30 June 2007.

The fringe lending - Decision making RIS was finalised in early 2006. It has cleared Queensland Cabinet and is awaiting submission to MCCA.

1.3.2 National Regulation of Finance Brokers

Sponsor: New South Wales.

Objective: Develop a model for consistent national regulation of finance and mortgage brokers incorporating the following features:

- Coverage extended beyond consumer credit to small business and investment credit, with capacity for exclusion from certain legislative requirements where appropriate;
- Requirements for brokers to be licensed or registered, and as a condition of licensing or registration to meet minimum competency or probity standards and to belong to an alternative dispute resolution scheme approved by ASIC or other nominated agency;
- A contractual relationship with the broker based on refinements to the NSW *Consumer Credit Administration Amendment (Finance Brokers) Act*;
- Broking clients being provided with appropriate remedies including a capacity to stay proceedings for the forced sale of their home where action is being taken against the broker that could result in the home being saved;
- Brokers being required to hold professional indemnity insurance and/or contribute to a fidelity fund

Milestones: Decision making RIS submitted to MCCA out of session for approval of the final recommendations. Ministers have been asked to respond by 1 September 2006. If approved a Bill will be drafted for consultation.

Completion: May 2007

1.3.3 Fringe Credit Providers

Sponsor: Queensland

Objective: Amending the uniform *Consumer Credit Code* (the Code) to provide additional protections to clients of fringe credit providers, including payday lenders. Following community and industry consultation on draft policy options, the current recommended proposed amendments include:

- introduce a prohibition on taking security over household goods;
- require credit providers to provide information about direct debit authorities;
- clarify disclosure of an annual percentage rate is required for all credit contracts;
- prevent avoidance of the code by amending exemptions including the pawnbrokers exemption, broker/credit provider arrangements, misusing business purposes declarations and the bill facilities exemption;
- enabling review under s.72 (Court may review unconscionable fees and charges) of the Code of unconscionable interest rates as set, all unconscionable fees and charges and interest, fees and charges which in combination are unconscionable;
- permitting class actions and government consumer agencies to make applications under both ss.70 (Court may reopen unjust transactions) and 72.

1.3.4 Credit Card Issues

Sponsor: New South Wales.

Objective: To report to MCCA on increasing levels of credit card over commitment and make recommendations to improve responsible lending practices. This project was to include research contracted by New South Wales into the causes of excessive credit card debt, however the project is in doubt due to intervention by the Australian Bankers' Association. New South Wales is therefore proceeding with the development of a Consultation Regulatory Impact Statement setting out options for dealing with the perceived problems.

Milestones: When the Consultation Regulatory Impact Statement satisfies the requirements of the Office of Regulation

Review, it will be circulated for public comment. Final recommendations in the form of a Decision Making Regulatory Impact Statement will be developed in consultation with the Office of Regulation Review and submitted to MCCA.

Completion: 2007

Milestones: Consultation RIS to be circulated for public comment November 2006.

1.4 National Regulation of Property Investment Advice

Sponsor: Queensland

Objective: Examination of the national regulation of property investment advice.

Milestones: Final RIS to MCCA - 2006.

Completion: 2006

1.5 Unfair Contracts

Sponsor: Queensland and Victoria

Objective: To investigate policy options to address unfair terms in consumer contracts and the merits of adopting a more nationally consistent and effective regulatory regime.

Milestones: Final RIS to MCCA – December 2005
Implementation of regulatory regime - June 2006

Pre-determined project timeframes have not been met due to the difficulties experienced in obtaining the ORR's approval of the RIS. Depending on the outcome of the RIS process, States and Territories should be able to decide whether to implement unfair contact terms legislation in the form proposed in the national model in mid to late 2006.

1.6 Residential Tenancy Databases

Sponsor: Commonwealth (Attorney-General's Department).

Objective: Investigate and report on the role and operation of Residential Tenancy Databases (RTD) and the extent of the RTD use in Australia;

Examine the existing framework for regulating the use of RTDs, highlighting key issues relevant to tenants and other market participants such as RTD operators, real estate agents and landlords; and

Develop, where necessary, options for a nationally consistent framework.

Completion: May 2006

1.7 National Consistency for Co-operatives Legislation

Sponsor: New South Wales.

Objective: To facilitate co-operatives operating on an interstate basis through nationally consistent co-operatives legislation.

Completion: End 2006.

1.8 Pecuniary Penalties

Sponsor: Commonwealth (Treasury).

Objective: Investigate and report on the desirability of adopting pecuniary penalties, or some other more flexible enforcement strategy, in substitution for, or as an alternative to, criminal penalties for breaches of Part V of the *Trade Practices Act 1974* and the equivalent State and Territory legislation.

Milestones:	February 2007	• Final Report to SCOCA
	March 2007	• Final Report to MCCA

Completion: March 2007

Strategy 2 — Consistent Enforcement

2.1 National Register of Encumbered Vehicles

Sponsor: New South Wales.

Objective: To examine the development of a National Register of Encumbered Vehicles.

Completion: Consultant's Report completed December 2005. Completion of Report advised to SCOCA March 2006

Out of session MCCA paper was submitted to SCOCA out of session in May 2006.

Standing Committee of Attorneys-General is currently considering proposals for possible national Personal Property Securities (PPS) register. Formal consultation arrangements established between SCAG and MCCA/SCOCA .

PPS Project is now on the COAG agenda. SCAG has been asked to report to COAG by end 2006 on progress with developing timeframes and options, including any cost and consumer protection issues.

Strategy 3 — Education

3.1 Financial and Consumer Education for Young People

Sponsor: Queensland and New South Wales.

Objective: To improve the consumer and financial literacy of young people through a multi-faceted education and communication strategy that embraces a national focus and partnership with the Ministerial Council on Education, Employment, Training and Youth Affairs.

Milestones: The first milestone has been completed. This was the establishment of a Working Party with membership from education departments and fair trading offices from each jurisdiction. The first meeting of the Working party was in Feb 2005.

The second milestone was completed in August 2005. This was the development of a nationally agreed educational framework for consumer and financial literacy

to improve consistency among curriculum resources (Pillar 2).

The framework has been approved by the Australian Education Systems Officials Committee (AESOC) and the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) and will be added to the MCEETYA website in April 2006.

The table below outlines the completion dates for the remaining milestones.

PHASE	PILLAR	DESCRIPTION	COMPLETION DATE
One	1	Undertake a national research study which provides sufficient causal and empirical evidence to inform the marketing and education program. The Commonwealth's Financial Literacy Foundation has indicated it will conduct nationwide research on financial literacy during April 2006, with results to be tabled in July 2006. In order to reduce possible duplication, the working party has suspended activity on this part of its plan for six months in order to review the outcomes of the research.	Review October 2006
	2	Completed	August 2005
Two	3	Develop and implement a national communication strategy to highlight the problems and consequences of escalating youth debt.	June 2006
	4	Expand the range of existing high-school education resources addressing consumer and financial literacy and develop additional resources especially for students in the early and middle phases of learning. The aim is to focus those aspects of consumer and financial literacy that are essential and not to crowd an already crowded curriculum.	June 2006 and ongoing

3.2 National Indigenous Consumer Strategy

Sponsor: Western Australia

Objective: To prepare, in consultation with stakeholders, a five year National Indigenous Consumer Strategy, covering the Terms of Reference approved by MCCA/SCOCA.

Completion: Strategy launch 1 September, then ongoing for five years.

Strategy 4 — Australia/NZ Co-operation

Cooperation between New Zealand and Australia is becoming more important with the development of a single trans-Tasman economic market. Australia and New Zealand are co-operating on a number of key Trans Tasman issues, including the Review of MCCA, the Review of Australia's Product Safety System and the Review of Australia's Trade Measurement System.

Strategy 5 — Research Into Consumer Concerns and Trade Practices

5.1 Consumer Policy Research

Sponsor: Commonwealth

Objective: To provide information to improve the ability of policymakers to make appropriate, timely and effective policy decisions.

Completion: Ongoing

Milestones:	May 2006	Ministers agreed that two items be included on the research agenda: a baseline study for consumer product safety and a scams research project.
	September 2006	MCCA agrees to progress the baseline study for consumer product safety as a matter of priority.
		Finalise the Terms of Reference for the baseline study.
	October 2006	Publish the Request for Tender for the baseline study on Austender.
	November – December 2006	Evaluate the tenders, and select and engage the services of a Tenderer to conduct the baseline study.

ATTACHMENT 3

The contribution of consumer policy to the achievement of sustainable economic and social goals

Introduction

This paper discusses the ways in which consumer policy can contribute to sustainable social, economic and environmental goals. Whilst once government social, economic and environmental policies were developed from what could be described as a silo lens, there is now an increased emphasis on providing better policies and overall outcomes for society through 'joined-up' government. Hence an understanding of how policy areas inter-relate is critical.

The goals of consumer policy include:

- ensuring consumers have access to relevant and accurate information so that their expectations are met,
- ensuring consumers have access to products and services which meet reasonable standards of safety,
- promoting confidence in market rules and institutions, and
- enabling consumer access to redress.

These goals help create an environment in which all consumers can transact with confidence, including more vulnerable consumers. By promoting such an environment consumer policy can aid people to make informed decisions about the goods and services they purchase, be it health care, education, finance or household appliances. It is argued that confident consumers will contribute to the achievement of sustainable social, economic and environmental goals. This is because there is a strong connection between the concept of confident consumers and responsible consumers — consumers who are aware of the impacts of the choices and decisions they are making.

Information provision is a key consumer policy tool for achieving an environment in which consumers can transact with confidence. Information alone, however, is not enough to produce sustainable outcomes and confident consumers, and more direct government intervention is needed in a number of areas. The paper discusses types of consumer policy intervention and how behavioural economics may offer insights into achieving successful intervention outcomes.

What do we mean by sustainable outcomes?

It is first necessary to define what sustainable social, economic and environmental goals are. 'Sustainable' has a myriad of meanings depending

on the context, but a uniting thread is the production of positive short and long term results or outcomes. Social, economic and environmental outcomes cover the spectrum of areas that government may wish to influence. One of the most comprehensive, and frequently cited, definitions of sustainable development is that by Brundtland (1987):

> *Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*

This definition is specifically in relation to environmental resources, but can be equally applied to economic or social capital.

Market approach to maximizing utility

The utility a person gains from taking (or not taking) a course of action is an unquantifiable measure of their pleasure. In a perfect market, the economic rationale is that consumers will make decisions that produce the best outcomes for them and that this alone should produce desirable economic and social outcomes in the short and long term. This argument, and the problems with it, are illustrated through this simple example.

If I have $2 I could choose to spend it on a biscuit or an apple. I like the taste of biscuits more than apples so it stands to reason that I will buy the biscuit rather than the apple, as this course of action will lead me to derive more pleasure (or maximize my utility). Of course, in life no action is without consequence. Whilst in the short term I will gain much pleasure from eating the biscuit, I also have to take into account the longer term consequences. If I eat too many biscuits it will increase my risk of poor health, including possible weight gain or cavities in my teeth or even acquiring diabetes.

A heightened risk of these possible negative health impacts is not necessarily enough to convince me to spend my money on apples instead of biscuits. I first have to make a decision as to whether I will gain more pleasure out of eating biscuits for 60 years and then spending 10 years, say, suffering from diabetes or spending 85 healthy years' eating apples.

Many problems with this simple scenario should be immediately apparent. One problem is that the information I need to make this decision may not be available, such as how long I will live if I abstain from biscuits. Other pieces of information may be available, such as my risk of contracting diabetes; however this may be very difficult to understand or interpret. I also have to weigh the cons of biscuit consumption against the pros, namely how good the biscuit will taste. This is a seemingly trivial piece of information, but it is likely that the only way I will be able to make an accurate assessment of biscuit quality is to buy the biscuit and eat it, by which stage the point is somewhat moot. These problems are typical of situations where consumers are trying to make choices that account for the long term economic, social and environmental implications of their decisions. Such assessments are often characterised by a lack of verifiable information.

Behavioural economics

Recently the study of behavioural economics has begun to challenge some of the fundamentals of traditional economics – particularly that people's behaviour can be modeled based on assumptions that they are rational actors and self interested, and that information problems are restricted to those associated with obtaining ready access to accurate information. Behavioural economics has two main implications for considering the role of consumer policy in achieving sutstainable economic and social goals.

First, behavioural economics studies indicate that consumers often do not choose between products and services based solely on self-interest. Many are concerned about the long term social and environmental effects of their choices. But, as noted above, the information needed to make such judgments if often difficult to obtain and interpret. Thus, as with other areas where government action may be necessary to address information deficiencies in markets where consumers have difficulty identifying the products and services with the characteristics they are looking for, there may be a similar role for government to assist consumers to identify goods and services with the social and environmental characteristics they are looking for.

Second, people's behaviour or the way they interpret information may mean they, unknowingly, make choices that are not economically, socially or environmentally sustainable in the long run. Some examples of 'irrational' behaviour are the observations that people interpret information in a manner that supports their own opinions, and people pay less attention to statistical evidence than to their own experience or stories that are high profile or have gained recent media attention. Individuals are not good at assessing future risk or probability; sometimes being overly optimistic at their chances of avoiding risk (for example, suffering from obesity) and sometimes being overly cautious about the chance of being affected by extremely rare events (for example, being killed in a plane crash). Behavioural economics recognises that consumers not only face economic constraints (that is their purchasing choices are limited by the amount of money they have), but they also face psychological constraints such as a lack of willpower, a desire for fairness or a subconscious need to follow social norms.

Government regulation of markets

The objective of government intervention, be it to achieve social, economic or environmental outcomes, is to deliver better market outcomes. Within markets individual consumers make decisions about what is right for them, taking account of the available information. As illustrated in the example on a choice between biscuits and apples, it can be difficult for individuals (and governments) to have full information or interpret that information if it is available — for example, individual consumers tend to discount the utility of future events (with the result that they may not act in their own long-term best interest).

Government intervention, which includes consumer policy tools, is concerned with protecting the interests of individuals, society and the welfare of future generations.

Governments can use a range of policies to assist consumers to make more informed choices that are better aligned with their needs and preferences. Some options are discussed below.

Information provision

Undoubtedly, information provision is a key tool in the consumer policy toolbox. Consumer law prohibits the provision of false or misleading information and, in some cases, imposes positive information requirements. Many industry-led regulatory codes also stress the importance of information provision and transparency.

Most positive information duties are descriptive, requiring details such as the price, nature of goods or services and so on. Some information requirements take the form of warnings. However, a consumer information strategy should be more ambitious than merely focusing on information provided by the trader. Consumers need relevant accurate information to allow them to understand the short and long term implications of their choices, as well as any wider effects on society. The question for consumer policy is who should deliver that information – government, traders, independent third parties – and in what form should it be delivered. Comparative information such as the Water Efficiency Labelling and Standards Schemes database: http://search.waterrating.com.au/ or reports published by independent consumer organisations can be useful for those who can access them. Consumers also want to know what negative information is held about traders, for example where a product or trader has breached accepted standards.

Alone information provision has limitations. People have limited time to seek out relevant information and limited capacity to process that information. Government agencies, in particular, need to be careful, therefore, so that multiple demands for information disclosure, mandatory labeling or warnings do not overwhelm consumers to the point where they overlook everything. Similarly, in some industries a lack of alternative choices, or impediments to switching, may mean that information provision does not produce the desired outcomes.

All these factors mean that, although information provision is fundamental to the functioning of the market, it is not the only consumer policy tool worth considering.

Social marketing

Social marketing is a type of government policy response that responds to and capitalises so called ‘irrational’ tendencies to lead to better societal

outcomes. There are various examples of social marketing that appeal to people's sense of upholding social norms or 'doing the right thing' even if it is not in their short term best interest. For example the Immunise Australia campaign to increase the levels of full age-appropriate childhood immunisation or the New Zealand Retirement Commission Sorted campaign to persuade people to save for their retirement. Environmental issues such as water conservation or reduction of carbon emissions have frequently been the subject of social marketing campaigns.

The situation facing a consumer requested to act in an environmentally responsible way is often characterised as a social dilemma: it is not individually rational for a consumer to sacrifice short-term advantage for the common good, but if too few make the needed sacrifices, everybody ends up worse off than if they all contributed. In economics such dilemmas are referred to as negative externalities. Luckily, as mentioned above, people often want to do the right thing, particularly if it is consistent with social norms. However, evidence shows that people are less inclined to make sacrifices for the common good where they do not believe that others will also contribute. In this instance, education and social marketing campaigns make a useful complement to traditional information-type approaches, as a mechanism for influencing social norms and reinforcing behaviour that is consistent with desirable norms.

Standards/bans

Items with an element of danger associated with them may be suitable to be regulated or banned entirely. From an economic and a social perspective, standards and bans can be justified from a number of angles. If a person is killed or injured as a result of a faulty product the costs are not only personal, but, at the societal level, there may be an increased burden on the health and welfare systems as well as the loss (either in the short or long term) of a workforce participant. Standards can promote best practice and create a level playing field for businesses that want to improve their environmental quality.

Redress

Providing consumers with redress options, should a transaction turn sour, creates an environment for consumers to take chances on innovative products. Redress options include the specification of a process to follow if a disagreement arises through to providing forums such as tribunals for grievances to be heard. The existence of redress options allows consumers to make transactions with more confidence and encourages consumers to take a chance on unknown products or traders, this can include products and services that businesses promote based on their environmental or social benefits.

With the rise of the customer service mentality in the provision of government services, the roll for consumer redress has extended beyond the purchase of consumer goods to the provision of housing, healthcare, education and welfare. These may be examples of areas where governments can draw on

the approaches and processes developed in the context of consumer policy to deal with similar problems that arise in other social policy areas.

The use of consumer tools to achieve alternative outcomes

Governments often employ the consumer policy tools discussed to improve market efficiency, but there may also be opportunities to add to these consumer policy interventions to achieve other goals. Harnessing an efficiently functioning market to achieve other social or environmental goals does not necessarily detract from the original intention of the policy or require additional work or divergence of resources by consumer agencies. For example, if a licensing scheme is established to achieve consumer policy objectives, using such a scheme (through additional conduct restrictions for example) to achieve other policy objectives (such as social, health or environmental) may be an efficient way of achieving these objectives.

Alternatively, policy objectives in other areas of government may benefit from exploiting synergies with consumer agencies' activities (for example, using the one consumer agency to administer multiple licensing schemes). In addition, consumer tools that are known to influence consumer purchases (such as bans, standards, disclosure requirements) may be used to achieve wider policy outcomes. As an example, disclosure requirements such as mandatory energy or water efficiency ratings are used to influence consumer decisions with the aim of achieving environmentally sustainable outcomes.

Some are concerned that using consumer policy tools for wider purposes, or leveraging off government policy endorsed for one purpose to achieve another, raises transparency and due process issues. These concerns should be manageable, however, provided the consumer policy and other objectives are clear and not mutually exclusive. In fact, using a tool, such as a licensing, to achieve two complementary objectives could cut traders' and consumers' compliance costs. For traders, they would only need to provide the one set of information to serve multiple purposes, and for consumers it makes the search for information easier. As consumer agencies have well developed expertise in information provision and the other consumer tools, it makes sense to leverage off this expertise to achieve other outcomes.

Conclusion

Consumer policy has a role to contribute to wider sustainable economic, social and environmental goals. By producing confident consumers, consumer policy aids individuals to make the best decisions for them. Confident consumers are better placed to make responsible, sustainable decisions. In particular, information provision is essential to allow consumers to weigh up different products or different suppliers of the same product. Other tools that help to create confident consumers include social marketing campaigns, standards and bans (where appropriate) and the provision of mechanisms for redress.

The reach of consumer policy extends well beyond the quality of consumer goods. Consumers, in many cases, are concerned with other aspects of their purchase, such as the environmental impact, where the goods have been made, and the ethical treatment of workers or local suppliers. Confident consumers are more able to exercise choice so that the services they select take account of their broader concerns and ensure better personal and societal outcomes.

Overall, transacting with confidence is not just important for the individual, it is also essential to a thriving, innovative and sustainable economy. When consumers demand higher quality products and services, make effective choices among the offerings of competing suppliers and seek satisfaction when their purchasing decisions are not met, they can stimulate greater economic efficiency, innovation and positive social and environmental outcomes. Effective markets need demanding consumers who take action if business does not meet their needs, and demand better services, new products and better value for money.

ATTACHMENT 4

The need for governments, businesses and consumers to share responsibility for achieving consumer policy outcomes

Government sharing responsibility

Government seeks to foster a fair, equitable, informed and dynamic market. However, this includes a responsibility to develop a policy framework that allows markets to operate freely, where possible, and avoids unnecessary regulation. Overregulation may impede business efficiency and impact negatively on the community and the economy.

Education – The Government informs consumers so that they may take greater responsibility for their purchasing decisions and for protecting their own interests. This includes improving consumers' skills to search for and use information on products, terms, rights and responsibilities, and dispute resolution.

Making sure transactions are informed enhances fair dealings, consumer confidence, competition and market efficiency. In Australia, a range of information and education conduits and tools target consumers and business, for example:

- guides to legislation,
- fact sheets about rights and responsibilities,
- good business guides,
- email newsletters eg including on legislation updates,
- campaigns targeting high-need stakeholders, vulnerable consumers, or issues such as choosing personal finance or a car,
- teaching modules,
- media campaigns, and
- input at trade shows and exhibitions.

Government, community and industry based help lines and websites also inform and educate market participants on fair trading and consumer protection issues. Initiatives vary across jurisdictions, raising the question of whether improvements may be identified by measuring and comparing their effectiveness.

Outcomes may also be enhanced by consumers and businesses having input into, or participate in, programs. For example, in the UK industry participates in education road shows. Business and government benefit from business participation in education that improves consumer confidence. Program costs can be shared and partnering increases the chance of reaching many more consumers, as government and business have different contact and relationships with different consumers.

Most government agencies regularly measure the performance and effectiveness of their information and education programs. Research is often inconclusive, however, on the programs' effects on behavioural change in markets or the extent to which they reduce consumer detriment.

As an impediment to successful education initiatives, studies suggest that consumers have only limited rationality when entering transactions and their decision-making may be affected by their social or cultural background, economic circumstances, stage of life and their skills. Education programs designed to empower consumers may be less effective unless the diversity of their behavioural characteristics in different marketing environments is addressed.

Regulation - The community expects government to protect consumers when unfair practices cause significant detriment and self-empowerment falls short of resolving problems. However, intervention must be accountable and subject to scrutiny through policy development and approval processes.

A governments' ability to regulate the market depends on having clear policy objectives, efficient and effective laws, resources for enforcement and community expectations that action will be taken if laws are breached. In some cases, the law may not keep pace with new technologies or changing marketing practices or it may become redundant and government has a responsibility to undertake timely reviews.

Dispute resolution – By themselves, the legal system and private litigation are generally inadequate in empowering consumers to resolve their own disputes. Empowerment in part, depends on consumers having easy access to user-friendly and affordable dispute resolution services.

In addition to law enforcement, most State and Territory fair trading and consumer affairs agencies conciliate disputes between consumers and traders. The agencies cannot make legal determinations in disputes and consumers may be referred to small claims courts or tribunals, low cost services that can consider disputes against a trader and make binding orders.

The relative simplicity, speed and certainty of the process enable many consumers to take responsibility for resolving their own disputes, and may assist in improving market behaviour. However, some consumers, such as those from disadvantaged groups, or who are less articulate or confident in self representation, may be less inclined to use the service without personal assistance such as from an advocacy service. The availability of self-help information and advocacy assistance in the small claims court and tribunal processes differ across jurisdictions.

A number of fair trading agencies have established statutory tribunals or compensation funds to consider complaints about specific professions, for example, real estate agents and motor dealers, where there has been a

breach of relevant law. They provide redress in potentially high detriment areas of the market and may invoke sanctions against misbehaviour.

Business sharing responsibility

Businesses have a responsibility to know their legal obligations, abide by the law and trade in a fair and ethical manner. This includes truthfully providing all of the important information about their products and terms which may be needed by consumers to make considered purchasing decisions. Businesses that are well informed about their products, and their rights and responsibilities, are able to deal fairly and more effectively with customers and quickly resolve any complaints. This enhances consumer confidence and business competitiveness.

The cost to business of seeking professional advice on rights and obligations is often prohibitive, particularly for small business, and unless alternative sources of reliable information are available, appropriate decisions may not always be made. Governments provide printed information on 'good business practice' and guides to specific pieces of legislation, but they do not provide legal advice.

Businesses also have a responsibility to take reasonable steps to ensure their products are suitable for the purposes for which they are sold, and do not harm consumers. More generally, the community expects that the production and marketing of goods and services will convey an overall community benefit and not conflict with society's social or environmental values.

Some businesses take responsibility for positive market outcomes by joining to establish voluntary codes of conduct, with rules on product and trading standards, transparent dealings and dispute resolution, for example. When used effectively, such measures avoid costly disputes, enhance business reputation and increase consumer confidence. An effective voluntary code may also avoid the need for government intervention. However, if serious market problems arise, governments may not favour self regulation if:

- private and public goals are misaligned, such that private parties do not have incentives to act consistently with public goals,
- the public sector has a comparative advantage, by having the capacity and resources to make mandatory rules and compel compliance with those rules, or
- rule-making by private parties sets up anticompetitive practices that cannot be resolved without government taking over the regulation..

The Australian Competition and Consumer Commission (ACCC) has a system for publicly endorsing high quality voluntary industry codes of conduct. The ACCC assesses codes against guidelines, covering transparency, industry coverage, stakeholder consultation, complaints handling, monitoring and sanctions for non compliance. Some peak business and consumer groups have been reluctant to support the system, however.

A UK review of different country's regulatory regimes found that some industry codes played a role in enforcement. They were commonly regarded, however, as achieving limited success. Poor results were attributed to:

- business resistance to signing up to codes with tough provisions, and agreed codes tending to be vague on consumer protection,
- industry sponsors being reluctant to discipline members for code breaches, and
- poor industry coverage, particularly where there was resistance to the code rules.

In addition to developing voluntary codes of practice, there are other activities that businesses can engage in that recognise and respond to the social consequences of their actions. These activities include developing industry dispute resolution schemes and consumer education programs.

While these voluntary strategies benefit business by improving their reputation, increasing consumer confidence and giving ethical businesses an advantage over their competitors, they may not be readily adopted by business. Businesses may have little incentive to engage in these activities if the benefits flow to the industry as a whole and the business is unable to, or would have difficulty, capturing the financial gains.

There is potentially a role for government to encourage and facilitate the adoption of good trading practices, by assisting business to be aware of their obligations to consumers and the potential financial benefits of good customer service, to respond quickly and effectively to consumer complaints and to recognise the problems faced by vulnerable and disadvantaged consumers.

Finally, business and government may share responsibility for market regulation through a co-regulation, for example, government may prohibit an activity unless the business engaged in that activity has been accredited by an approved industry body. Such arrangements may be more flexible and less burden on business and government.

Disputes resolution - Industry-based disputes resolution schemes are another mechanism industry organisations may use to share responsibility for resolving consumer complaints. Dispute resolution schemes may also enable the industry to identify and address systemic market problems without government intervention.

Again, among other things, the effectiveness of dispute resolution schemes depends on the level of resources, quality of rules and enforcement of decisions. Also, consumers are unlikely to use a scheme unless the process is inexpensive, quick and impartial.

Consumers sharing responsibility

The market relies on consumers making choices that reflect their preferences and result in a welfare optimising outcome. Consumers must take some responsibility for gathering information and making well considered choices that are in their interests. Consumers making informed decisions can enhance competition and market efficiency.

Consumers generally have unequal bargaining power and are at an information disadvantage when dealing with business. They may need some government assistance to make informed choices and to protect them from business taking advantage of them.

Informed consumers - Consumers should be encouraged to take responsibility for shopping around and comparing product information on quality, price, and terms of purchase, as well as for understanding their rights and obligations and mitigating any risks. Consumers, who actively gather information, make considered choices and understand and know how to exercise their rights and responsibilities tend to have fewer complaints about purchases. This reduces the need for regulation and improves market outcomes.

For consumers to exercise genuine choice and advocate effectively for themselves in the marketplace, they must have access to information and sufficient skills to make decisions in their interests. As indicated earlier, consumers faced with complex decisions often have limited rationality and varying skills. In particular, vulnerable and disadvantaged consumers often do not have the skills to use the available information and some people have less capacity than others to adjust to the complexity of contemporary marketing, products and transaction practices, including the ongoing uptake of new technologies.

Generally, even in countries with relatively uniform consumer laws, consumers have limited knowledge about their legal rights. Awareness is generally higher for general duty, catch-all provision such as prohibition of misleading and deceptive behaviour, and awareness may be increased further if legal cases against businesses that breach their duties receive media coverage.

Despite these limitations, the benefits of consumer education extend beyond enhancing competition and market efficiency. Consumer education establishes a lifelong process essential to the economic and social well-being of individuals and the community.

Consumer advocacy - Consumer advocacy can play a significant role in enabling consumers to share responsibility for policy outcomes. In the last decade, consumer advocates in Australia have taken a lead role in addressing major consumer issues, particularly those affecting low income and vulnerable consumers. Their work has provided valuable input on the consumer perspective in policy development on social and economic issues in the market.

However, consumer advocacy organisations are usually resource poor and often rely on volunteers willing to sacrifice their time for the public interest. Future, funding is often tenuous and they have limited capacity in providing sufficient services to their constituents.

Australian consumer representatives believe that industry groups have a disproportionate influence on regulatory development, leading to outcomes that favour industry interests. The UK government has boosted consumer advocacy and redress, by establishing a single, statutory consumer organisation, the National Consumer Council. This organisation champions consumer interests across all sectors in private markets and public services and raises the profile of the consumer agenda with decision-makers.

Representative legal actions - As indicated earlier, consumers are often unable or reluctant to initiate litigation. In a number of countries, consumer organisations have the authority to litigate on behalf of an individual consumer or a group of consumers. This will soon be the case in the UK.

Representative actions are useful in cases of widespread consumer harm and they may prevent wrongful conduct from continuing. The process could extend access to redress to larger numbers of consumers and contribute to improving market outcomes. However, the advantages and disadvantages of introducing such a system in Australia has not been thoroughly assessed.

Conclusion

Society can not rely solely on market based responses to ensure that its social and economic objectives are achieved. The community will continue to expect governments to maintain a proactive consumer policy, which enhances market efficiency and the wider public interest.

However, it seems reasonable that, where possible, all stakeholders should share greater responsibility for how well the marketplace meets the legitimate needs of its participants and the wider community. Business, government and consumers all play a strategic role in improving economic efficiency and social equity within government policy objectives.

ATTACHMENT 5

The appropriate balance between consumer empowerment and the need to ensure that consumers and businesses are not burdened by unnecessary regulation or complexity when governments intervene in markets

Consumer empowerment and regulation

Consumer policy plays a role in empowering consumers by providing:

- rights and protections, including legal rights,
- Information and education,
- redress including access to dispute resolution mechanisms,
- consumer advocacy services, and
- input to consumer policy such as through consultation programs.

Basic consumer rights are recognised under the United Nations Guidelines for Consumer Protection, including the right to safety, to be informed, to choose, to be heard and to redress, with recognition that consumers often face imbalances in economic terms, educational levels and bargaining power. Common law, statute law and quasi-regulation provide more specific rules in the market.

Consumers who are more aware of their rights and responsibilities are generally better equipped to make decisions in their own best interests, reducing the need for regulation. Demanding consumers also improve business behaviour and enhance the competitive environment. This is particularly effective in industries that value their market reputation.

While enhancing empowerment, education programs may have limited effective unless they improve consumer skills and result in behavioural change. Behavioural economics studies indicate that, even when consumers are well informed, they may be subject to natural biases or take short-cuts in decision making, causing them to ignore or misinterpret important information. Also, some consumers (for example, through social disadvantage) may lack the skills to use information or have difficulty in adjusting to new technology products and transaction methods.

As a result, even well informed consumers may need additional protection when the market complexity or product/service risks are beyond them. A well educated consumer may still find it difficult in a complex market to detect sophisticated deceptive sales practices or harsh or unfair terms obscured in lengthy contracts, or to negotiate outside standard (take it or leave it) contracts. Awareness campaigns exhorting consumers to read the fine print may have little effect in these situations.

Similarly, dispute resolution mechanisms also have a role in empowering consumers but, as noted in the paper at attachment 4, by themselves, these mechanisms cannot resolve systemic market problems In the UK, a new initiative is being implemented to address such systemic problems. Designated consumer organisations have been given legislative standing to make 'super-complaints'. The process provides for an examination of the root causes of problems in market structure that extends beyond law enforcement issues (see attachment 9).

Overall, a range of strategies exist to improve consumer empowerment and reduce the need for regulation. But these strategies have limitations and in some cases consumer problems still arise. In such cases it is important that policy makers consider how the problem may be resolved with least disruption to market. This would include an assessment of existing regulation, government policy objectives and effectiveness of improved information and dispute resolution and the costs and benefits of alternative options for regulation.

Unnecessary, overly complex or overly burdensome regulation often has a negative impact on the community and the economy. It may result in business facing higher costs of entering the market or higher operating costs, including deflecting time and resources away from more productive activities. The additional costs may be passed on to consumers in higher prices or a reduced range of products or services. Ultimately, such costs may distort the market, impede innovation and competitiveness and reduce market efficiency.

Consumer policy is not intrinsically detrimental to markets, as insufficient or ineffective market regulation can undermine economic efficiency or social objectives. Empowering consumers with information, purchasing skills, appropriate protection, redress and a voice on issues affecting their interests, can drive rather than hinder markets. Consumer spending in Australia accounts for approximately 60 per cent of gross domestic product and shifts in confidence and demand can have significant implications for economic growth. Achieving a balance, so that consumer empowerment measures do not amount to over-regulation, may not be achieved without appropriate policy development tools and gate-keeping processes (discussed later in this document).

Addressing economic and social issues

Regulation that efficiently balances consumer empowerment and regulation costs needs to be based on a good understanding of economic and social problems that arise in consumer markets. While some consumer protection regimes are principally designed to enhance market efficiency and productivity, others address social imperatives, such as protecting disadvantaged groups, social justice, access and affordability of services, and public safety. Regulatory intervention addressing unfair practice, personal safety or inequity have both economic impacts and more qualitative social benefits.

For example, many low income earners may have difficulty in fully participating in accommodation and finance markets. Where they do so, they often lack the capacity to protect their interests. Some traders have emerged specifically to take advantage of the vulnerability of such groups. Assessment of unacceptable levels of detriment in such markets is informed by understanding the equity and public interest values and the impacts of market failure, including financial loss, and the implications for competition, consumer confidence and market efficiency.

Economic assessments of the need for government intervention generally focuses on market failure, including:

- lack of competition, for example abuse of market power,
- barriers to market entry,
- product differentiation, for example defective or unsafe products,
- information problems, for example asymmetry of information between the buyer and seller, or misleading or deceptive information, and
- third-party effects or externalities not costed in the market price, for example the effects on others or the wider community of product use.

But even to understand the economic implications of problems in consumer markets a relatively sophisticated understanding of consumer and business behaviour is needed. This is most evident in relation to information problems, where it is well recognised that an effective exchange of information and fair and competitive dealings in the market are important to consumer protection and economic efficiency, but less well understood how marketing trends and complex transactions impact on effective information exchange. For example, consumers can still be disadvantaged even with full disclosure if the terms and conditions are provided:

- in overly complex language, small print and/or an excessively wordy format,
- so it is difficult to distinguish key terms, which may be obscured among less important terms or non-contractual marketing information,
- too late in the transaction process,
- in circumstances where the consumer does not have time or space to make a sufficient assessment,
- through an unfamiliar medium or technique and the consumer has not been aware of having accepted the conditions or that certain conditions or charges would apply, and
- in a manner exploiting a consumer’s tendency to underestimate risk.

Such practices create barriers to comparing price, quality, utility, terms and risks, they hide transaction costs and insulate products from a truly competitive process. Unpopular, harsh or even unfair terms are easily concealed. In some markets, this may result in significant detriment to individual consumers, misallocation of resources and inefficiency.

Similarly, the information imbalance is increasing with industry uptake of new or evolving technologies, which is continually producing novel products and marketing arrangements. The speed and complexity of change means it is very difficult for many consumers to optimise their search and decision-making behaviours. Some consumers are technology savvy, while many others have less capacity to keep pace with change.

Many consumers still do not have confidence in online markets which otherwise may enhance product choice, competition, efficiency and growth in markets.

As noted previously, efficiency and equity are not mutually exclusive goals. Both economic and social concerns may be bound up in information failure, inequality of bargaining power or a lack of consumer redress. A policy may be justified on the basis of consumer rights to honest dealings as well as fair competition or efficient allocation of resources in the market. Fraudulent and misleading practices can reduce the incentive for industry participants to compete on the basis of quality or innovation, and consumers may become mistrustful of a particular sector. Therefore, a balanced approach to any intervention requires a coherent and strategic rationale, which reduces reliance on reactive policies and takes account of all government policy objectives.

It also needs strong best practice processes that are also capable of identifying conflicts and trade-offs between efficiency and equity objectives. Complex interactions are evident in the case of tobacco marketing, for example. Consumers are well aware of the risks and consequently, most people do not smoke. Yet governments intervene with major market restrictions, to protect individuals and reduce the significant indirect costs borne by the wider community.

The trade-offs between economic costs and social policy objectives in markets such as night clubs, liquor sales and private security services, where the social imperatives of personal and community safety and well-being may be the overriding objective determining intervention. Regulating crowd controllers and responsible service of alcohol at entertainment venues may increase costs to business and restrict industry competition, but government also places a high value on safety of patrons, law and order and community protection.

Similarly, regulating private boarding houses may involve increased costs which create barriers to market entry for service providers and impact on the level of competition and choice of accommodation. However, personal safety and living standards for disconnected and vulnerable people who are otherwise homeless, may be the paramount objective.

Avoiding unnecessary regulation

Generally, governments discourage market intervention unless it is absolutely necessary. When faced with market dysfunction, policy makers rely on policy development tools and gate-keeping processes for a balanced approach. Assessment usually starts with a description of the problem in terms of:

- nature and level of detriment,
- impacts on the market and the community including disadvantaged or vulnerable consumers,
- industry profile and effectiveness of existing regulation,
- stakeholder and community views,
- existing government policy objectives,
- capacity to and effectiveness of empowering consumers without regulation, and
- regulatory options.

Central government agencies, Cabinet and Parliament commonly play a key role in determining the process for analysis and approval of regulatory proposals. Agencies usually require a cost-benefit analysis to identify the extent to which the benefits may outweigh any costs of intervention.

A number of Australian jurisdictions use Regulatory Impact Statements (RIS) to assess intrastate regulation. RISs incorporate a cost-benefit analysis, but, in some cases, its use is limited to subordinate legislation. The disparities among jurisdictions' policy development processes raises the question of whether best practice is consistently achieved and whether there are opportunities for increased information exchange and shared training.

All proposals for national regulatory schemes by Ministerial Councils and standard setting bodies, irrespective of the regulatory instrument, are subject to a national RIS if they impose any appreciable costs on business or potentially restrict competition in the market. The Office of Best Practice Regulation (OBPR) administers the COAG guidelines on the preparation and approval of a national RIS. Key elements are:

- assessment of the issue and a statement of the government's objective, including a definition of the problem and evidence of its nature, magnitude and impacts,
- explanation of how the objective may address the problem without pre-justifying a particular course of action,
- assessment of feasible options via cost-benefit, impact and risk analysis of each option,
- summarisation of the consultation process and views of stakeholders,
- justification for the preferred option, and
- description of how the regulation will be implemented and when it will be reviewed.

The COAG guidelines state that the analysis may measure the economic and social impact of government action and decisions should not be based only on the effect on particular groups in society but should include consideration of what is best for the community as a whole. It is contended that as long as assumptions and justifications for regulatory action are explicit, cost-benefit analysis may provide an objective and transparent process.

In practice, cost-benefit analysis has significant limitations. While financial impacts to business and government of intervention may be quantified, often this is not possible for social issues. Community interest may be described in qualitative terms, however, in many cases- they cannot be attributed with a tangible or monetary value. The benefits of maintaining safe, supportive and inclusive communities and individual well-being often cannot be monetised.

A cost calculator has been prepared as a tool to assist in the analysis of financial impacts of regulation but tools are not readily available to weigh or measure the benefits of remedying information asymmetry and improving competition, or unfair practice, which may cause significant detriment to competition, resource allocation and market efficiency. In the absence of such tools, the process's focus tends to be skewed towards the analysis of direct financial impacts within an economic framework**.**

Much is unknown about specific economic benefits of consumer policy. Costing models would assist in assessing the net benefits of consumer protection regulation if they could measure:

- regulation's contribution to improving individual market efficiency,
- the impact the quality of regulation has on the economic performance of comparable industries,
- the effect of high levels of business compliance on firms' performance,
- the costs of unfair trading practices and the type and extent of consumer detriment arising from such practices, and
- risks to consumers and the community arising from problems in consumer markets.

In its 2004-2005 annual report, the Productivity Commission considered the quality of, compliance with, and support for the RIS process. The report noted the views of peak industry bodies however the views of community representatives were absent. This raises the question as to whether procedures for review should provide for broader input, including from consumer organisations.

ATTACHMENT 6

The benefits and challenges from greater national and international trade in consumer products

Introduction

Reform of Australia's consumer policy framework must take account of the increasing depth and breadth of trade in consumer products across state and territory borders within Australia and between Australia and the rest of the world.

Trade liberalisation, the growth of new markets and new centres of production in developing economies, as well as advances in communications, information technology and marketing mean that Australians are increasingly purchasing consumer products manufactured in other countries. Many of these latter forces also drive trade within Australia, including the growth of electronic commerce. Australians now use the Internet to purchase goods from suppliers located in other states and territories with a convenience not previously available.

Increased trade in consumer products forms part of a much broader growth of trade in goods and services that delivers substantial benefits to Australians, with more freedom of choice, stronger economic growth, improved living standards, and greater innovation and productivity. At the same time, greater national and international integration of consumer markets poses challenges to consumers and businesses. Well-developed consumer policy can ensure that consumers, businesses and the community can realise more of the benefits from trade.

Benefits from greater trade in consumer products

As discussed above, increased trade in consumer products cannot be considered in isolation from the broader growth in national and international trade.

The benefits of trade are well documented. Increased trade leads to more freedom of choice, stronger economic growth, improved living standards, and greater innovation and productivity. While these benefits are discussed separately below, they are all closely related.

Freedom of choice

In general, individuals have a strong preference for freedom of choice in the economic decisions they make. Greater national and international trade provides consumers and businesses with improved choice over what products to buy and sell and at what price. In particular, increased trade in consumer products provides consumers with access to a wider range of high quality

consumer products, at more competitive prices, than would be available locally or domestically.

Stronger economic growth

Increased trade allows individuals, businesses and communities to specialise, exploiting their comparative advantages by using their resources to concentrate on what they do well relative to others. At a firm level, greater national and international trade helps businesses access wider markets, improving profits by increasing sales, realising economies of scale and spreading the fixed costs of research and development over a wider customer base. Firms also benefit from improved access to competitively priced raw materials, services, components and expertise.

By allowing resources to be used more effectively and efficiently, increased trade contributes to economic growth and, therefore, increases real household incomes. As a corollary, restrictions on trade cause the economy to become less efficient, reducing growth prospects and associated benefits such as job creation and improved incomes.

Improved living standards

Greater national and international trade boosts the living standards of Australians in two important ways. Firstly, and most importantly, stronger economic growth creates new jobs and raises incomes. One in five Australian jobs are directly or indirectly linked to exports, and in regional and rural Australia one in four jobs are export related.[7] Employees in businesses exposed to international trade tend to also enjoy relatively high wages. Australia's 30,000 exporting firms pay their employees, on average, $17,400 more than non-exporting firms.[8]

Secondly, trade helps lower the cost of living by ensuring that consumer products are more competitively priced and by providing access to inexpensive imported goods. This particularly benefits low income families.

Greater innovation and productivity

Trade exposes Australian businesses to competition from the best Australian and overseas producers and improves opportunities to absorb new and more efficient production processes. It also creates opportunities for Australian businesses to target overseas markets. This creates powerful incentives for businesses to improve their performance by minimising waste, improving production techniques and investing in research and development to create innovations that will enhance their products' competitiveness. As a result, productivity levels tend to be highest in industries that are exposed to trade. This higher productivity translates into improved profitability, economic growth and job creation.

[7] Department of Foreign Affairs and Trade, *Trade 2006*, p.2.
[8] Ibid, p.2.

Challenges from greater trade in consumer products

In the course of delivering the substantial benefits described above, increasing national and international trade in consumer products poses several challenges for Australian consumers, businesses and governments.

Consumers are purchasing a range of new products from new suppliers located in remote jurisdictions and are often using new technologies to do so. Each of these factors is an important driver of the benefits from greater trade, yet each can give rise to consumer challenges. Australian businesses are seeking to exploit new markets both overseas and in other states and territories while dealing with an often complex and inconsistent array of regulations. In developing consumer policy governments must seek to address the challenges faced by consumers while ensuring that consumers and businesses can realise the benefits that increased trade brings.

Consumer challenges

While Australian consumers continue to face a number of more traditional challenges, three concerns exemplify the consumer issues arising from greater trade in consumer products. These are the:

- need to ensure the safety of the increasing number of imported consumer products;
- risks that may be involved in electronic commerce; and
- increasing number and sophistication of scams.

Product safety

Increased trade in consumer products means that many of the products purchased by Australian consumers are manufactured overseas. Australia has a well-developed system of product safety regulation, which applies to goods imported into Australia as well as those manufactured domestically. However, there is a risk that goods manufactured outside of Australia may either not conform to existing Australian product safety regulations, where these are in place, or may fall short of the community's expectations for product safety. This risk has been highlighted by recent media reports of unsafe imported children's toys.

Australia's consumer product safety system is being reviewed by the Ministerial Council on Consumer Affairs (MCCA). This review has been informed by a Productivity Commission (the Commission) research study entitled *Review of the Australian Consumer Product Safety System*. While the Commission found that the product safety system is functioning reasonably well, MCCA and the Commission have identified reforms that would improve the speed and effectiveness with which the product safety system can identify and respond to emerging hazards, including those posed by imported consumer goods.

Electronic commerce and scams

Business-to-consumer electronic commerce offers Australian consumers and businesses substantial economic and social benefits, while presenting consumers with a number of new challenges due to the differences between shopping online and in the traditional retail environment. Perhaps the most significant of these challenges is the growing number and sophistication of scams. While consumers have always been exposed to a range of misleading or unconscionable practices, the Internet and e-mail have made it easier for unscrupulous businesses to target large numbers of consumers at very low cost. Often these scams originate overseas and the perpetrators are often difficult to identify and lie beyond the direct reach of Australian regulators.

In addition to scams, other consumer challenges that are particularly relevant to electronic commerce include the:

- need for appropriate security for consumers' personal and payment information,
- growth of unsolicited commercial e-mail (spam),
- need to ensure that consumers' private information is handled appropriately,
- need to ensure that information important to consumers' purchasing decisions is disclosed and easily accessible, and
- need to ensure that consumers have ready access to effective avenues of dispute resolution and redress.

Australia's response to these challenges must take into account the rapid evolution of online markets and the technologies that support them. Australia has a well-developed and robust regulatory framework that is designed to address the fundamental and enduring consumer issues on which these challenges are based. Elements of this framework include the *Trade Practices Act 1974*, *Australian Securities and Investments Commission Act 2001*, *Spam Act 2003*, and *Privacy Act 1988.* Beyond this legislative framework, non-regulatory solutions such as self-regulatory guidelines and codes of conduct and consumer education and information initiatives provide a flexible and swift means of responding to consumer challenges without stifling innovation. In particular, the use of technology-specific regulation should be viewed with caution, due to the risk that such regulation will fail to keep pace with, and may impede, advances in electronic commerce.

As many of these challenges have an international dimension, cooperation between Australian and overseas consumer regulatory agencies is important. The *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*, signed in April 2003, are designed to facilitate such cooperation.

Business challenges

Growing trade in consumer products means that Australian businesses are increasingly operating in national and international consumer markets. These markets are, however, often characterised by government regulation that differs across jurisdictions within Australia and between Australia and our overseas trading partners.

The need to monitor and comply with a range of inconsistent regulations can impose costs on businesses operating across borders and can ultimately present a barrier to trade. The costs associated with different types of inconsistency are discussed in attachment 8. While these difficulties exist in a number of markets and areas of consumer regulation, two areas that exemplify the problem of inconsistent regulation are consumer product safety and trade measurement.

In the report of its recent research study, *Review of the Australian Consumer Product Safety System*, the Productivity Commission found that inconsistencies in product safety regulation across Australian jurisdictions can impose large costs on businesses. The Commission considered that these inconsistencies make it difficult for businesses that supply goods across state and territory borders to fully understand and comply with the different regulatory regimes and can impede economic integration between Australia and New Zealand.

In its report, the Commission identified criteria that can assist governments to assess whether a market should be regulated on a national or a multi-jurisdictional basis.[9] It considered that the safety of consumer products in Australia should be regulated by a single national regulator enforcing a single national law. The Commission pointed to the benefit that included the reduction in business compliance costs and the economies of scale that arise when businesses can supply a product in accordance with uniform regulations, along with the resultant potential for lower consumer prices. The Commission also found that consumers' risk preferences and the risks posed by consumer products do not vary significantly across jurisdictions in Australia. Where a product poses a risk to consumers in one jurisdiction, this risk will also exist in other jurisdictions in which the product is sold.

Businesses wishing to trade across state and territory borders may also contend with inconsistencies in trade measurement regulation. While the implementation of uniform trade measurement legislation was agreed in 1990, not all jurisdictions have adopted the uniform legislation. In addition, administrative procedures for implementing the legislation differ between jurisdictions, introducing further complexity for businesses trading across borders. A review of the trade measurement framework is currently being undertaken to address these issues.

Implications for consumer policy

[9] Productivity Commission, *Review of the Australian Consumer Product Safety System*, 16 January 2006, p.37.

Well developed consumer policy assists in addressing the challenges posed by greater national and international trade in consumer products, while ensuring that consumers, businesses and the community can fully realise the benefits that increased trade promises. Through improving consumers' confidence in markets for goods and services, good consumer policy strengthens trade in domestic markets and provides Australian businesses with a competitive advantage in winning market share overseas.

Equally, Australian consumers and businesses endure the burden of failed regulation. Inappropriate or poorly designed regulation leads to consumer challenges remaining unaddressed or to trade being restricted by regulation that is excessively complex or costly to comply with. In developing trade and other agreements, however, there is a risk of diminution of the Australian consumer policy framework. Care is needed to be taken to ensure this does not occur.

Accordingly, policy-makers should seek to match consumer policy response to clearly identified problems in consumer markets. This principle has a number of important implications.

- Where a consumer problem has been caused by a lack of consumer information or relates to the manner in which consumers utilise information (including as a result of behavioural biases), consideration should be given to consumer information and education approaches.
- Consideration should be given to market-based approaches, such as co-regulation and self-regulation, as such policies are the least likely to disrupt trade and are most likely to allow consumers to satisfy their individual preferences for goods and services.
- If policy-makers determine that a regulatory response will deliver the greatest net benefit to the community, the regulation should be introduced in the manner least likely to impose unnecessary administrative and business compliance costs. This would involve:
    - seeking regulatory consistency across Australian jurisdictions and between Australia and our major trading partners,
    - ensuring that effective guidance is provided on how compliance with the regulation will be assessed,
    - using mechanisms, such as sunset clauses and periodic reviews, to ensure that regulation remains relevant and effective over time,
    - consulting with businesses and consumers throughout the development, design and review of consumer regulation, to ensure that the full impact of government action is understood,
    - avoiding duplication between industry specific consumer regulation and general consumer regulation, and
    - ensuring that enforcement responses are appropriate, proportionate and timely.

Finally, the increasingly national and international nature of consumer markets requires cooperation between consumer policy makers and regulators across Australian jurisdictions and between Australia and other countries.

ATTACHMENT 7

Enhanced integration between the Australian and New Zealand economies and consumer policy

Introduction

The purpose of this paper is to consider the ways in which enhanced integration between the Australian and New Zealand economies can improve the environment in which consumers transact and, accordingly, can improve outcomes for consumers.

The goals of consumer policy include:

- ensuring consumers have access to relevant and accurate information so that their expectations are met,
- ensuring consumers have access to products and services which meet reasonable standards of safety,
- promoting confidence in market rules and institutions, and
- enabling consumer access to redress.

Trans-Tasman integration can help achieve these goals. For example, harmonized rules and consistent standards can reduce the costs to consumers of seeking out information and to businesses of complying with the rules/standards. This paper discusses current mechanisms for achieving integration and notes opportunities for possible enhanced integration.

New Zealand and Australia's current commitment to close relationship

The recently released report of the Australian Government's House of Representatives Standing Committee on Legal and Constitutional Affairs *Harmonisation of Legal Systems within Australia and New Zealand* noted that Australia and New Zealand "have a uniquely close and abiding relationship borne of shared history and longstanding connections – and it is a relationship that continues to grow closer over time." The report further said that "Both the Australian and New Zealand Governments affirmed this relationship in their evidence to the inquiry. [Department of Foreign Affairs and Trade Australia] DFAT stated that:

> Australia's relationship with New Zealand is the closest and most comprehensive relationship we have with any country.
>
> …Migration, trade and defence ties, and strong people-to-people links have helped shape a close and co-operative relationship. .. At the government-to-government level, Australia's relationship with New Zealand is more extensive than with any other country.

> …On the economic and commercial fronts, both governments are strongly committed to the closer integration of our two markets, including the closer alignment of our respective legal and regulatory regimes to streamline business activities and create a more favourable climate for trans-Tasman business.

The [New Zealand Government] NZG stated that:

> New Zealand's closest international relationship is with Australia, as reflected in our trade, investment and people flows, depth of regulatory coordination and an array of inter-governmental trans-Tasman agreements and arrangements. The two governments have expressed a desire to deepen and broaden the economic relationship by advancing the concept of a single economic market, or seamless business environment."

Closer Economic Relations

The relationship between Australia and New Zealand goes back many years. It was greatly strengthened in 1983 by the Australia New Zealand Closer Economic Relations Trade Agreement (CER). CER is the most comprehensive trade agreement entered into by either country, spanning areas that include free trade in most goods, market harmonisation in services and capital, mutual recognition of many standards and the creation of an open labour market.

CER has substantially benefited both countries. Australia is New Zealand's biggest export market. New Zealand is currently the fourth largest market for Australian exports. Australia has also become New Zealand's primary source of investment capital with Australia owning 85 per cent of New Zealand's banking assets.

The CER has been extended several times into new areas, and is supplemented by frequent Ministerial meetings including New Zealand's participation on Ministerial Councils, the joint food standards agency Food Standards Australia New Zealand, the Joint Accreditation System of Australia and New Zealand and the trans-Tasman mutual recognition agreement (TTMRA).

Recently (2004), CER was supplemented by the Single Economic Market initiative. The New Zealand Deputy Prime Minister and Treasurer, Dr Michael Cullen, and the Australian Treasurer, Peter Costello, meet regularly to advance this initiative which includes the *Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law*.

There are also plans for a joint therapeutics agency, which will be an international agency established in accordance with the treaty between the two countries (signed in December 2003). The agency will be responsible for

standards for the manufacture, supply, import, export and promotion of therapeutic goods.

These integration mechanisms are described in more detail below.

Mechanisms for Economic and Consumer Policy Integration

Ministerial Councils

New Zealand actively participates in a number of Ministerial Councils. Ministerial Councils, and associated officials forums, provide an opportunity for jurisdictions to share knowledge, coordinate regulatory approaches, and collaborate on complex projects. Ministerial Councils allow flexibility as jurisdictions are not bound by decisions and can implement different solutions if appropriate.

When considering Trans-Tasman Mutual Recognition Agreement (TTMRA) issues, New Zealand has full membership and voting rights on Ministerial Councils, but does not vote on issues that are applicable to Australian jurisdictions only. At the officials' level, New Zealand is frequently well engaged in Australian forums.

The House of Representatives Standing Committee on Legal and Constitutional Affairs report on *Harmonisation of Legal Systems within Australia and New Zealand* recommended "that the participating Australian government's move to offer New Zealand Government ministers full membership of Australasian (currently Australian) ministerial councils." The report argued that "this would strengthen Government-to-Government links, provide an additional perspective in the consideration of policy issues, and ensure that New Zealand ministers are kept abreast firsthand of significant developments in Australia which have ramifications for New Zealand and the trans Tasman relationship."

New Zealand attends and contributes to the Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Officials on Consumer Affairs (SCOCA). MCCA has been successful in sharing responsibility for developing innovative solutions to complex consumer issues.

Food Standards Australia New Zealand

Food Standards Australia New Zealand (FSANZ)[10] develops food standards, and joint codes of practice with industry, covering the content and labelling of food sold in Australia and New Zealand. In addition, FSANZ develops Australia-only food standards that address food safety issues – including

[10] Previously known as the Australia New Zealand Food Authority (ANZFA). It was originally established by the *Australia New Zealand Food Authority Act 1991* (as the National Food Authority), following an inter–governmental agreement between the Australian Commonwealth, States and Territories, to develop nationally uniform food standards. New Zealand joined in 1996 with the signing of the Treaty for a joint Food Standards System.

requirements for primary production – and maximum residue limits for agricultural and veterinary drug residues.

The Board of FSANZ comprises 10 members, a chairperson, the CEO of FSANZ, a consumer representative, two members nominated by the New Zealand Lead Minister and five others with relevant expertise from a specific list.

Its corporate plan notes that FSANZ is "an essential element of a strong food regulatory partnership between governments at all levels in Australia and New Zealand. Food standards developed by FSANZ are consistent with food regulatory policies and guidelines handed down by a Ministerial Council. Other regulatory bodies, in Australia's states and territories and in New Zealand, enforce the standards and work with industry to achieve compliance."

JAS-ANZ

The Joint Accreditation System of Australia and New Zealand (JAS-ANZ) was the first joint Trans-Tasman institution, established in 1991 by Treaty between the New Zealand and Australian Governments. It accredits conformity assessment bodies, removing the need for multiple audits in the Australian/New Zealand market and assisting exporters of goods and services to third countries by gaining international recognition of certificates of conformity. This flows through to benefit consumers who are assured that goods and services will meet appropriate standards.

The governance structure of JAS-ANZ comprises a ten members Board. Six board members are appointed by the Australian Government and three are appointed by the New Zealand Government. The other Board position is held by the Managing Director.

At the 15th birthday of JAS-ANZ in October 2006, the New Zealand Minister of Commerce noted that JAS-ANZ has developed and consolidated its position as an effective organisation in the Australasian and international arena. She also summed up the advantages to consumers of an independent third party accreditation body like JAS-ANZ:

> "One of the main benefits of third party accreditation is that it promotes trust and confidence in goods and services. Trust has always been the cornerstone of good business practice. In the past you could deal with your neighbour or the local supplier of goods or services because you knew them. You trusted them; they trusted you; and besides which, you knew where they lived if they let you down.
>
> Today people do not always know the people they are dealing with on such an intimate basis: supply chains span the globe and goods are shipped from one end of the world to the other.
>
> Contracts for the supply of goods and services have become

> increasingly complicated and the acceptable margins of error ever tighter. How do we build trust into these relationships that are formed at a distance?
>
> The answer is a system for ensuring quality assurance and environmental management around processes, products and services. Stipulating that products and systems are certified by JAS-ANZ-accredited bodies meets the demands of international trade by identifying trusted bodies to undertake the assessments that can be relied upon."

An example of how JAS-ANZ accreditation could enhance integration between New Zealand and Australia can be found with gas appliances. Currently, gas appliances have a temporary exemption under TTMRA. New Zealand has proposed third party certification by JAS-ANZ accredited bodies that gas appliances meet the New Zealand gas appliance safety standard. Such an approach would provide greater confidence to Australian gas safety regulators that gas appliances manufactured in New Zealand to the New Zealand Standard are safe for use in Australia. This matter is under discussion, but there is confidence amongst gas safety regulators and the Australian and New Zealand government's that this approach would allow the temporary exemption to be lifted.

TTMRA

The TTMRA came into force in 1998. Under the TTMRA, most goods able to be legally sold in one country can be legally sold in the other country, without having to meet further sales-related requirements. Similarly, people registered to practice an occupation in one country are entitled to practice the equivalent occupation in the other country, without having to undergo further testing or examination.

The TTMRA is a central instrument of regulatory coordination between the two countries and is a key foundation in both Governments' effort to create a trans-Tasman single economic market. In a joint statement from Australian and New Zealand Ministers in September 2006, they stated "The TTMRA has significantly reduced transaction costs associated with the sale of goods and occupational registration on both sides of the Tasman. Without mutual recognition, the growing integration of the Australian and New Zealand economies would simply not be possible. The Trans Tasman Mutual Recognition Arrangement has been, and will continue to be, an important driver of regulatory co-ordination".

A review of the TTMRA was undertaken in 2003. Part 1 of the review was undertaken by the Productivity Commission. It identified that the TTMRA could be improved by:

- streamlining the approval process for registration of occupations by enhancing information flows and reducing registration requirements between jurisdictions,

- examining, on a case by case basis, the need to include regulations governing the use of goods that impede goods mobility within the scope of the mutual recognition schemes;
- reducing the administrative costs of the annual roll-over of the six Special Exemption Co-operation Programmes by extending the length of the Programmes and requiring both a detailed work plan for resolving remaining issues and annual progress reports,
- ensuring that the objectives and obligations of the Trans-Tasman Arrangement and the Australian Agreement are taken into consideration early in the policy development process. One way to achieve this is to adapt the current Regulatory Impact Statement regime in both New Zealand and Australia to encompass consideration of mutual recognition obligations; and
- promoting the awareness of the obligations and benefits of the Trans-Tasman Arrangement and the Australian Agreement with regulators, local government, relevant industries, professional associations and consumers in a co-ordinated manner across all participating jurisdictions.

The Productivity Commission also reinforced the importance of joint trans-Tasman standards development and noted that the Australian and New Zealand standards setting bodies should follow a hierarchy in the development of standards. International standards should be adopted where possible, followed by joint standards and finally domestic standards.

The 2003 review of the TTMRA, endorsed by all heads of government, confirmed that while the TTMRA has been largely successful in removing barriers to trade and facilitating the movement of registered occupations, business stakeholders and regulators need to be better informed of the strategic objectives and obligations of the mutual recognition Arrangement.

Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law

The first Memorandum of Understanding (MoU) on the Harmonisation of Business Law was agreed in 1988. A second MoU was agreed in 2000; and in 2006. a further MoU was agreed.

The 2006 MoU states that "the Governments of New Zealand and Australia recognise the importance of accelerating, deepening and widening the relationship that has developed through the growth of trans-Tasman trade, particularly since the commencement of the Australia New Zealand Closer Economic Relations Trade Agreement in 1983. Both Governments consider that further coordination of significant areas of business law (including consumer law but not taxation) can facilitate the achievement of this goal."

It further notes that "both Governments acknowledge the importance of a global approach to business law issues (particularly in light of the increasing prevalence of electronic commerce) and the significance of the trans-Tasman

relationship in that approach" and "both Governments have committed to the objective of a single economic market."

The MoU acknowledges that "New Zealand and Australia have already achieved a significant degree of coordination and cooperation in a number of areas of business law, including:

a. competition laws enforced by the Commerce Commission in New Zealand and Australian Competition and Consumer Commission,
b. consumer protection laws, including fair trading laws,
c. cross investment activity including the offer of securities between Australia and New Zealand, in particular, equities and interests in managed funds; cross border listings on ASX and NZSX,
d. mutual recognition of registered occupations, as provided for under the Trans-Tasman Mutual Recognition Arrangement, and
e. New Zealand reforms regarding takeovers and securities law, and the adoption by both countries of International Financial Reporting Standards."

Going forward, with respect to consumer law the work programme commits to information sharing amongst regulators and, where appropriate, joint participation in policy, research, compliance and education programmes on consumer issues relating to business law and explore the potential for sharing work and coordination of work on enhancing financial literacy.

Other key areas identified for greater coordination in the future, which are relevant to consumer policy include: cross-border insolvency, disclosure regimes, coordination of insurance, disqualification of directors, intellectual property rights, and coordination of anti-money laundering measures.

Information Sharing between the ACCC and the NZCC

One area, which has been identified for several years, that could enhance integration of the New Zealand and Australian economies is to provide for better sharing of information between the New Zealand Commerce Commission (NZCC) and the Australian Competition and Consumer Commission (ACCC)[11]. There are a number of firms who operate in both the New Zealand and Australian markets. Competition and consumer protection regulation in New Zealand and Australia are similar. However, in both countries legislation prevents the two regulators assisting each other in investigations on contraventions of fair trading and competition policy laws.

Australian Government legislation to implement this proposal was scheduled for introduction into the Parliament in the week beginning 26 March 2007. New Zealand is also developing proposals for information sharing between the NZCC and the ACCC.

[11] This was also recommended by the Productivity Commission in its report on the Australian and New Zealand competition and consumer policy regimes in 2005.

Making Regulation Effective Across Borders

The integration of markets, and increase in cross-border market activity and cross-border firms, raise a number of issues where there are differences in the regulatory regimes across Australia and between New Zealand and Australia.

Currently there is a lack of uniformity in many areas among Australian States and Territories as well as between Australia and New Zealand. This increases the layers of complexity for consumers wishing to enforce their rights or for businesses trying to fulfil their obligations. Cheaper travel and new technology has increased the number of trans-Tasman and interstate transactions. It is not unknown for a consumer in New Zealand to purchase a good from an outlet in Queensland with a head office in Victoria.

MCCA for several years has been considering how harmonise product safety and trade measurement regulation.

The Australian and New Zealand Governments recognise there is an increasing risk of regulation not achieving its policy objectives, even when those objectives are the same in both countries, and even when the substantive content of the rules is very similar, as a consequence of limits on the regulators' ability to cooperate across borders, for example, by sharing information, exercising powers to obtain evidence or conduct searches in one country in support of enforcement action in the other country; or unenforcing penalties or judgements across countries. To address these concerns an Australian and New Zealand officials working group is reviewing trans-Tasman co-operation in court proceedings and regulatory enforcement. The proposals under consideration would facilitate enforcement of court judgments relating to civil penalties and certain criminal fines for regulatory offences across the Tasman.

New Zealand has identified that this would benefit consumers by strengthening judgement under its Commerce Act and Fair Trading Act.

Conclusions and Recommendations

This paper discussed existing models of trans-Tasman cooperation and the way these institutions help build common standards, share information and promote consumer confidence. These are examples of consumer benefits from enhanced integration between the Australian and New Zealand economies.

The paper also noted some areas where better integration could be or is being explored. It looked at the broad institutions for economic integration, rather than specific subject areas. Further analysis of regulatory reform in specific subject areas could further improve economic and consumer policy integration between New Zealand and Australia.

ATTACHMENT 8

National consistency and uniformity

Consumer protection in Australia is regulated by a mix of general and industry-specific legislation at the Commonwealth and state and territory level. The result is that there are different levels of protection for consumers and regulation for businesses depending on which laws apply to the relevant industry or jurisdiction.

General consumer protection legislation in Australia

The main pieces of general consumer protection legislation in Australia are the *Trade Practices Act 1974* (Cth) (TPA) at the Commonwealth level, and the Fair Trading Acts in each of the states and territories.

The state and territory Fair Trading Acts were introduced between 1985 and 1992 to establish a uniform consumer protection regime by extending the coverage of the TPA (which only applied to corporations) to all types of traders. The Fair Trading Acts generally mirror the consumer protection provisions in Part V of the TPA (and the associated enforcement and remedy provisions in Part VI). However, despite the intent to create a uniform consumer protection framework throughout Australia, the Fair Trading Acts have never been uniform across all jurisdictions. For example, there are differences in the way door-to-door trading and dual pricing are dealt with, and the Fair Trading Acts also adopted different definitions, which alter their operation and coverage between jurisdictions.[12] Further, since the Fair Trading Acts were introduced, their, divergence has increased with the various amendments that have been made. Victoria and NSW have included provisions regulating telemarketing practices, although these are not uniform. One of the more significant differences between the state and territory Fair Trading Acts has been the recent inclusion in Victoria of provisions relating to unfair terms in consumer contracts.

Industry-specific consumer protection regulation

In addition to the above general fair trading laws, each state and territory has a multitude of industry-specific regulation, such as licensing and registration schemes. These industry-specific regulations are the areas of greatest divergence in the consumer protection frameworks of the states and territories.

The jurisdictions differ in the industries they regulate, for example, only Victoria, New South Wales and Queensland regulate bodies corporate (or

[12] For example, in the TPA and in the Fair Trading Acts in Victoria, Tasmania, South Australia and Queensland, 'supply' in relation to goods includes supply or re-supply by way of sale, exchange, lease, hire or hire-purchase. However, in NSW, Western Australia and the ACT, 'supply' also includes exhibit, expose or have in possession for the purposes of sale, exchange, lease, hire or hire-purchase or for any purpose of manufacture or trade. (CCH Australia 2006, para [600]).

strata title). Even where jurisdictions enact legislation that covers the same industries, they are likely to adopt different approaches. For example, each jurisdiction has varying levels of regulation relating to conveyancers and smash repairers.

The differences between jurisdictions are not just in legislation. The *Trade Practices Act 1974* and Fair Trading Acts in each jurisdiction, except New South Wales, enable mandatory codes of conduct to be prescribed for specific industries. (New South Wales recently amended the Fair Trading Act to permit prescription of a mandatory code for motor vehicle insurers and repairers.) Although few codes have been prescribed, these provisions have the potential to create substantial differences in regulation between jurisdictions.

Potential costs of this lack of uniformity

In its *Review of National Competition Policy Reforms*, the Productivity Commission noted that inconsistencies in consumer policy increased compliance costs and impeded the development of national markets. The report of the Australian Government's Taskforce on Reducing Regulatory Burdens on Business also commented that the lack of uniformity led to "greater compliance costs and burdens for companies that operate nationally, such as food franchises and banks" (Regulation Taskforce 2006, p51). Inconsistencies could also effect medium-sized businesses by deterring them or making it too costly for them to expand operations in to other jurisdictions.

Industry also stresses the need for uniformity in administration and enforcement as well as regulation. Shared enforcement responsibility offers unique challenges where a trader from one jurisdiction is engaging in illegal conduct in another jurisdiction. Jurisdictions have responded to this issue in a range of ways, including extending the application of their extraterritoriality provisions or making use of Federal processes where possible. To further assist in responding to cross-border enforcement situations and ensuring that coordinated enforcement is delivered, MCCA has established the Fair Trading Operations Advisory Committee, which meets monthly to discuss enforcement issues of significance.

In addition to increased compliance costs for business (which may flow through to consumers), differences between jurisdictions' laws can create uncertainty for both consumers and businesses on the application of Acts and Regulations. This may result in consumers being unaware of their rights or the available remedies[13], and traders being unaware of their obligations. The cost of these inconsistencies will depend on:

- The nature of the market and market participants – the costs of different regulations are greater for traders that operate in more than one state, or would do, without the differences in regulatory

[13] Consumers may also assume they have rights when they do not. For example, in Victoria, there is a 3-day cooling off period for most used car purchases, but not for new car purchases; whereas in NSW, both new and used car purchases are entitled to a cooling off period, but only where a credit agreement from a linked credit provider is entered into as part of the sale.

arrangements. Similarly, the costs of confusion to consumers are greater where consumers transact across borders (online markets and border areas) and cross-border migration is high. Further, if traders are mobile across borders, rogue traders may take advantage of regulatory differences and 'jurisdiction shop', increasing overall costs to the community.

- The type of regulation imposed – differences between regulations affecting outputs (such as the nature of products that can be sold) may result in greater compliance costs than differences between regulations affecting matters of process (such as the type of premises a trader can operate from). Traders are more likely to be able to accommodate the latter differences, and, if they only have a physical premises in one jurisdiction, they will not be affected by the different regulations.
- The extent of the differences between the various regulations – traders incur much higher costs where regulations differ to such an extent that they are incompatible and the trader cannot comply with both simultaneously. However, incompatible regulations are infrequent. Where regulations are merely different, but compatible, a trader may be able to comply with both by adopting the highest standard. If this standard is inline with normal business practice, there would be no cost resulting from the different regulations.

The differences in regulations between jurisdictions may be reduced by increasing uniformity and harmonisation. 'Harmonisation' aligns laws, rules and processes to promote consistency in their application and outcomes, and to remove inconsistent or contradictory requirements.

In addition to reducing business and consumers' costs by creating economies of scale and reducing duplication of activity, greater harmonisation may also reduce the costs of government developing, administering, monitoring and enforcing the regulatory schemes.

Potential costs of, and barriers to, greater harmonisation

Moving to a more harmonised regulatory environment does impose initial costs on business and government. Both businesses and consumers may be required to become aware of, and adhere to, new rights and responsibilities; and businesses and governments may incur large costs from adopting new administrative systems and processes.

These costs must be balanced against the costs of existing regulatory differences and the benefits from greater harmonisation. In many cases, only those transacting across borders will benefit, but all consumers and businesses will be affected by the costs of change, because there is no way of limiting the costs to the beneficiaries.

There are also costs associated with harmonisation that go beyond the costs of change and strike at the heart of the federal system and the sovereignty and separation of the Australian jurisdictions. Jurisdictions may be reluctant to

move toward increased harmonisation because, depending on the approach adopted, harmonisation may:

- Require jurisdictions to relinquish some, or all, regulatory control. For example, where template legislation is adopted, amendments may be determined by a majority of jurisdictions, in which case a jurisdiction may have to adopt legislation it is not in favour of,
- Prevent a jurisdiction from making legislation that would benefit it, or that is tailored and responsive to any particular and unique needs of that jurisdiction,
- Make the regulatory scheme less responsive to emerging issues and there may be greater delays in enforcement activity or introducing legislative amendment,
- Reduce the resources available, including for enforcement activity if a single regulator model is adopted.
- Remove the potential to benefit from competitive federalism, where each jurisdiction has incentives to introduce the most efficient regulatory structure to attract traders and investors to their jurisdiction.

Models for greater harmonisation

If greater harmonisation is appropriate, there are a number of approaches that could be adopted. These include adopting a single national law, adopting template or model legislation in each of the states and territories, or agreeing to uniform legislative provisions or principles. Different approaches could be taken to the regulation of different industries or areas of consumer law.

The first approach — a single national law — would require Commonwealth legislation. As outlined in the overview, the Constitution restricts the areas in which the Commonwealth can legislate. Therefore, the Commonwealth would either have to have power, or the states and territories would, pursuant to s. 51(xxxvii) of the Constitution, have to refer their constitutional powers in this area to the Commonwealth. An example of such a system was the enactment of the *Corporations Act 2001* (Cth), following the referral by each of the states of the necessary constitutional powers.

The second approach — 'template' legislation — would require one jurisdiction to enact a 'template' Act with other jurisdictions enacting legislation that refers to the first jurisdiction's legislation. Any change to the original jurisdiction's template Act automatically becomes law in the other jurisdictions. Template legislation is currently used to regulate credit in Australia. Under the *Australian Uniform Credit Laws Agreement 1993*, initial legislation was enacted in Queensland and enabling legislation was then enacted in the other states and territories[14]. As a result, any changes to the Uniform Consumer Credit Code (which are decided by the Ministerial Council) only need to be made in Queensland, as they apply automatically[15] in the other jurisdictions.

[14] Except Western Australia, although it has subsequently passed enabling legislation.
[15] In both Tasmania and Western Australia, however, there is a system whereby amendments to the Code or Regulations must be ratified by their respective parliaments before coming in to force.

The third approach — model legislation — involves each state and territory adopting separate but uniform legislation. This approach underpinned the state and territory Fair Trading Acts, which were intended to mirror parts of the Trade Practices Act. As noted above, however, amendments to the state and territory Fair Trading Acts, since their introduction, mean that they are no longer uniform.

The Uniform Trade Measurement Legislation Scheme is an example of an attempt to address the problem of divergence following the initial agreement. Under the scheme, the states and territories[16] each enacted model legislation and a ministerial advisory council was established to oversee the maintenance of the legislation and its administration. Under the agreement, any amendments to the legislation must be first agreed by the Ministerial Council. Problems exist, however, as there is a lack of uniformity in the administration Acts and Regulations, and lack of synchronisation in amending the legislation in each jurisdiction.

The fourth approach — uniform legislative provisions — requires each jurisdiction to agree on uniform provisions that they then reflect in legislation. The national travel agents scheme is an example of such an approach. Each of the states and territories, except the Northern Territory, has enacted travel agents legislation with uniform core provisions pursuant to the Travel Agents Participation Agreement.

The final approach — uniform principles — involves jurisdictions agreeing on a set of principles for regulation, rather than legislative provisions. Such an approach gives jurisdictions more flexibility in how they give effect to the agreement and is common in international agreements such as Directives within the European Union and Model Laws of the United Nations.

Each of the above approaches has different advantages and disadvantages and their suitability will depend on the circumstances of the industry or area to be regulated. Regardless of the approach, however, many factors must be considered when assessing the desirability of greater harmonisation, including:

- the appropriate level of regulation (this may require increases in regulation in some jurisdictions and reductions in others),
- the appropriate institutional arrangements for administering and enforcing the scheme (for example, a single national regulator or multiple jurisdiction-based regulators; establishment of new agencies or an expansion of the functions of existing regulators),
- how any future amendments can and will be made,
- who will be responsible for educating consumers and traders about the scheme, and
- how policy decisions, including the prioritisation of issues and the allocation of resources will be made.

[16] Except Western Australia.

It may be very difficult for each of the Australian jurisdictions to reach agreement in relation to the above issues.

ATTACHMENT 9

The role of consumers and consumer organisations in relation to consumer policy research and advocacy

Introduction

This paper briefly addresses the role which individual consumers and consumer organisations can play in consumer policy development through research and advocating consumer interests.

Why Involve Consumers and Consumer Organisations in Policy Research and Advocacy?

The right of citizens to participate in public policy is an essential element of the democratic political construct. More and more, attention is being paid by governments to the role citizens can play in general policy development. The United Nations Guidelines for Consumer Protection include, as one of the legitimate needs which the Guidelines are intended to meet:

> *"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."* [17]

The European Union, amongst others, has expressly recognised the need for this involvement:

> "In order for consumer protection policies to be effective, consumers themselves must have an opportunity to provide input into the development of policies that affect them." [18]

Not only is there a basic right for consumers to contribute to consumer policy development but recent thinking on the role of consumers in consumer policy has highlighted the intrinsic connection between this role and an effective, competitive market.

> *"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."* [19]

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[17] United Nations, 2003, United Nations *Guidelines for Consumer Protection*, p3

[18] Consumer Policy Strategy 2002-2006, Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 7 May 2002, p21

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

The Productivity Commission's clear recognition of the relevance of consumer advocacy in ensuring a competitive marketplace is, of itself, a powerful rationale for supporting this role. There are, however, many other reasons in support of consumer involvement in policy research and advocacy.

All discussions of the merit of a role for consumers and consumer organisations in consumer policy and advocacy must acknowledge that it is consumers who ultimately pay for all regulation and for all market failure, therefore they have a fundamental stake in the development and operation of regulatory frameworks. Adding a specific consumer perspective also can increase the effectiveness of policy development by:

- explaining how consumers are likely to view a situation or problem,
- identifying consumers' views on the priorities in a particular situation,
- suggesting how the consumer perspective relates to the views of other stakeholders,
- anticipating how consumers might respond to developed strategies,
- offering solutions to a problem that will meet the needs of consumers, and
- predicting how their constituency will respond to proposals and ideas.

In addition to providing a counter-balance to producer views (as noted by the Productivity Commission), the perspective provided by consumer advocacy can also serve to balance and hold accountable government service providers and regulators. In many cases, government remains the provider of goods and services to consumers and, in addition, government regulators can be vulnerable to both industry capture and to complacency. By serving as a "watchdog" consumer organisations can play a fundamental role in the maintenance of an effective marketplace.

Involving consumers and consumer organisations directly in policy development and advocacy also increases their understanding of the nature and complexity of markets, their operation and their regulation.

Mechanisms for Policy Research and Advocacy

Individual consumers and organisations could use a range of potentially powerful mechanisms to undertake consumer policy research and advocacy, including:

- directly researching consumer issues of interest (something made significantly easier by the Internet),
- lobbying relevant public sector agencies,
- lobbying Members of Parliament and Ministers,
- lobbying media outlets or writing letters to the editor,
- contributing submissions or other appropriate input to consultative policy processes,

- membership of relevant government boards, committees and advisory or reference groups, and
- directly participating in the political process, either in political party policy processes or as political candidates.

While these mechanisms are open to both individual consumers and consumer organisations, their capacity to use these mechanisms depends on many factors, including:

- the level of resources available,
- the relevant government's policy towards engagement with consumers and the processes for engagement, and
- the importance of individual issues and the level of consumer motivation to engage.

Very few individual consumers have the capacity to exploit these mechanisms in a sustained or organised fashion.

Consumer Representation on Government Boards and Committees

One of the most common techniques governments use to provide for consumer involvement in consumer policy development and for advocacy of consumer interests (particularly in the administration of government policy) is through consumer representation on government decision-making and advisory boards and committees. To be truly effective, a consumer representative must be able to:

- address all issues from the perspective of the consumer,
- develop and maintain relationships with the people and groups they represent,
- use strong communication skills, or develop those skills with the appropriate training and support,
- respect diversity,
- work effectively in a team environment,
- understand, commit to and maintain confidentiality when it is required,
- maintain an interest in current affairs and news, especially those issues relevant to consumers and to the board/committee on which they sit,
- participate in community activities that are relevant to their consumer networks,
- access a broad community network with which to consult regularly,
- be accessible to the consumer groups they represent, and,
- bring to the board/committee some understanding of the issues and the industry in question. [20]

[20] WA Consumer Advisory Council, *Consumer Representation on Boards and Committees. A Guide for Industry and Government*, June 2006 p4-5

Consumer Organisations in Australia

Even where examples of effective individual consumer action exist, they are usually limited to specific one-off issues. It is for this reason, consumer organisations have grown up to help advance consumers' interests on a collective basis. 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. Market sectors such as credit and tenancy are populated by a wide range of non-government consumer organisations throughout Australia, whereas other market sectors, such as building, real estate and motor vehicles have a poor level of representation.

Where consumer organisations do exist, their service delivery role is re-enforced by a widespread Commonwealth, State and Territory government funding model that ties funding to service delivery, leaving little resource available for general policy research or advocacy. While many of these organisations, nonetheless, seek to participate in policy research and advocacy, frustration at the level of expectation of their involvement compared with their resources is evident.

> *"The reason for declining, both personally and on behalf of Care, is the continued increase in expectations of what consumer organisations can reasonably achieve, with no consideration of resourcing and capacity.*
>
> *There is no doubt that the UCCCMC's work and this project in particular are important. Consumer engagement in the process is also vital. The question is who in the consumer movement can undertake these types of tasks without impacting adversely on their core activities and their clients whilst properly investigating and representing a 'national perspective'? short answer – there are no such groups, or at least none with current capacity. Both the CFA and AFCCRA have struggled valiantly to maintain a presence (on the back of volunteer labour) but calls for this situation to be addressed have been ignored. SCOCA, as the body to which UCCCMC reports, has known about these issues for many years and provided not much more than a sympathetic ear. If the eventual collapse of organised consumer advocacy in Australia is an acceptable outcome for SCOCA, then continuing to do nothing will deliver that in the not too distant future. In that sense, please feel free to pass these observations on to SCOCA."* [21]

Consumer organisations in Australia also tend to have low levels of membership, which impacts on their capacity to represent the views of consumers in general.

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[21] Tennant D, Director of CARE Inc email to Pamela Criddle UCCCMC Executive Officer, 22 November 2006. Reproduced with permission.

Australia has two national consumer organisations, the Consumers' Federation of Australia (CFA) and the Australian Consumers' Association (ACA). The CFA is a national peak body with over 100 consumer organisations as members. It promotes the interests of consumers, particularly low income, vulnerable and disadvantaged consumers, by:

- identifying areas in which the interests of consumers are being adversely affected,
- advocating policy and law reform changes to benefit consumers,
- conducting consumer awareness and information programs,
- liaising with other consumer and community groups to advance the interest of consumers,
- facilitating consumer responses to government, industry and regulators where specific funding or resources are available, and
- doing other things to further the interests of consumers.

The objects of the CFA are consistent with those which might be expected of a broad-based and effective consumer advocacy organisation. However, the CFA, though previously funded by the Commonwealth Government, is an unfunded body and is dependent on volunteers for its work. As a result, the capacity and role of the CFA has seriously declined.

The ACA is a not for profit company limited by guarantee with individual and corporate members. It is funded by membership income and fees for services and employs a full time staff. While the ACA claims over 200,000 members, these constitute subscribers to its various services and do not reflect active members involved in consumer policy debate or development.[22]

The ACA operates Choice, a magazine and Internet based service which advises consumers on products and services, engages in policy advocacy and is represented on numerous national and state boards and committees. But, while the ACA participates in national consumer policy research and advocacy and it is recognised as the leader in the national consumer debate from a consumers' perspective, it has been noted that the ACA, as publisher of *Choice Magazine*, is primarily a business answerable to its readership.[23] In relation to the role of the ACA, David Tennant commented:

> *"The readers of Choice will not tend to be low income or vulnerable consumers, nor will the products reviewed be those that are necessarily available to those on limited incomes or with limited practical choice. In part, the ACA has recognised the responsibility it carries for taking on rights related advocacy, by maintaining limited numbers of highly effective specialist policy staff. The cooperation with front line consumer advocates that has followed has been some of the best we have seen in recent years.*

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22 ACA website at www.choice.com.au

23 Tennant D, Australia's Desperate Need for a National Consumer Council, Address to the Second National Consumer Congress, Sydney, February 2005, p7

> *No matter how hard that advocacy groups try, or how flexible the ACA is in reinvesting in the community some of the money it makes from the sale of publications, we still have a huge structural and capability hole in the make-up of the consumer landscape in Australia."* [24]

The United Kingdom's approach

Commentators often contrast Australia's position in relation to consumer organisations with the United Kingdom, in particular with the National Consumer Council (NCC) (supported by the Scottish Consumer Council, the Welsh Consumer Council and the General Consumer Council for Northern Ireland). The NCC is a non-departmental government body. Its board is appointed by the Secretary of State for Trade and Industry and around 75per cent of the NCC's funding comes from the UK Department of Trade and Industry. The remainder of the funding comes from a variety of sources for specific projects.

In arguing for an Australian National Consumer Council, Tennant noted:

> *"…how much better might a review of consumer protection policy and regulation (a la the Productivity Commission's recommendation) be if it were assisted by a national policy think tank and research facility able to inform that process on behalf of consumers?"* [25]

Whether the United Kingdom's approach is a better or more effective option to that which has applied in Australia has not been fully considered by Australian governments. However, it clearly provides a relevant contrast for consideration. It will be interesting to see whether the lack of such a body does impact on the Productivity Commission's review of the Australian consumer policy framework and, if so, whether the Productivity Commission provides any commentary on the ability of individual consumers or consumer organisations to participate in the first national review of the consumer policy framework in Australia. [26]

Certainly there have been recent Australian examples where the lack of an independent, resourced and co-ordinated consumer voice has hampered public policy development (such as retail trading hours debates in Western Australia and home warranty insurance debates throughout Australia subsequent to the collapse of HIH Insurance in 2001).

In addition to the existing role of the NCC, the UK Department of Trade and Industry recently (2006) undertook a public consultation process on an initiative, known as "Consumer Voice", to strengthen and streamline consumer advocacy in the UK. The proposed model had three key elements:

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24 Ibid

25 Tennant D, op cit, p9

26 For details of the Productivity Commission review, see www.pc.gov.au

- the provision of a single point of contact for consumers across all markets (Consumer Direct) to obtain information and impartial advice,
- the extension of new redress schemes to all energy and postal service complaints to resolve problems where service providers have been unable to do so, and
- the consolidation of sectoral consumer bodies to form one stronger body, to represent the interests of consumers across all markets and to provide information and advice on the consumer perspective to business, Government, and sectoral regulators.

On 16 November 2006, the UK Government moved to give effect to the Consumer Voice proposal by introducing into Parliament the *Consumers, Estate Agents and Redress Bill*. The Bill's Consumer Voice proposals include strengthening and streamlining consumer representation, by bringing together Energywatch, Postwatch and the National Consumer Council to form a more coherent and effective consumer advocacy body (which will also be called the 'National Consumer Council').

Some Recent Australian State Initiatives

At a State level in Australia, there have been four recent initiatives to establish new organisations to facilitate consumer input into consumer policy research and advocacy.

In Western Australia the Consumer Advisory Council, established to advise the Minister for Consumer Protection on, inter alia, building consumer capacity in Western Australia, recommended creating a Consumer Research and Advocacy Centre in Western Australia. Acting through the Department of Consumer and Employment Protection, the Western Australian Government has supported the creation of the Centre for Advanced Consumer Research in partnership with the University of Western Australia. This Centre commenced operation in the 2007 academic year and it will provide a research and teaching function, with a national focus for its research program.

A model for a consumer research centre exists in Queensland – the Griffith University Centre for Credit and Consumer Law – although this Centre has a specific focus on credit and consumer utilities matters.[27]

A consortium of non-government consumer agencies is currently seeking funding for an independent non-government consumer advocacy service in Western Australia. The model being promoted incorporates a contract for management support to be provided by the ACA. This model is unique in Australia and may provide a precedent for either a national consumer advocacy service, or similar services in other States.

[27] Other organisations and programs which conduct research exist, for example, the Victorian Consumer Utilities Advocacy Centre Ltd and the Western Australian Consumer Utilities Project.

In October 2006, the Victorian Government announced the merger of the existing Victorian Consumer Credit Legal Service and the Consumer Law Centre of Victoria to form the Consumer Action Law Centre**.** The new Centre is intended to provide a State-wide specialist legal practice in consumer law and to provide advocacy on behalf of Victorian consumers. [28]

The success of these initiatives is yet to be determined. Each, however, reflects a recognition, at least at the State level in Australia, that more needs to be done to facilitate a viable role for consumers in policy research and advocacy.

Class Actions, Super-Complaints and Representative Actions

One specific way consumer organisations, in particular, can advocate on behalf of consumers is by pursuing legal action to ensure consumer rights are upheld or, by way of test cases, seeking to expand consumers, rights or force a change to consumer policy. In Australia, consumers and consumer organisations can take class actions to pursue consumers' rights. Two models designed to expand the role of consumer organisations in the pursuit of consumer legal action are in place in the United Kingdom – super-complaints and representative actions.

Class Actions

Early class actions in Australia involved claims on behalf of consumers for loss caused by contaminated products such as peanut butter and oysters. These claims were funded by firms acting for the representative party in the class action.

In conventional forms of litigation the parties know the identity of the claimants from the outset of the dispute and are able to ascertain the quantum of the claim and the nature of the loss from an early stage of the proceeding. None of this applies to class actions.

In Australia (unlike the United Kingdom) class actions are relatively easy to commence and the class action procedure has been used in a wide variety of situations. The essential elements needed to commence a class action pursuant to the *Federal Court of Australia Act 1974* are that:

- there must appear to be seven or more persons with a claim against the same person,
- the claims must arise out of related circumstances, and
- the claims must give rise to a substantial common issue of law or fact.

Subject to fulfiling these elements, there is no limit to the subject matter of class actions.

[28] Victorian Minister for Consumer Affairs, media release, 18 October 2006

The ease with which class actions can be commenced, coupled with the flexibility of the class action procedure, is likely to provide a platform for further class actions in Australia. The availability of third party financing to pursue a class action is also likely to ensure that class actions are an increasingly common feature of the Australian legal system. In Australia there has been a rapid growth in the number of commercial funders of litigation. At least two funders are listed on the Australian Stock Exchange (IMF Australia Ltd and Hillcrest Litigation Services Ltd).

The class action procedure provides a convenient way for a large number of people affected by anti-competitive conduct to seek recompense.[29] While a class action aims to recover damages on behalf of the class affected, such actions can have a significant effect on consumers in general, either through the size of the class affected, or the outcome settling broader principles or questions of statutory interpretation.

Super-Complaints

The Enterprise Act 2002 (UK) (which came into operation in 2003) changed competition and consumer law enforcement in the United Kingdom, including introducing the "super-complaint" mechanism. A super-complaint as defined in section 11 of the Enterprise 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 or services is or appears to be significantly harming the interests of consumers". The market in question may be regional, national or supranational (as long as the UK forms a part of that market), although only the effects within the UK can be considered.

The super-complaint process allows designated consumer bodies to bring to the attention of the Office of Fair Trading (OFT) and other relevant regulators, market features that appear to be significantly harming consumers' interests. The Secretary of State for Trade and Industry has the power to specify which sectoral regulators have duties in relation to super-complaints. Super-complaint duties have been given to: the Director General of Telecommunications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Energy Regulation, the Director General of Water Services, the Rail Regulator, the Civil Aviation Authority and the Office of Fair Trading (Order 2003 SI 1368).

Only bodies designated by the Secretary of State for Trade and Industry can make a super-complaint. The Secretary of State can make any organisation a designated consumer body provided it appears to represent the interests of consumers of any description and also meets any other criteria published by the Secretary of State. The Consumers Association, the National Association of Citizens Advice Bureaux, and the National Consumer Council have been designated as super-complainants under the Enterprise Act (Order 2004 SI 1517). Energywatch and Watervoice were designated in January 2005, and

[29] Grave D & Adams K, 2005, *Class Actions in Australia*, Lawbook Company, Australia

Postwatch and CAMRA (Campaign and the General Consumer Council of Northern Ireland) were designated in October 2005. [30]

When making a complaint, the super-complainant is expected to provide a paper setting out the reasons why, in its view, a UK market for goods or services has a feature or combination of features which is or appears to be significantly harming the interests of consumers and should therefore be investigated. The paper should be supported, wherever possible, by documented facts and evidence.

Super-complaints are given fast-track consideration. The regulator is required to publish a reasoned response within 90 calendar days of receiving the complaint In response to a super-complaint from the Citizens Advice Bureaux in 2005 the OFT investigated the payment protection insurance market in the UK. In 2005 it also investigated bank charges in Northern Ireland following a super-complaint from the Consumers Association and the General Consumer Council of Northern Ireland.

The super-complaints process has recently been reviewed by the New Zealand Ministry of Consumer Affairs as part of its review of redress and enforcement provisions of New Zealand consumer law. That review did not propose the introduction of super-complaints in New Zealand. A full review of the utility of the super-complaints process in the Australian context has yet to be undertaken.

Representative Actions

There are situations where the only available recourse for a consumer is to seek damages through the court system. There are instances where a breach of consumer protection legislation affects a number of consumers in a similar way, such as a widespread scam. These consumers are unlikely to pursue damages individually due to the perceived complexities of the legal system and with low individual losses. In Australia, such consumers may choose to commence a class action. However, there are circumstances where no viable class action can be commenced and, in these cases, a representative action by a consumer organisation may be the only way to achieve redress.

In the United Kingdom, where the legal system does not encourage class actions, the concept of a statutory right for non-government consumer organisations to bring a representative action has been developed. [31] In order to avoid exposing business to spurious or vexatious claims or unwittingly creating a compensation culture, the UK proposals provide safeguards to be satisfied before a representative action could be brought to court:

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[30] DTI web site at http://www.dti.gov.uk/consumers/enforcement/super-complaints/page17902.html

[31] UK Department of Trade and Industry, Representative Actions in Consumer Protection Legislation, 12 July 2006, p4

- representative actions could only be brought by a body designated by the Secretary of State,
- actions would only be brought on behalf of named consumers who could demonstrate loss and who wished to pursue a claim for damages, repair or replacement of faulty goods, and
- permission would have to be sought from the court prior to bringing a case.

These powers are triggered once the OFT or Competition Commission has decided that an infringement has taken place. The designated body may then bring a representative action to the Competition Appeals Tribunal on behalf of named consumers who have suffered detriment. After considering the case the Tribunal may award payment to compensate consumers for their losses.[32]

In Australia, several jurisdictions have given the consumer regulator the power to bring or fund actions on behalf of consumers but there is no statutory right for non-government consumer organisations to take such action.[33] Nevertheless, it is open for consumer organisations, or individual consumers, to take action to enforce consumer laws that have a general market application. Such action is likely to be limited due to the cost of legal action and the risks of action being unsuccessful (although the growth in litigation lenders may ameliorate some of these concerns). Despite these limits, Australia has seen at least one high profile example of this form of action, involving a claim that tobacco advertising was misleading and deceptive in breach of the *Trade Practices Act 1974*.

Issues for Consideration

Recognising the role of consumers and consumer organisations in consumer policy research and advocacy, it is appropriate for Australian consumer agencies to consider the following questions.

1. Is individual consumers' or consumer agencies' involvement in consumer policy research and advocacy sufficient to meet the best interests of the community and the economy?
2. Do consumer agencies use best practice engagement principles and processes to facilitate individual consumers' or consumer agencies' involvement in consumer policy research and advocacy and appropriately encourage and support consumer representatives on government boards and committees?
3. Should the funding for consumer organisations be modified or increased to expand their opportunity to participate in consumer policy research and advocacy?
4. Should industry provide more funding or other resources for consumer organisations?

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[32] UK Department of Trade and Industry, Representative Actions in Consumer Protection Legislation, 12 July 2006, p7

[33] See for example s105 Fair Trading Act 1999 (Vic); s18 Consumer Affairs Act 1971 (WA); and s12 Fair trading Act 1987 (NSW)

5. Should governments give existing national consumer organisations – the CFA and/or the ACA – more support, facilitate the creation of a new national consumer organisation along the lines of the United Kingdom's National Consumer Council, or develop other models, such as a merger of existing organisations (as has occurred in Victoria to establish the Victorian Consumer Action Law Centre and as is proposed in the UK as part of the Consumer Voice proposals) or a consumer advocacy service similar to that proposed in Western Australia?
6. Is there scope for co-ordinating existing consumer research facilities and programs or is there strength in maintaining diversity?
7. Is there merit in reforming legal action, such as the introduction of super-complaints or formalising opportunities for representative actions by consumer organisations, or is the class action process sufficient?
8. If there is merit in reforming legal action, could such reforms be implemented without reforming Australia's existing consumer organisations?

ATTACHMENT 10

The need for consumer policy to be based on evidence from the operation of markets, including the behaviour of market participants

Introduction

The term 'evidence-based policy' has evolved from the concept of 'evidence-based practice' both of which were preceded by 'evidence-based medicine'. Evidence-based medicine is the process of systematically finding, appraising, and using research findings as the basis for clinical decisions.

The Blair Labour Government in the UK is generally credited with introducing evidence-based policy into government processes. Research undertaken for the Australian Housing and Urban Research Institute in 2004 noted that the UK Government, inspired by the international success of the evidence-based approach to health care, was keen to apply a similar approach to the public policy arena. The UK White Paper on *Modernising government* (1999) stated that 'This government expects more of policy makers. More new ideas, more willingness to question inherited ways of doing things, better use of evidence and research in policy making and better focus on policies that will deliver long term goals.' The White Paper also talked about 'policies that are forward-looking and shaped by the evidence rather than a response to short term pressures'.

Commentators suggest that the Blair Government was 'anti-ideological and pragmatic' and the focus was on policy making that was soundly based on evidence of 'what works'. Others support the UK approach where 'policy making would be driven by evidence (particularly research evidence) of what was proven to be effective in addressing social problems and achieving desired outcomes' (Nutley 2003). This is in contrast to some conventional policy development processes where intuitive appeal, tradition, politics or the extension of existing practice may set the policy agenda; or, as quoted by Reid (2003), to policy-makers who 'prefer to be led by ideology and pragmatism'.

Evidence-based policy in the United Kingdom

The UK Cabinet Office report *Professional Policy Making for the Twenty-First Century* (1999) described the features of evidence-based policy:

> 'The advice and decisions of policy makers are based upon the best available evidence from a wise range of sources; all key stakeholders are involved at an early stage and throughout the policy's development. All relevant evidence, including that from specialists, is available in an accessible and meaningful form to policy makers. Key points of an evidence based approach to policy-making include:
> - reviews existing research,
> - commissions new research,

- consults relevant experts and/or used internal and external consultants, and
- considers a range of properly costed and appraised options.'

The report stated that the raw ingredient of evidence is information, which is derived from a variety of sources: expert knowledge; published research; existing statistics; stakeholder consultations; previous policy evaluations; the Internet; outcomes from consultations; costings of policy options; output from economic and statistical modelling. If the aim is to identify 'what works', then rigorous evaluation is necessary. The report noted that this is problematic in economic and social science research dealing with controversial and politically contested policies, where it is difficult to produce data with the necessary scientific reliability and validity.

The following case study was highlighted as an example of where it was possible to apply rigorous scientific method:

Solvent abuse labelling

The problem: Young people abusing solvents, which were safe when used as intended but highly dangerous when deliberately inhaled. One option was to permit the sale of solvents, but require the product to be labelled with an unambiguous health warning.

The evidence: The UK Department of Trade and Industry commissioned quantitative and qualitative research in which 15 alternative warnings were tested with parents, teachers, young people and others over a period of two years. The commonly used warning was found to be ineffective.

The result: A new warning 'Solvent abuse can kill suddenly' is now used.

Bullock, Mountford and Stanley (2001) reported on a 2000 survey of UK civil servants which identified ways in which the policy-making process was informed by evidence. These included:

- research uncovered reasons for reforming or developing new policy,
- reaching consensus in a group with different interests was facilitated by the presentation of evidence,
- policy-making could be faster when experts' experiences or lessons from previous research were built into development,
- evidence contributed to a better understanding of complex policy areas, and
- evidence was used to fine-tune policies or assess whether objectives are being met.

A case study is provided below:

Home Buying/Selling Reform.

Underpinning the reform process was an extensive program of research into home buying and selling in the UK and abroad, including:

- a study of the system in England and Wales, involving a tracking survey of nearly 800 buyers and sellers,
- international comparisons,
- citizens' workshops to gain consumers' views in low value/low demand areas, and
- piloting key elements of the proposed reforms in market conditions.

The benefit was an independent and comprehensive look at the policy area from a number of perspectives, rather than only special interests, resulting in consensus between a number of stakeholders.

Reid (2003) studied of the use of evidence by policy-makers in a non-departmental public body, the Higher Education Funding Council for England. 'Evidence' was most commonly understood in terms of systematic research. Reid described three models of policy-making, the role of evidence, and the use of different models by practitioners:

Rational decision model —the UK Civil Service (and the Australian public sector) promotes this model. Research and information are vital in the analysis of the problem, analysis of solutions, and analysis of implementation. This is seen as an idealised model, which 'lacks behavioural realism'.

Enlightenment model — in this model, policy is said to be 'evidence-informed'. This model was more strongly supported.

Power-bargaining and negotiation model — this was the dominant model used. Evidence was welcomed as 'an indispensable weapon in the struggle to control and justify policy direction. Evidence did not necessarily reduce the role for ideology or conviction-based policies; rather, it was taken up and used in arguments based on ideology and conviction'.

Evidence and Consumer Policy

Literature searches have uncovered no material directly related to the use of evidence-based policy processes in consumer policy development in Australia or overseas. Nevertheless, some observations can be made.

Perri 6 (2002) defined evidence as 'information that is relevant to making a decision to commit to one policy or another or none, because it indicates the possible or probable benefits, risks, acceptability or status of a policy' and argued that policy making should reflect a wide range of types of information that are counted as evidence, not just technical evidence, for example about the cost-effectiveness of interventions.

Davies and Nutley (2001) argued that since the use of evidence is just one imperative in effective policy making and policy making itself is inherently political, they would prefer to talk about 'evidence influenced' or 'evidence-aware' to reflect a more realistic view of what can be achieved. Further, Nutley (2003) suggested that research is only one source of evidence. Agreement as to what counts, as evidence should emphasise a 'horses for

courses' approach. Reid (2003) pointed out that any study of evidence-based policy should look at:

- the nature of the evidence,
- the nature of the policy process, and
- the nature of the link between evidence and the policy process.

It is clear that the UK Government interprets evidence-based policy in this broader context and that it is only one factor in several identified as necessary in modernising and improving policy development (other principles articulated in *Modernising government* include designing policies around shared goals and carefully designed results, not around organisational structures or existing functions; making sure policies are inclusive; and avoiding imposing unnecessary burdens and improving the way risk is managed).

It is also clear that 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 consultation, international experience, surveys, and economic and social modelling etc, for example the following case illustrates using evidence to enhance the policy-making process:

Consumer Credit Code – Pre-contractual disclosure

The scheme of pre-contractual disclosure in the Code has been due for improvement for some time. Recommendations aimed at enhancing pre-contractual disclosure arose out of the Post Implementation Review (PIR) of the Code and were later endorsed by the National Competition Policy Review (NCP Review) of the Code.

The Code is based on "truth in lending" provisions which assume that given full, or at least adequate, knowledge of the nature of the credit product and the terms of the transaction with the supplier, consumers will make choices that are in their best interests.

Since the initial work undertaken on the PIR recommendations, research suggests that consumers' attention to written information varies according to the product sought, the importance attached to the product, the volume and expression of the information, when it is received, and whether credit is the primary purpose or whether it is secondary to the purchase of goods of services. Whilst the knowledge and skills of consumers vary, it is clear that providing minimal essential information at the appropriate time and in a way people can assimilate will assist the majority of consumers.

The PIR noted that the length and complexity of the pre-contractual consumer information prevented many from understanding the key features of the contract or being able to compare credit products. Although it was a goal of the PIR to increase comparability between products it had become apparent that many consumers do not use disclosure as a tool to compare products,

relying on other forms of communication, particularly the internet, to make their decisions.

In summary, the PIR recommended that disclosure be simplified. MCCA endorsed the recommendations contained in the NCP report and directed UCCCMC to proceed with their implementation following public consultation.

A key issue that has arisen from the consultative process is the view that any new disclosure proposals should be tested with consumers to ensure they are effectively simplifying pre-contractual disclosure in line with the NCP recommendations. Industry and law society submissions also stressed that altering the existing disclosure requirements would substantially increase industry costs and should be based on a proper analysis of whether the disclosed information will be used and understood by consumers. They argued that, at the very least, change would need to result in a substantial improvement on the current scheme.

It was generally asserted that not testing the new disclosure proposals would be contrary to principles of good regulatory policy development. Some consumer advocates also supported this view, however, this was tempered by concerns about the potential delays such testing with cause.

SCOCA agreed to engage a consultant to research and test the proposed improvements to pre-contractual disclosure. The research and analysis would aim to formulate tailored disclosure requirements and test that these benefit consumers and are capable of implementation by industry.

Obtaining evidence about how markets and market participants operate is particularly relevant when information disclosure is the policy instrument under consideration. Information disclosure became increasingly popular during the 1990s with the use of policies like health warnings and more extensive product labelling. It is now a well-used regulatory tool designed to address market failure caused by information asymmetry. In theory, information disclosure enables consumers to make rational, informed decisions and exercise choice in relation to market transactions. In addition, the discipline imposed on suppliers by mandatory disclosure ensures that the market operates fairly.

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.

For example, as noted in the case study above, the Uniform Consumer Credit Code is based on ‘truth in lending’ provisions. The UCCC replaced legislation which was a great deal more prescriptive, to the extent that it prohibited separate fees and charges on a credit contract. Effectively, if the credit provider wanted to charge any additional fees, the fees had to be absorbed within the credit charge by increasing the annual percentage rate. Under the UCCC, this prohibition on fees and charges was replaced by information

disclosure. It was anticipated that as consumers would be made aware of the existence and amount of fees and charges, they would have the opportunity to reject credit products if the fees and charges were excessive.

Good regulatory practice requires that regulation is effective, that is, it focuses on the problem and achieves the intended policy objectives with minimal side-effects (Victorian Guide to Regulation, 2005). But consumers and businesses question the effectiveness of information disclosure in certain circumstances. Consumer advocates describe disclosure as 'light touch' regulation that does not directly regulate business conduct and allows business to shift risks onto consumers. Businesses are concerned that detailed and complex disclosure requirements have high compliance costs without necessarily providing consumers with understandable information they can use to make decisions.

The Australian Government's *Best Practice Regulation Handbook* points out that recent economic literature has identified that, even when consumers do have full information, they may be subject to ,biases that prevent them from making fully rational decisions (page A-3). The Deputy Chair of the Australian Competition and Consumer Commission referred to this work on behavioural economics in her 2006 Lecture, *The Interface between Consumer Policy and Competition Policy* and stated: 'Even well-informed consumers exhibit consistent patterns of behaviour leading them away from decisions that would better satisfy their preferences'.

Evidence is needed on the effectiveness of mandatory information disclosure as a regulatory tool addressing market failure and the circumstances under which disclosure is likely to be the best practice regulatory solution in the consumer policy framework.

Clearly, reliable information about the nature of consumer problems and the effectiveness of government policies in addressing those problems is important to developing and implementing good consumer policy. The information necessary to gain an adequate understanding of consumer problems and potential government responses is, however, complex. Usually, issues like the benefits of improving social justice or predicting how consumers will respond to making emotional decisions in uncertain environments, cannot be measured quantitatively. Evidence to inform government's consideration of such issues often needs to be based on qualitative information or a balanced assessment of the views of those with experience in the sector, such as interest groups and the regulator. Because of the potential complexity of consumer problems, and the lack of comprehensive, accurate quantitative data, the concept of evidence-based policy needs to be applied carefully. There are considerable risks in taking a simplistic approach to gathering and applying evidence.

Critiques of evidence-based policy

The concept of evidence-based policy has attracted criticism. First, some are concerned that not all research is of sufficient quality to form the basis of sound policy making. Evidence-based policy requires a systematic approach

to searching for appropriate evidence, critically appraising the studies identified and balancing the evidence in that research, including its strengths and weaknesses. The demands for better evidence have led to a trend to promote more useful and usable research, which not only helps policy makers understand society but also offers some guidance on how to improve the outcomes for consumers. Competition from the commercial research and consultancy sector has shown academics the importance of conducting and communicating research in ways users find helpful.

However, not all commentators view this trend favourably. They suggest that evidence-based medicine constrains other forms of scientific research and/or promotes an overly narrow range of research methodologies, and that this criticism is directly relevant to debates about the value of evidence-based policy.

Second, the idea that research evidence is neutral and objective, and apparently above political ideology is also subject to criticism. There is a need to reflect critically on the assumptions that some social researchers constitute and pass off as 'evidence'.

Third, some commentators consider that 'what works' is too simplistic a policy development focus. They point out that research can fail to be policy relevant when too little attention is paid to the 'why' and 'how' of policy change in the real world and when relevant information remains elusive due to the complexity of social reality. The question should be 'what works for whom in what circumstances?' and there should be an evidence base in all stages of the policy cycle.

Finally, the definition of evidence-based policy as an approach that helps people make well-informed decisions about policies, programs and projects by putting the best available evidence from research at the heart of policy development and implementation, has been challenged on the grounds that policy making involves factors other than evidence, and that to give such a central place to research based evidence is misplaced. The other factors and other evidence that are important include:

- the experience, expertise and judgement of decision makers,
- sound evidence not only of the cost of policies, programs or projects but also the cost-benefit of different courses of action,
- an understanding of values, ideology, political beliefs, and accepted norms,
- the views of lobbyists, pressure groups, and consultants, whose evidence is less systematic and more selective, and
- an understanding of the pragmatics and contingencies of political life.

Recognition of other factors leads to discussions of the limitations of evidence-based decision making, for example:

- governments are often under pressure, with no time to study things as much as they want, so they make decisions based on informed guesswork,
- assumptions about the future may be untestable, so predictions must be weighed against the credibility of sources and common sense,
- decision-makers may be aware of information that cannot be made public and sometimes difficult to verify, and

Overall, policy making is as much art as science; it requires judgement, the capacity to understand the limitations of evidence and make reasonable inferences based on incomplete information, and the ability to integrate scientific evidence with soft evidence, such as opinion, gained from a variety of sources.

Conclusion

Consumer policy needs to be based on, or at least influenced by, evidence on the operation of markets. Such evidence may challenge, reinforce or overturn long held assumptions about market behaviour and the effect regulatory and non-regulatory policies have on the market and its participants. Some of the critical issues are:

- the relative weight attached to the different forms of evidence or, as Davies and Nutley put it, the 'problems of selection, assessment and prioritising of evidence'.
- the availability of relevant evidence, such as evidence about the quantification of consumer costs and benefits. The addition of Consumer Policy Research to the MCCA Strategic Agenda is an acknowledgement of the importance of research evidence, but this initiative cannot be expected to fill all the gaps.
- the design and evaluation of evidence — for example, the results of surveys depend on the questions asked (a good example being the current debate over whether the community is willing to drink re-cycled water. People respond that they are willing to drink re-cycled water, but a different result is achieved when they are asked if they are willing to drink 'recycled sewage').
- the influence of economic theory on consumer policy development. The recent publication *Behavioural Analysis for Policy* (Ministry of Economic Development, NZ) points out that much public policy analysis about markets is based on the assumptions of the neoclassical economic model. It notes that behavioural theory (or behavioural economics) complements neoclassical economics by filling in some of the gaps in our knowledge of actual behaviour and challenging some neoclassical assumptions. The growing body of research on consumer behaviour in actual markets is a source of evidence which should not be ignored.

This paper draws heavily on the following:

Perri 6, *Can Policy Making be Evidence-Based?* MCC: Building knowledge for integrated care, Volume 10 Issue 1 February 2002.

UK Cabinet Office, *Modernising government,* March 1999.

Strategic Policy Making Team, UK Cabinet Office, *Professional Policy Making for the Twenty First Century,* September 1999.

Huw T.O. Davies, Ph D and Sandra M. Nutley, Ph D, *Evidence-based policy and practice: moving from rhetoric to reality,* Third International, Inter-disciplinary Evidence-Based Policies and Indicator Systems Conference, July 2001.

Helen Bullock, Juliet Mountford and Rebecca Stanley, *Better Policy-Making,* Centre for Management and Policy Studies, November 2001.

Sandra Nutley, *Bridging the policy/research divide – Reflections and Lessons from the UK,* Keynote paper presented at "Facing the Future: Engaging stakeholders and citizens in developing public policy" National Institute of Governance Conference, Canberra, Australia 23/24 April 2003.

Fiona Reid, *Evidence-based Policy: Where is The Evidence for it?* School for Policy Studies Working Paper Series Paper Number 3 May 2003.

David Zussman, *Evidence-based policy making: some observations of recent Canadian experience,* Social Policy Journal of New Zealand, 2003

Philip Davies, *Is Evidence-Based Government Possible?* Jerry Lee Lecture 2004, Washington D.C.

William Solesbury, *Evidence Based Policy: Whence it Came and Where it's Going,* ESRC Centre for Evidence Based Policy and Practice: Working Paper 1 (UK) 2001

Greg Marston and Rob Watts, '*Just the facts Ma'am': A critical appraisal of evidence-based policy,* Just Policy No. 30, July 2003 (Australia)

Amanda Wolf, *Research strategies for policy relevance* Social Policy Journal of New Zealand 2004.

ATTACHMENT 11

The role of industry specific regulation, including codes of conduct, and its relationship to general regulation

Australia's consumer policy framework includes a combination of general and industry-specific regulatory approaches and non-regulatory initiatives. General regulation establishes rights and obligations that apply across all industries. It is triggered by the characteristics of the behaviour, product or service or trader, not the industry they operate in. General regulation includes the *Trade Practices Act 1974* (Cth) and the state and territory fair trading acts. Examples of other general legislation in Victoria include the *Goods Act 1958,* the *Co-operatives Act 1996,* the *Associations Incorporation Act 1981* and the *Trade Measurement Act 1995*.

Industry-specific regulation sets rights and obligations in specific industries. Each Australian jurisdiction has a range of industry-specific regulation. In Victoria, this includes the *Travel Agents Act 1986*, the *Second-Hand Dealers and Pawnbrokers Act 1989* and the *Motor Car Traders Act 1986*. Industry-specific consumer regulation is also common in portfolios outside consumer affairs, for example in the regulation of health professionals and public transport.

Industry-specific regulation also includes codes of practice backed by legislation, such as codes developed in specific industries under co-regulatory schemes and mandatory codes prescribed under the fair trading acts. With exception of NSW, the fair trading acts in each jurisdiction provide for the preparation and prescription of mandatory codes of conduct for different industries. In NSW, a recent amendment to the *Fair Trading Act 1987* provides for the adoption by regulation of the Motor Vehicle Insurance and Repair Industries Code of Conduct as a mandatory code.

Differences between general and industry-specific regulatory approaches

The distinction between general and industry-specific regulation is not clear cut. While there is considerable overlap, there are also broad differences in the character of each approach. It is useful to recognise these differences when analysing the strengths and weaknesses of each approach.

General regulation deals with issues across a range of diverse industries. The fair trading acts, for example, can cover everything from take away food, to selling musical instruments, alternative health care and car repair services. Because of this diversity, general regulation usually uses standards to guide acceptable behaviour, rather than defining rules that impose specific conditions on traders.

In Victoria, the Associations Incorporation Act, for example, prohibits committee members from knowingly or recklessly misusing information or their position in the association. It is triggered by people committing certain offences, rather than preventing them from becoming officers if they do not meet preconditions. Similarly, the Victorian *Fair Trading Act 1999* tends to regulate conduct rather than setting rules for traders, products or services. For example, the Act specifies that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive' (s. 9(1)) rather than specifying what traders must do to avoid misleading or deceiving consumers.

It would be difficult, if not impossible to define detailed rules that are appropriate for the diverse range of activities usually covered by general regulation.

Industry-specific regulation is generally more narrowly focused and tends to focus more on the trader. Because it applies to a single industry or sector, industry-specific regulation often sets more prescriptive rules than general regulation does. For example, the Victorian *Motor Car Traders Act 1986* and the *Estate Agents Act 1980* put conditions on the people who can hold a licence to operate in those industries, rather than simply prohibiting certain types of behaviour. Licence conditions include having sufficient financial resources to carry on business in the case of motor car traders (s. 13(4)) and holding minimum qualifications for estate agents (s. 14. (1)).

Strengths of general regulation

General regulation is already in place. Therefore, it may be possible to solve a problem with little or no change in regulatory provisions. If general regulation can address a problem, it avoids the duplication, increased complexity and higher regulatory costs that can arise if specific regulation is enacted where it is not needed. It is, therefore, important to understand the problems each type of regulation is suited to solving. The strengths of general regulation include:

1. universal and consistent coverage,
2. lower business administration and compliance costs, and
3. reduced risk of regulatory capture.

Universal coverage and consistency

The fair trading acts apply broadly to conduct in trade and commerce. Because general regulation is triggered by generic behaviours or problems it can accommodate changing industries and emerging problems more easily. Prohibitions on misleading conduct, for example, automatically protect consumers against misleading claims about products in new industries. This is especially important as rates of technological development and innovation increase.

General regulation also:

- avoids boundary problems between Acts and the complexity of deciding which activities should be defined into or out of an industry-specific Act. General regulation reduces the risks of gaps, overlap or inconsistencies, particularly in industries that are still emerging, are constantly changing or are difficult to define.
- deals with issues in industries in which the problems are too small to warrant a separate regulatory regime but significant enough to justify low cost government intervention.
- applies consistently across all industries, which has fairness, efficacy and efficiency benefits (box 1).

Box 1: Benefits of consistent regulation

From a fairness perspective, consistent regulation means that consumers who face the same risks receive the same protection, and traders that engage in the same types of behaviour suffer the same consequences.

The efficacy of the regulation is improved by reducing gaps and overlap. Gaps allow behaviours that the legislation is trying to redress to continue in some sectors. Consumers in these sectors are disadvantaged. Overlap occurs when an industry is covered by two or more Acts that address similar issues. This can increase compliance costs, add complexity and cause confusion. It increases the risk of conflict among the various regulatory requirements.

From an economic efficiency perspective, consistent regulation prevents one industry from being unfairly advantaged simply because it is subject to more lenient regulation. This is not an argument for no regulation; it simply means that similar problems should be regulated in a similar way.

Lower costs of administration and compliance

Regulation can impose costs on taxpayers, compliance costs on industry and costs on consumers through higher prices and reduced choice. Under general regulation, there is no need to develop and manage multiple regulatory regimes or multiple regulators. General regulation reduces the complexity of regulation and the administrative burden for regulators, which reduces the cost to taxpayers of administering regulation. Regulators can focus on developing skills, expertise and a body of case law related to the general regulation rather than having to spread resources across a multitude of specific regulations.

From an industry perspective, because general regulation is often less prescriptive than industry-specific regulation it gives traders more flexibility in how they comply with the law. They can choose methods that suit their operations. This reduces compliance costs and increases flexibility and innovation. If what constitutes compliance is unclear, however, general regulation may increase uncertainty, at least temporarily, which could raise the cost of compliance. Prescriptive rules can lead traders to focus on meeting the letter of the law rather than delivering on its intent to avoid consumer detriment. In addition, if traders must comply with multiple Acts

there is more risk of confusion among traders and that the combined effects of these Acts could have unanticipated costs.

The compliance costs of both general and industry-specific regulation can flow to consumers as higher prices. To the extent that industry-specific regulation is more prescriptive, and hence has higher compliance costs, it may result in larger price increases. General regulation is also less likely to constrain which traders can enter an industry and which products they can sell. It is thus less likely to restrict the range of service providers, products and services available to consumers.

Regulatory capture

When a group of stakeholders gain undue influence over the development of the regulations or the activities of the regulator it is called regulatory capture. While it is essential to consult all stakeholders in the regulatory process, the views of interest groups should be balanced with the public interest when making decisions.

With industry-specific regulation, it can be harder to maintain this balance. Because of the regulation's industry-focus, industry-based interest groups may be able to influence those developing the regulation. This risk is more acute if the industry-specific regulation is administered by an industry-specific regulator. Again there is a greater chance that ongoing contact with the industry might have an undue influence on the regulator. The risks can be reduced if the industry has properly resourced consumer advocacy groups. Such groups, for example Victoria's Consumer Utilities Advocacy Centre, develop specialist expertise in consumer issues in that industry and provide a counter viewpoint to industry stakeholders. General regulation administered by a general regulator reduces the risk of regulatory capture.

Strengths of industry-specific regulation

The advantages of industry-specific regulation are that it:

1. provides targeted solutions,
2. is easier to enforce, and
3. addresses problems before they occur.

Targeted solutions

Industry-specific regulation targets particular problems in particular industries, reducing the risk of overregulation — for example, it may be desirable to extend consumer protection to activities that do not involve trade and commerce (as covered by the fair trading acts), such as the collection of donations for charities. Specific regulation can address such issues without risking extending general regulation to areas it is not intended to cover.

Specific requirements in industry regulation may be easier for traders to understand. This may be particularly so in the case of codes of practice where

industry has been actively involved in the development of the standards in the code. Some traders may prefer the clarity of prescriptive rules that tell them exactly what they need to do to comply. It may, however, be possible under the fair trading acts to develop guidelines for traders to clarify their obligations.

Industry-specific regulation can also address highly technical issues. Sometimes, it is necessary to define technical standards precisely; for example, the risk to health and safety if the electrical work in people's homes does not meet a minimum standard is very high, justifying more detailed industry-specific regulation.

Easier enforcement

Some commentators argue that industry-based regulation is easier to enforce than general regulation, particularly when it is more specific or sets technical rules or preconditions for entering an industry. It is easier to demonstrate that prescriptive rules have been broken and prosecution is less dependent on proving that the intention or the outcome of the breach would damage consumers. This has advantages for consumers seeking to resolve disputes themselves through legal action or other dispute resolution processes. The regulator is also more likely to be able to use its own testing to obtain evidence and is less reliant on the participation of consumers.

It is also easier for regulators to detect and prove that a business has breached a rule if the industry is subject to ongoing monitoring or testing — particularly if traders are required to report regularly against compliance. This is a common feature of many industry specific regulatory regimes. However, it may be possible to increase the range of remedies and the speed with which general regulators can activate those remedies, so that the enforcement advantages of industry-specific regulation are less.

Addresses problems before they occur

Some industry-specific regulation proactively addresses problems before they arise. It sends a clear signal to traders about what is expected from them. Product standards, for example, set minimum requirements and prohibit the sale of products that are likely to harm consumers. Where substandard products or services can cause severe injury or death, eliminating these risks can be important. Eliminating such risks may also be important if it is difficult to detect poor quality after it has occurred; for example, when there are long time lags between the use of the product and its detrimental impact.

Consideration of appropriate policy responses

When developing responses to emerging issues, policy makers should assess the ability of the existing regulation to address the problem before examining the need for additional industry-specific regulation. First, consideration should be given to the following ways in which general regulation or its administration may be improved:

- Increasing the resources available to the regulator — to promote compliance, raise awareness of enforcement activities and, if necessary, prosecute offenders. Improving enforcement of general regulation also has flow on benefits by expanding the body of information and legal precedent surrounding the general regulation, improving its certainty and clarity across all industries.
- Changing the enforcement priorities of the regulator — to ensure the regulator's activities are prioritised appropriately.
- Widening the coverage of the general regulation or improving its enforcement provisions.

Second, industry-specific regulation may already exist to achieve other objectives in that industry, such as the regulation of a monopoly market or to achieve health and safety outcomes. In these sectors, adding provisions to achieve consumer policy objectives may be an appropriate response to address an emerging issue.

Relying on existing regulation will not be an appropriate response for all issues. In a number of cases, separate industry-specific regulation has improved the outcomes for consumers. For example in:

- the electricity industry it is recognised that energy is an essential service and consumers are not sufficiently informed, experienced or motivated to ensure that their energy market contracts contain efficient, fair and reasonable terms without the support of basic consumer protections,
- the consumer credit sector, the difficulty consumers have understanding complex consumer contracts is recognised as a justification for specific regulation to assist consumers choose between credit products and protect themselves against overly harsh terms in credit contracts,
- the domestic building industry consumers experience problems because before they lock themselves into a building contract they cannot assess fully the skills of their builder, the terms of that contract, or guarantee their rights if something goes wrong. Consumer orientated building regulation guarantees builders hold minimum standards and protect consumers rights if workmanship is incomplete or substandard,

ATTACHMENT 12

What is an Unfair Contract

In its discussion paper of 2004 on unfair contract terms, the Standing Committee of Officials of Consumer Affairs defined unfair contract terms as "those terms in a contract which are to the disadvantage of one party (usually the purchaser of goods or services) but which are not reasonably necessary for the protection of the other party (usually the supplier)".[34]

The disadvantage to one party commonly accrues through the other having rights that can be exercised without reference to the affected party, and without the affected party being able to contest their exercise. The effect of this may be to transfer significant cost or risk away from one party to the other.

The expression "unfair contracts" is regularly used for the purpose of describing contracts containing unfair terms. Unfair contracts may deprive affected parties of rights or entitlements they assume or expect they will have, or the ability to exercise them effectively.

Unfair contract terms are more prevalent where there are insufficient incentives for suppliers to make their terms fair. Among other reasons, there may be insufficient incentives because the market characteristics or circumstances of the transaction result in a substantial asymmetry in the relative bargaining power of consumers and suppliers.
For example:

- The supplier may offer the goods on a take it or leave it basis;
- The purchaser may not have time to read the contract in detail before being asked to sign it;
- Standard form contracts are usually prepared by or on behalf of the supplier;
- Purchasers do not always shop around on the basis of contract terms; and
- Terms may be relatively standard throughout a particular industry.

The relationship between the parties is, as a consequence, biased in favour of one party, usually the supplier, over the other. Rights are given to that party without either corresponding rights being given to the other or appropriate restrictions being placed on the exercise of the party's rights.

Examples of Unfair Contact Terms

Examples of unfair terms include:

- A term that authorises a supplier to complete, on the purchaser's behalf, a part of the document not completed by the purchaser, and in which the

[34] "Unfair Contract Terms: A Discussion Paper", Standing Committee of Officials of Consumer Affairs, January 2004.

purchaser agrees to be bound by the completed document as if the purchaser had completed it35;

- A term that allows the supplier to vary charges during the term of the contract without advising the purchaser in advance and without giving a penalty-free exit right for detrimental changes;
- A term that allows the supplier to change aspects of the product or service without notice and without giving a penalty-free exit right for detrimental changes;
- A term that excuses the supplier from the consequences of its failure to honour its promises; or
- A term that claims to bind the purchaser to the terms and conditions of another document, but without the purchaser having the opportunity to consider those (as for example the terms and conditions of insurance offered by the supplier).

In Australia, car rental and mobile phone contracts have been considered at some length in the context of unfair contract terms. For example, the MCCA Working Party on Car Rentals has examined contracts used by car rental businesses and a sample of consumer complaints.[36] It found that consumer complaints relating to car rentals commonly involve:

a. complex and poorly laid out contracts including obscuring key provisions in small print;

- absence of transparent processes for vehicle inspection and damage assessment;
- disputed vehicle damage and liabilities; and
- harsh contract provisions.

In its view there was an imbalance of information as between customers and suppliers, and the industry was widely characterized by one-sided practices.

Some banking contracts also contain provisions allowing the bank to change features of the contract or service without notice and without the customer having the ability to negotiate about the change.

Unfair Contract Terms and the General Law

The general law assumes that a contract is freely entered into. In some circumstances, it may allow one of the parties to establish, by legal action, that it was not. The party seeking to do that bears the onus of proving that it was not.

This assumption also implies that the parties could choose who they contracted with and on what terms, that the parties had equal bargaining power, are able to take care of their own interests, know their own rights and

[35] It is not uncommon for a party to be empowered to fill in blanks in a contract but under the common law they must only do so in accordance with what has been agreed. So, such a term is not inherently unfair, although there may be unfairness (illegality) if the supplier fills in the blanks improperly.
[36] National Car Rental Working Party, March 2003.

entitlements, are able to negotiate on equal footing, and understand the terms of the bargain.

These things may not always hold good. On the one hand, standard form contracts make commercial sense because of their convenience to suppliers selling multiples of the same goods, and their ability to lower transaction costs for both suppliers and consumers. On the other, the development of the standard form contract has tended to deny purchasers the opportunity to negotiate individual contracts and terms, particularly where the goods they are purchasing are not available from any other source, or where the supplier makes it clear that it is unwilling to negotiate on the form of the contract.

The general law has developed mechanisms to address some aspects of unfair contractual situations, but usually requires the conduct of one party to be characterised as unconscionable, although unconscionable terms may be evidence of unconscionable conduct. This is a significantly different concept from that of unfairness. Unconscionability may also require some inappropriate intent or knowledge on the part of one of the parties, whereas it may simply be the effect of the terms, or some of the terms, of a contract entered into that are actually in issue. The difference has been described in commentary elsewhere as involving the distinction between procedural and substantive unfairness.[37]

Common law unconscionability is essentially procedural, and does not address substantive issues. As a result, unless there is associated procedural unfairness it does not necessarily address the situation where terms are simply unfair in themselves.

Australian statute law (e.g. the Trade Practices Act) has adopted the issue of unconscionability, and expanded the concept beyond its general law limitations but the courts rarely find in favour of complainants in relation to substantive contract term issues.

Unconscionable conduct is not a criminal offence, and addressing it therefore requires civil action, either by the fair trading authority or the aggrieved party, with the further consequence that the outcome of proceedings is likely to affect only the parties to the proceedings. Civil action is not generally capable of addressing the issue of unconscionable conduct in any way that might be regarded as systemic. That is, the results of any action taken, whether by litigation or otherwise, are most likely to affect only the parties to that action. This leaves little scope for a regulator to take up an issue relating to unfair contracts in a way that will be of wider benefit to the community.

The result of this has been that regulators have most recently considered it necessary to take particular action to introduce special provisions to deal with unfair contracts or unfair contract terms.

[37] "Unfair Contract Terms: A Discussion Paper", Standing Committee of Officials of Consumer Affairs, January 2004, @ pp 15 - 16 & 21 - 23.

Specific Legislation Dealing with Unfair Contracts

Both the Uniform Consumer Credit Code and the Contracts Review Act 1980 (NSW) allow the reopening of a contract that is "unjust". Both define "unjust" as including "unconscionable, harsh or oppressive" and include lists of considerations that the Court asked to assess the unjustness of the contract must[38] or may[39] take into account. The Contracts Review Act incorporates provisions that allow a systemic approach to addressing unjustness, but the Uniform Consumer Credit Code does not. The two schemes have been criticised for not adequately addressing unfair contract terms. In particular, the Consumer Credit Code has been criticised for dealing only with procedural fairness.

The United Kingdom has regulated unfair contract terms since 1973 through the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The first of these applies only to excluding and limiting terms. The second, though of more general application, does not provide any ability to address terms systemically. The third has allowed the UK Office of Fair Trading to take action to stop businesses using unfair terms.

Legislation in some of the Canadian provinces appears to contain a range of provisions dealing with unfair, harsh or oppressive conduct or terms.[40]

Recent Initiatives - The 2004 Discussion Paper

The 2004 discussion paper outlined a number of options for addressing unfair contract terms. As they are outlined in the paper[41] they are:

Option 1 — No additional regulation

This would mean keeping the status quo of reliance on section 51 AB *Trade Practices Act 1974* (unconscionable conduct) (and its mirror provisions in the State and Territory fair trading statutes) and section 70 Uniform Consumer Credit Code. In New South Wales, subject to its review, the CRA would continue to apply, and in Victoria the new provisions in relation to unfair contract terms in its Fair Trading Act 1999 have now taken effect.

Option 2 — Self regulation

This would allow self regulation by business and industry through mechanisms such as guidelines or voluntary codes.

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[38] Contracts Review Act
[39] Uniform Consumer Credit Code
[40] See for example Saskatchewan Consumer Protection Act 1996, or Alberta Fair Trading Act 1998, both of which include provisions that deal with "terms or conditions that are harsh, oppressive or excessively one-sided".
[41] "Unfair Contract Terms: A Discussion Paper", Standing Committee of Officials of Consumer Affairs, January 2004, pp 9 - 10.

Option 3 — United Kingdom model and variants

This model and its variants prohibit the use of unfair terms in consumer contracts and provide a mechanism for determining whether a term is unfair. There is provision for not only individuals to take action but also for fair trading agencies to deal with unfair terms systemically. The Victorian variation also allows for a 'black list' of terms which will be regarded as unfair and for prosecution for use of such terms.

Option 4 — Contracts Review Act 1980 (NSW)

The NSW *Contracts Review Act 1980* (CRA) provides a mechanism for individual consumers to take action with respect to unjust contracts and for the State fair trading agency to take systemic action.

Option 5 — Composite model

This model considers using those provisions from the CRA which address issues of concern prior to and at the time of making the contract and the aspects from the UK model and variants which consider the actual unfairness of the term itself. It would allow for both an individual and systemic response to unfair contract terms.

The Conclusions of the 2004 Discussion Paper

The discussion paper reached 6 conclusions[42]

a. the issue of unfair terms in contracts is a phenomenon experienced in many countries and there is evidence to indicate that Australia is no exception
b. unfair terms are commonly found in a diverse range of industry types across the marketplace
c. to date, Australian law has responded to unfair contracts which have an element of procedural unfairness; that is, where the circumstances leading up to, and/or at the time of the making of the contract, create unfairness
d. under the current[43] legal regimes in Australia the courts have been reluctant to find unfairness solely on substantive grounds, that is, on the basis that the unfairness of the actual terms of the contract leads to an injustice
e. legal regimes to date in Australia, have not proven effective in managing unfair contract terms systemically and therefore the impact on the marketplace has been minimal); and
f. the current statutory regimes in Australia have created some confusion in practice because of their failure to distinguish between procedural and substantive unfairness.

[42] "Unfair Contract Terms: A Discussion Paper", Standing Committee of Officials of Consumer Affairs, January 2004, p39.
[43] Publication of the Discussion Paper pre-dated the introduction of Part 2B of the Victorian Fair Trading Act. Therefore, references to inadequacies in the current legal regimes do not take into account the unfair contract terms provisions in Victoria.

Action since 2003

In 2003 Victoria passed amendments to the Fair Trading Act 1999 to incorporate provisions to address unfair contract terms. The provisions cover "consumer contracts": *an agreement whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use, for the purposes of the ordinary personal, household or domestic use of those goods or services*

The specific features of the amendments include:

a. a term is unfair if it is contrary to the requirement of good faith and in all the circumstances it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer;
b. a consumer who believes a term to be unfair can use Part 2B as a defence to an action by the supplier to enforce a contract.
c. a term found to be unfair is void, but the rest of the contract continues to bind the parties if it is capable of existing without the term;
d. in assessing whether a term is unfair, the court can have regard to whether the term was individually negotiated, whether it is a prescribed term, and whether it has an object or effect set out in the Act;
e. standard form contract terms can be prescribed as unfair by regulation and it is an offence to use or recommend the use of a prescribed term;
f. the Director can apply for an injunction where it is believed that a person is using or recommending the use of an unfair term in a consumer contract or a prescribed term;
g. an oral contract is covered with respect to consumer contracts;
h. a term relating to price is covered by the provisions;
i. neither business to business contracts nor contracts to which the Uniform Consumer Credit Code applies are covered.

No other Australian jurisdiction has enacted similar provisions.

The issue of unfair contracts is included on the MCCA Strategic Agenda, with the intention of developing nationally uniform legislation to address the problems such contracts create. Previously-settled project timeframes have not been met due to the difficulties experienced in obtaining the Office of Best Practice Regulation's (OBPR) approval of the Regulatory Impact Statement (RIS). No further progress has been made since the MCCA meeting in May 2006. SCOCA is considering what additional information may be required for inclusion in the RIS in light of OBPR feedback. State and territory MCCA members continue to support taking measures to address unfair contract terms.

A review by a committee of the NSW Legislative Council also recommended the adoption of UCT legislation[44]. The review made the following recommendations:

[44] NSW Legislative Council, Standing Committee on Law & Justice, "Unfair Terms in Consumer Contracts", 23 November 2006.

That the NSW Government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts.

That the NSW Government model its amendment to the *Fair Trading Act 1987* (NSW), to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, on Part 2B of the *Fair Trading Act 1999* (Vic).

That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consult with the Victorian Government to draw upon its experiences in designing and implementing Part 2B of the *Fair Trading Act 1999* (Vic).

That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consider the views set out in this report regarding appropriate inclusions in the NSW scheme.

That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, create a taskforce within the NSW Office of Fair trading to develop the scheme. The taskforce should include industry representatives as well as consumer representatives and other relevant stakeholders and experts.

ATTACHMENT 13

Institutional arrangements for consumer protection agencies

The effectiveness of consumer policy will be influenced by the nature of the institution (or institutions) charged with managing its development, implementation and enforcement.

Designing the institutional form of a consumer protection agency is not straight forward. What constitutes 'best practice' in institutional design is problematic. Decisions on structure inevitably involve tradeoffs, for example between cost and complexity and reducing risks such as conflicts of interest, poor management, inefficiency and industry capture.

The structure of the relationships between the regulator, other organisations and external stakeholders – particularly the Minister responsible for consumer policy – and the scope of the regulator's functions will affect its incentives and capacity to maintain a rigorous approach to regulation.

There are four main issues to consider in formulating institutional arrangements:

1. *General or industry-specific* – should the regulator's responsibilities relate to a single industry or cover similar regulation across a range of industries?
2. *Independence* – should the regulator have statutory independence, separating it from government or be an administrative unit of a department of government?
3. *Functions* – how much of the regulatory process should the regulator be responsible for, should the tasks of policy development, administration of regulation and enforcement be separated? Should consumer agencies be advocates for consumer interests? Should consumer regulators also be responsible for handling consumer enquiries and complaints and resolving disputes?
4. *National or State* – should State/Territory regulators be established or should responsibility rest with a national regulator or some combination of national/State/Territory regulators?

General or industry-specific regulators

A major issue in institutional design is whether the regulator should have responsibilities confined to a single industry or cover similar regulation across a range of industries? It makes sense for a general regulator to administer general regulation. However, a general regulator or an industry-specific regulator could administer industry-specific regulation. Both general and industry specific regulators have their own strengths and each is likely to be preferred under different circumstances (attachment 11). Some of the

generalised arguments for each type are outlined below. The strengths of one, expressed in the negative, are by implication largely the relative weaknesses of the other.

The advantages of general regulators

1. General regulators provide universal coverage and consistent approaches across industries. Boundary problems, often with attendant legal expenses, are avoided, further reducing the risks of gaps, overlap, uncertainty or inconsistency.[45]
2. General regulators tend to have lower unit costs of administration and compliance — there is no need to develop and manage multiple regulatory regimes and the cumulative costs of regulation are more readily monitored. For businesses, not having to understand and comply with multiple Acts reduces compliance costs.
3. A general regulator reduces (but does not necessarily eliminate) the risk of excessive influence by industry-based interest groups.
4. General regulators are more likely to develop greater expertise in regulatory issues — knowledge and insights gained in regulatory practice in one industry can be more readily distilled and applied across others within a general regulator's jurisdiction.

The advantages of industry-specific regulators

1. Industry specific regulators can provide more targeted solutions to problems within a particular market, especially where there are highly technical issues.
2. Enforcement may be more readily initiated by a sector specific regulator. It can be easier for a specific regulator to detect and prove that a business breached a standard if the standards are technical and the industry is subject to ongoing compliance monitoring or reporting. Such arrangements across several industries would be difficult for a general regulator to manage, probably requiring it to digest prohibitively large amounts of information.
3. An industry specific regulator may identify market problems earlier. The more intensive industry knowledge likely to be developed by a industry specific regulator (together with monitoring or reporting requirements where they exist) means the regulator is more likely to detect emerging consumer problems earlier and be in a position to address them proactively.
5. The existence of a number of specific regulators could facilitate regulatory improvement through benchmarking of performance.
6. When cost recovery is appropriate, industry specific regulators lend themselves more readily to recovering costs from the regulated industry.

The recent proliferation of industry-specific regulators

[45] These risks are greatest under industry specific regulation that exempts an industry from the application of general regulation.

In addition to the above policy rationales, there are a number of stakeholder perceptions that may help explain why the number of industry-specific regulators has grown and why it may be difficult to rationalise them:

- an industry association may consider it will have more influence over the regulator because its views are not competing with those of other industries, and the regulator will better 'understand' its problems,
- governments may perceive that establishing a specialist regulator conveys to the community the politically desirable message of greater government activity and commitment to fixing the problem, compared to allocating the problem to an existing general regulator, and
- an individual Minister is more likely to gain an increment to his/her portfolio status through a new specialist regulator, whereas an existing general regulator may reside in another's portfolio.

Independence of the regulator

The second main issue for formulating institutional arrangements is the degree of independence of the regulator. Independence is about the nature of a regulator's external relationships, particularly the degree of control or influence other organisations or individuals can exert in practice. There is a range of models for the structure of relationships between a regulator and its stakeholders, particularly the relevant portfolio Minister and the regulated entities. These relationships are at the core of the concept of regulatory independence.

What makes a regulator 'independent'?

The fundamental pre-condition of independence is distinct, detailed legislation establishing the regulator, governing its objectives, powers and functions and requiring it to report to parliament on activities and outcomes. This is in contrast to a situation where regulatory functions are embedded among a range of policy or service delivery functions in a Ministerial department, often without a clear, unambiguous mandate.

Constraints on independence

Even with well-defined statutory objectives and functions, a regulator's independence can be constrained by government decisions and policies. Statutory independence can be compromised a number of areas, including finance, personnel, operations and enforcement. In practice the other major determinants of independence are:

- adequate resource base — the means of funding (such as government budget allocations, a levy on the regulated industry, fees charged for licences or inspections, or a combination of these), the level and certainty of funding over the medium term — will, directly or indirectly, bear on the nature and scope of the regulator's activities;

- staffing flexibility — the government may centrally set salaries, conditions and staffing policies that affect the regulator's ability to attract and retain competent staff, particularly if highly specialised staff are needed for certain regulatory functions;
- operational clarity — the clarity of the regulator's objectives, their linkages to wider government policy and other agencies and any guidelines on the exercise of regulatory powers will influence how effectively the regulator develops the policies and delivery mechanisms for achieving the objectives; and
- enforcement decision-making — while there are a wide range of enforcement powers and possible approaches to their use, any compromise of a regulator's exclusivity of decision-making about enforcing its regulatory regime will jeopardise its overall independence.

In practice, a further area affecting a regulator's independence is the method and terms and conditions of appointments to regulatory boards and chief executive positions. Primarily, independent regulators are characterised by institutional structures, such as board membership, that are independent of government and do not include stakeholders. Stakeholders are consulted but are not formally part of the decision making process.

Arguments for the independent regulator model

The major expected benefit of an independent regulator is protecting the regulator's market interventions from direct political influence and the influence of specific interests. Such regulators are at less risk of becoming 'captured' and acting in the interests of the regulated entities or other interest groups. These risks are lowest with an independent general regulator, though some risks remain when the independent regulator is industry specific. Industries with an independent regulator also benefit from greater transparency, consistency and a longer term focus than from a regulator that is part of a government department.

In addition, there is less risk that enforcement activities could be affected by political influence that directly or indirectly changes priorities or even, at the extreme, specific enforcement actions. For example, the main consumer protection agencies in the states are units of government departments reporting to Ministers who may have actual or perceived influence over the regulators' enforcement approaches and actions.

The following rationales for establishing independent regulators have also been identified:[46]

- *Expertise* — relevant information can be gathered from the regulated sector more easily and technical experts are more likely to be attracted to more flexible organisations rather than the 'ordinary' bureaucracy;

[46] The rationales are taken from Gilardi, F., 'Evaluating Independent Regulators' in OECD, *Designing Independent and Accountable Regulatory Authorities*, p. 102-3.

- *Flexibility* — independent regulators' autonomy makes them more able to adjust regulation to meet changing market conditions;[47]
- *Stability* — distance from day-to-day political pressures on government mean that the rules of a regulatory regime will be less likely to be subject to sudden and unexpected change;
- *Credible commitments* — again due to distance from day-to-day political pressures and electoral constraints, independent regulators have longer time-horizons than politicians and their existence can increase the credibility of government commitments to concepts such as competitive markets, fair regulation or investor-friendly rules (depending on the political objectives);
- *Efficacy and efficiency* — as a result of the previous factors, independent regulators can lead to better regulatory outcomes which are translated into a better performance of markets;
- *Public participation and transparency* — decision-making processes are more open and transparent than those of ministerial departments and thus more sensitive to the diffuse and unorganised interests of consumers. This is likely to contribute to better informed decision-making. Openness and transparency are not only means but also ends in themselves as they are related to accountability.

Risks associated with independent regulators

The risks associated with the independent regulator institutional model broadly relate to:

- Inadequate accountability — although independent regulators are created by legislation and have powers delegated to them by elected officials, they are organisationally separate from governments and are not directly managed by elected officials. There is a risk of insufficient accountability and excessive discretion such that the regulator's actions deviate from the intention of its enabling statute, and
- Fragmentation of overall government policy and action — where there are multiple independent regulators there is potential for overlap, duplication and confusion and a lack of clear strategic direction. The consequences of fragmentation can be unnecessary extension of regulation (regulatory creep), higher budgetary costs to government and higher business administration and compliance costs. Also, those subject to regulation may find themselves responding to competing or confusing demands.

In addition, independent regulators are likely to be more costly because a separate organisation with associated accountability mechanisms is established.

[47] However a criticism sometimes made is that independent regulators tend to be inflexible in practice. See the discussion below regarding risks.

Reducing risks through regulatory design

The risks in the independent regulator model can be minimised and benefits maximised by careful regulatory design. Two of the major challenges are to ensure regulators are accountable for their activities and integrated into the government-wide policy framework.

Designing institutions to ensure adequate accountability

A number of mechanisms collectively operate to ensure adequate accountability. The starting point is for the enabling statute to specify clear, unambiguous outcomes for regulation and the types of activities the regulator should be involved in to achieve them. Other mechanisms include requirements for:

- regular public reporting on activities and outcomes,
- procedural transparency including due process, stakeholder consultation, regulatory impact assessments, announcement and explanations of policy and enforcement decisions and actions[48],

and the establishment of:

- a system of appeals from decisions by regulators (but without transforming the appellate body into the ultimate regulator), and
- a system for assessing performance ex post, which addresses performance against the regulation's objectives and conformity with regulatory quality standards for transparency, responsiveness, consultation and so on.

The accountability of statutory authorities and best-practice governance arrangements were examined more closely in a Report on the Corporate Governance of Statutory Authorities and Office Holders (the Uhrig Report) released in June 2003. This report set out key principles for establishing statutory authorities, including that the purpose and expectations of the statutory authority need to be clearly stated; and that individuals should understand what they are required to achieve, have the capacity to achieve and be held accountable for their performance.

Designing institutions to ensure integration into the policy framework

The satisfactory integration of individual regulators into the government-wide policy framework requires explicit co-ordination procedures across regulators to identify and cope with interactive policy objectives in a manner that ensures related policies are treated coherently.49 Another co-ordination problem

[48] Transparency in an operational sense is more than public consultation and regulatory impact assessment. It also refers to the capacity of regulated entities to identify, understand and express their views on their obligations under the rule of law. See R. Deighton-Smith, 'Regulatory Transparency in OECD Countries: Overview, trends and challenges' in *Australian Journal of Public Administration*, Volume 63 Number 1, March 2004, pp.66 -73.
[49] Ladegaard, P., 'Good Governance and Regulatory Management': a background note for an OECD Regulatory Management and Reform Seminar, 19-20 November 2001, Moscow.

arises in Australia's federal system of government where cooperation regarding national and international markets is necessary to avoid issues of regulatory overlap and duplication, and, perhaps, issues of internal barriers to trade. In addition, cooperation on governance issues relevant to independent regulators is essential if reform efforts by one level of government are not to be frustrated by the actions of other governments.

Separation of consumer protection functions

The third of the fourth main issues in formulating institutional arrangements concern the *scope* of the functions assigned to consumer protection agencies. What range of functions involved in protecting consumers should be assigned to bodies responsible for implementing consumer protection regulation?

Major functions involved in consumer policy

The major functions in developing consumer policy and regulation are:

1. identifying issues and defining problems requiring public attention and consideration,
2. analysing the causes and consequences of the problem and formulating options to deal with it, including the possibility of positive action by government,
3. recommending the most suitable option based on an assessment of the costs and benefits of the alternatives, and
4. evaluating the effectiveness of the solution implemented and modifying as necessary.

In addition to these generic policy-making functions, when a regulatory response is selected, the following major functions are necessary to implement the regulation:

1. making the rules for regulating the market,
2. informing the regulated and other market participants of their rights and responsibilities under the rules,
3. administering regulatory requirements (for example issuing licences)
4. handling complaints and resolving disputes,
5. promoting compliance with the rules by the regulated, and
6. enforcing the rules where breaches occur.

Identifying and accounting for the needs and views of consumers is important at all levels of policy development and implementation.

Integration model versus separation model

The institutional design issue arising from these functions is whether *all* of the functions should be performed by a single organisation or split between two or more organisations and, if so, how? The functions particularly at issue as to their location are:

- policy development (functions 1 to 3 above),
- regulation-making (function 5),
- enforcement (function 10), and
- evaluation (function 4).

There are many possible organisational structures. Two examples are the 'integration model' and the 'separation model'. In the integration model, all the functions rest with a single organisation, except policy decisions, which are the preserve of government. All state consumer protection agencies operate under the integration model, performing both policy advice and regulatory functions.

In the separation model, the functions are split across two or more organisations. For example, where a government department provides policy advice and develops regulation and the regulator implements the regulation. A practical example, though somewhat simplified, is the split between the Commonwealth Treasury and ASIC which is an independent statutory authority.

Examples of functional separation models

As noted above, there are numerous possible ways to split functions among institutions, and there are various rationales for splitting certain functions. A number of examples of functional splits and the corresponding rationales are outlined below.

Separating policy development/advice and regulatory functions

Should regulators undertake policy development and provide policy advice (including preparation of regulatory impact statements)?

The Victorian Competition and Efficiency Commission (VCEC) in its report on housing construction regulation posed the question as '…not whether regulators should be involved in providing policy advice at all, but rather the extent to which they should be involved and the channels through which this policy advice should be provided'.[50] Should the regulator have primary responsibility for developing policy and the regulatory instruments intended to achieve the government's objectives? Or should it contribute to the public policy process through its parent department (or some other agency) which is responsible for providing policy advice to the Minister?

The main argument for a regulatory agency undertaking policy work is that the expertise developed at one stage of the policy process can be used to inform other stages, thereby making regulation more effective and responsive. Having expertise in implementing policies (albeit, often, limited to policies adopting regulatory responses to problems), means the regulator is well placed to identify problems and assess the technical feasibility of policy

[50] VCEC, *Housing Regulation in Victoria*, p. 232. The following discussion draws on the Commission's discussion in chapter 9 of the report.

options. Assisting well-informed and responsive policy-making is also a key argument for other functions such as complaint handling and consumer and trader education being integrated with policy functions.

However, the combination of policy and regulatory functions carries a number of risks. The main arguments against combination are:

- the increased risk of 'regulatory creep'[51] because of the likely predisposition of a regulator to prefer policies that advance its institutional interest to maintain or expand its role[52],
- the potential for a regulator to be drawn into the political process and possibly compromise its perceived and actual independence and its capacity to make impartial decisions,
- the greater likelihood of a narrower policy perspective being applied by a regulator compared to its parent department, particularly where the regulator is industry or sector specific – this may manifest in a bias towards regulatory responses to problems or inadequate cost/benefit assessments of alternatives through lack of awareness of other government objectives and actions,
- the objectivity of policy advice may be compromised by an interest in having a regulatory response,
- the risk of reduced accountability as there is a built-in incentive for a regulator to less rigorously specify objectives against which its subsequent regulatory performance can be assessed,
- the increased risk of a regulator being captured by the regulated who will perceive the regulator as able to heavily influence policy development and therefore devote commensurate resources to exerting influence;
- the risk that the regulated may be unwilling to articulate a contrary view in policy debates due to concerns that to do so may affect the regulator's attitude towards them or even influence enforcement decisions, and
- the potential distortion of risk assessment in policy responses – a regulator may be more risk adverse and advocate regulation simply because it does not want to be criticised for missing a problem after deciding not to regulate a risk that later materialises.

Separating regulation and administration from enforcement

Should regulators enforce the regulations they administer?

In the case of combining regulatory administration and enforcement, most of the concerns are about natural justice, in particular, the risk of actual or apparent bias in enforcement decisions. There are arguments for separating the roles of prosecutor and judge so that the regulator is responsible for investigating businesses but it is not responsible for reaching a decision on whether the regulation has been breached. This separation ensures that the

[51] Regulatory creep is the extension of the scope or impact of regulation in a non-transparent manner, either deliberately or unintentionally. BRTF, *Avoiding Regulatory Creep*, October 2004, p. 5.
[52] Another response by a regulator to poor regulatory outcomes also may be to blame the scope and detail of the regulation rather than its own performance and respond by expanding the scope, prescriptiveness or complexity of regulation.

process of identifying and investigating complaints does not bias the decision on whether a breach has actually occurred.

Separating consumer advocacy from policy development and implementation

Should consumer agencies also advocate on behalf of consumers?

Government policy development processes are most effective when:

- governments have access to a full range of stakeholder views about the problems and potential solutions the policy is trying to address,
- the groups providing input are well informed and resourced to develop and present their views, and
- the policy is then developed and implemented through processes that objectively weigh the views of all stakeholders.

Challenges can arise for government agencies developing and implementing policy when the organisations best able to advocate for the interests of a key group of stakeholders, such as consumers, are not in a position to coordinate, analyse and present a position on behalf of their constituents. Government agencies are then left with a dilemma. Either they undertake the advocacy role themselves, which has potential risks for perceived and actual bias in the policy development processes, or they develop policy without a full understanding of the views or issues facing a key stakeholder group. The second approach risks policy outcomes that are naïve, ill-informed, one-sided and/or ineffective.

Separating evaluation from implementation of regulation

Should regulators evaluate the regulation they formulate and administer?

A longstanding issue in public policy is who should evaluate policy effectiveness. It should not be assumed that the policy-maker, implementer and evaluator should be the same. Whether evaluations are carried out by those delivering a policy (in this discussion a regulator) can have important implications for the robustness of the evaluation and its usefulness to improve policy effectiveness.

Arguments for combining the functions so that evaluation is undertaken by ‘insiders’ include:

- a regulator will have detailed knowledge of what is involved in administering and enforcing the regulations and of any problems affecting outcomes that were not foreseen at the design stage,
- if the evaluation leads to modifications of the regulatory scheme these will have to be implemented by the regulator, and
- implementation may be more effective if the regulator is more actively involved.

Arguments against combining implementation and evaluation reflect some of the risks of combining policy and regulatory functions. These include:

- an increased risk of compromised objectivity due to institutional interests biasing evaluation assessments, and
- reduced transparency and accountability for performance due to the ability to keep poor regulatory performance 'in-house' and minimise public scrutiny.

National or State regulator?

The final issue in formulating institutional arrangements concerns the constitutional basis and geographic scope of consumer protection agencies and the allocation of roles and responsibilities between national and state agencies. There are a number of key issues relevant to determining the appropriateness of national or state regulators. Relevant questions include:

- What are the constitutional limitations on the roles of either a national or state regulator?
- What is the geographic dimension of the relevant market — international, national, state, regional or local?
- How important is regulatory consistency to achieving objectives, and is a national regulator necessary to ensure a consistent approach? Can state regulators operating within a national framework deliver consistency as cost-effectively as a single national regulator?
- What are the benefits to industry of only dealing with one regulator, rather than different regulators in different states?
- What are the costs of a national regulator not accounting for state differences? Can a national regulator respond adequately to local implementation and enforcement priorities?

There are a range of options and models for moving to national or cooperative approaches among existing state and Commonwealth consumer policy and regulatory agencies. Such models include:

- Regulators could coordinate their processes or introduce one-stop-shops to minimise the costs of any gaps or overlap.
- National regulators may be appropriate in some cases. A national regulator could be a Commonwealth body or a body set up by agreement among the States and Territories.
- Even if legislation is national, state and territory based implementation may be more effective in some situations. Greater cooperation between agencies could enable the responsibilities for legislation and service delivery to be split. Such arrangements could include Commonwealth legislation with complementary State and Territory administration Acts, Commonwealth legislation with administration by the States and Territories through inter-government agreements or Commonwealth legislation with administration contracted to the States and Territories.

Whatever the option being considered, its workability must be closely examined.

Greater cooperation within coordinated national frameworks may generate significant improvements in regulatory outcomes and/or reductions in the administrative costs to regulated businesses and government. Of course such cooperation requires sustained goodwill and a common vision for consumer protection outcomes, not to mention considerable patience and flexibility to negotiate workable cooperative arrangements.

Conclusion

It was noted at the outset that designing the institutional form of a consumer protection agency is not straight forward. What constitutes ‘best practice’ is problematic. Tradeoffs are inevitable and judgement is required to balance a number of factors in each case.

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