Department of **Consumer and Employment Protection**
Government of **Western Australia**

Consumer Protection

Submission to the Productivity Commission

Review of Australia's Consumer Policy Framework

Department of Consumer and Employment Protection
Western Australia

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INTRODUCTION AND SUMMARY

The Consumer Protection Division of the Department of Consumer and Employment Protection (DOCEP) is charged with delivering consumer protection and fair trading in Western Australia. Acting in support of the Minister for Consumer Protection, DOCEP has policy responsibility for 59 consumer protection related Acts of the Western Australian Parliament and has administrative responsibility (alone or in conjunction with the relevant statutory board) for 54 of those Acts.

DOCEP welcomes opportunities to improve the efficiency and effectiveness of Australia's consumer policy framework through the Productivity Commission's (the Commission's) Review of Australia's Consumer Policy Framework ("the Review").

Initiatives that address undue regulatory burden are good for Western Australia and Australia, serving to reduce costs, provide more flexibility for business and facilitate more growth. Undoubtedly, a strong economy is critical to delivering increases in living standards, and providing the greatest opportunities to pursue the economic, social and environmental objectives at the State, Territory and Commonwealth levels.

This submission does not seek to address every individual issue raised in the Commission's Issues Paper, rather this submission is focussed on matters relevant to:

a) the rationale for consumer policy; and

b) how well the current framework and the suite of measures is performing.

In summary, DOCEP believes that the Australian consumer policy framework for the 21st century should be built around the following elements:

1. a clear recognition of the relevance and importance of effective consumer regulation to the creation and maintenance of competitive, efficient and effective national and local markets;
2. an equally clear recognition of the relevance of an on-going role for the Commonwealth and State/Territory Governments in consumer policy and regulation;
3. a commitment to uniformity of regulation when and where there is a considered and demonstrable need for uniformity, backed by a focussed allocation of resources to achieve uniformity;
4. effective consumer input into consumer policy development and administration through the creation and national resourcing of an Australian Consumer Council modelled on the United Kingdom's National Consumer Council;
5. a commitment by all parties to the resourcing of research into the operation of consumer markets and into consumer policy;

6. greater use of more flexible consumer policy tools - including general principles based legislation, codes of conduct and policy statements – to better equip the consumer policy framework to meet dynamic modern market conditions;

7. a more critical assessment of the appropriateness and effectiveness of proposed alternatives to government regulation, particularly education, disclosure and self-regulation, to deal with market failure, especially with regard to the interests of vulnerable and disadvantaged consumers;

8. an on-going commitment to regulatory impact assessment for all proposals for consumer regulation, subject to greater emphasis being given to fair and objective assessment of the social benefits and costs in addition to economic benefits and costs; and

9. a re-focussing of Commonwealth attention to consumer regulation, in particular, by separating the Australian Competition and Consumer Commission's functions of consumer regulation and education from its increasing focus on structural market regulation by the creation of a new Australian Consumer Affairs Commission which should also have responsibility for consumer protection in relation to financial services.

These are the matters that are addressed in more detail in this submission.

DOCEP wishes to note that the views expressed in this submission represent those of DOCEP and they do not necessarily reflect the views of the Government of Western Australia.

DOCEP looks forward to participating in the further stages of the Commission's Review.

1. RATIONALE FOR CONSUMER POLICY

1.1 Competition Policy and Consumer Policy

One of the goals of competition policy is to maximise consumer welfare in the marketplace. In a perfect market, competition creates the greatest choice for consumers of products and services, delivering them at the lowest price, and ensuring the highest quality for those products and services, while simultaneously driving economic efficiency, productive capacity and wealth generation.

It is fair to say that Australia's consumer policy framework, developed over the last 30 years in a somewhat incremental fashion, has occasionally resulted in sub-optimal regulatory outcomes for both consumers and businesses.

DOCEP is mindful that overly complex, or burdensome regulation has a negative impact on the community and the economy, resulting in businesses facing higher market entry costs, or operating costs, including deflecting time and resources away from more productive activities. These additional costs are then passed on to consumers in the form of higher prices, or a reduced range of products or services. Such costs distort the market, impede innovation and competitiveness and reduce market efficiency.

DOCEP fully accepts that regulation is undesirable, unless it can be clearly demonstrated that the cost of that regulation is outweighed by likely economic and social benefits of that regulation.

It is worthy to note that all Australian State and Territory Governments have recommitted to the principles contained in the Competition Principles Agreement (CPA) at the Council of Australian Governments (COAG) meeting of 10 February 06.

Under Clause 5 of the CPA, legislation should not restrict competition unless:

- it can be demonstrated that the benefits of the restriction to the community outweigh the costs (i.e. the regulation is in the public interest); and
- the objectives of the legislation can only be achieved by restricting competition.

Furthermore, in accord with the COAG Regulatory Reform Plan, agreed to at the 13 April 2007 COAG meeting, the Western Australian Government made a commitment to implement effective gate-keeping and review processes to enhance the quality, effectiveness and transparency of regulations in the State.

DOCEP is concerned that the overall tenor of the terms of reference for the Commission's Review reflects a concentration on the business costs associated with consumer regulation.

DOCEP believes that much of the work done on cost-benefit analysis of consumer regulation – while acknowledging the need to balance all costs and benefits – is skewed towards an assessment of direct costs, which are most capable of costing. Much less work has been done on assessing the economic benefits which effective consumer regulation can bring. Even less has been done in assessing the social and other benefits which regulation can deliver and the social and other costs of market failure.

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 vulnerable and disadvantaged groups, social justice, access and affordability of services, and public safety.

There are costs associated with all forms of regulation, however, DOCEP believes the Commission should also be mindful of the significant benefits attached to consumer protection regulation, not just for consumers, but also for the economy as a whole.

Consumer spending in Australia accounts for approximately 60 per cent of gross domestic product, any shift in confidence and demand can have significant implications for economic growth. Consumer confidence is essential to a thriving, innovative and sustainable economy.[1] 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 stimulate greater economic efficiency, innovation and positive social and environmental outcomes.

A consumer policy framework, which empowers consumers with information and purchasing skills, and which provides appropriate protection, redress, and a voice on issues affecting their interests, will stimulate, rather than hinder, markets.

While acknowledging concerns about the impact of regulation, it is also important to note that considerable changes have occurred in the Australian marketplace since the 1970s. With technological advancement, deregulation and competition reform, and reductions in barriers to international trade, consumers are faced with a broader range of products and services from a greater variety of sources.[2]

Not only do consumers have more choice between products, but they are also presented with far more complex products, such as electronic goods, telecommunications, financial services and energy. These products are often complex, and highly sophisticated and they are often bundled together.

The development of electronic commerce and on-line trading has also opened up opportunities for consumers to obtain goods and services from businesses from around the globe. This expansion of available markets and goods has brought its own challenges.

For consumers, there are significant challenges in being able to make informed decisions about products they cannot physically inspect. For regulators and consumers there are difficulties in enforcing standards and seeking redress. For businesses there can be concerns about unfair competition from traders who are not required to meet local regulatory requirements.

Within this environment, healthy competition will generally enhance consumer welfare, stimulating innovation and improving the price and quality of products and services that consumers desire. However, only a simplistic analysis would suggest that competitive markets alone result in effective consumer protection.

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1 For example, trade measurement regulation is designed to instill and secure consumer confidence. When transactions are based on measurements, it is important that those measurements are accurate.

2 For example, deregulation and competition reform have presented consumers with choices in energy, telecommunications and other areas, where previously the only choice was a government-owned monopoly.

Despite the existence of competitive markets, DOCEP notes that even well informed consumers may need additional protection when market complexity or product/service risks are beyond their understanding. Even with full disclosure, a well-educated consumer may still find it difficult in a complex market to assess the safety of products, 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.

Such practices create barriers to comparing price, quality, utility, terms and risks, as they hide transaction costs, and insulate products from a truly competitive process. This may result not only in significant detriment to individual consumers, but also a misallocation of resources and inefficiency in markets.

DOCEP considers this information imbalance to be increasing with industry uptake of new or evolving technologies, which produce novel products and marketing arrangements. The speed and complexity at which such changes occur make it very difficult for consumers to optimise their decision-making, even where they seek to do so.

DOCEP also notes that the relatively recent study of behavioural economics (to which the Commission has referred in its Issues Paper) suggests that, in fact, even well informed, capable consumers, do not always seek to optimise their decision-making. If this is the case, then even more doubt is thrown on the suggestion that a competitive market will, of itself, produce optimum outcomes for consumers.

FuelWatch

Regulation of fuel prices in Western Australia provides an example of low-intervention legislation being of substantial and measurable benefit to consumers, while causing minimal interference with economic efficiency.

The FuelWatch system provides price transparency and certainty for consumers. It assists motorists in making informed decisions about their fuel purchases and, in doing so, has downward competitive pressure on fuel prices. There is clear evidence that the FuelWatch approach has succeeded in both reducing prices and reducing excessive price fluctuations.

Essentially, the *Petroleum Products Pricing Act 1983* (PPP Act) and associated Regulations require fuel retailers within regulated areas to notify the Prices Commissioner about their next day's fuel prices by 2pm on the previous day. Retailers must charge these notified prices from 6am the next day for a 24-hour period. Information about fuel prices is made widely available to motorists through various FuelWatch services and the media.

Lower Prices in Western Australia

Perth motorists paid average prices for unleaded petrol that were lower than those in each of the Eastern State capitals during 2005 and 2006 (excluding the State subsidies provided in Brisbane and Melbourne). In 2005 Perth became the cheapest capital city in Australia in which to buy unleaded petrol, with a turnaround since 2003 of 3.8 cents per litre (cpl) compared with Melbourne. In fact, the real comparisons are almost certainly better than those that can be calculated, because of limitations in the price data available for Eastern States capitals.

Savings for Motorists

Although the individual differences seem small, a difference of 1 cpl at the bowser equates to savings of about $16 million per year for WA motorists. The decrease of 3.8 cpl compared with prices in Melbourne equates to relative savings of more than $60 million for Perth motorists. By way of comparison, the annual cost of running the FuelWatch system is about $550,000.

The difference between the average of the cheapest 100 sites in the metropolitan Perth area (approximately 1/3 of metropolitan sites) and the average metropolitan price for unleaded petrol (ULP) on any given day has been as high as 7.9 cpl. This equates to a saving of $4.34 on an average 55 litre tank.

Impact on Price Cycles

Price hikes now occur much less frequently in Perth than previously and are significantly longer than in other Australian capital cities. Generally ULP price hikes are occurring every 14 days in Perth, compared to every seven to eight days in the Eastern States capitals.

Perth also has a much smaller range between the top and bottom of the ULP price cycle. The average range of price hikes in Perth during 2006 was 6.4 cpl, whereas the average of price hikes for the same period in Eastern States capitals was considerably higher: 9.2 cpl in Melbourne.

Impact on Competition

There is no evidence that the FuelWatch system has been detrimental to the market by driving out independent retailers. The number of retail sites in Western Australia has declined slightly, consistent with ongoing rationalisation of the market nationally. However, the proportion of independent retailers has remained steady.

Use of FuelWatch Information

WA motorists have embraced the FuelWatch system and are using it to save on fuel purchases in ever increasing numbers: 28,368 motorists subscribe to the personalised FuelWatch daily email service; 1,807,620 motorists and others visited the FuelWatch website during 2006; and 1,867 telephone calls were made by motorists to the FuelWatch automated voice pricing line to obtain fuel prices during April 2007.

1.2 Vulnerable and disadvantaged consumers

An important rationale for consumer policy is to respond to the needs of vulnerable and disadvantaged consumers. DOCEP concurs with the definitions ascribed to the terms "vulnerable consumer" and "disadvantaged consumers" proposed by Consumer Affairs Victoria.[3]

"A vulnerable consumer is a person who is capable of readily or quickly suffering detriment in the process of consumption." This susceptibility to detriment may arise as a result of inelasticity of demand, the complexities of the market for a particular product, the product's qualities or the nature of the transaction. The individual's attributes or circumstances may also adversely affect consumption decision-making, or the individual's pursuit of redress for any detriment suffered.

Some consumers will be vulnerable because of either temporary personal circumstances that adversely affect them in consumption, or adverse market, product or transaction characteristics specific to a particular purchase, rather than their purchases generally.

The importance of this definition is that it recognises that vulnerable consumers are not a fixed class of consumers. Vulnerability is not just about a consumer's attributes, such as age, language, infirmity or disability. Vulnerability instead can arise from the circumstances of the market or particular transactions. This definition acknowledges that in certain circumstances even well educated, well informed consumers will be vulnerable.

The need to protect vulnerable consumers is well illustrated with regard to product safety regulation. Some products, because of their nature or technical sophistication, will be difficult for any consumers to adequately assess in the marketplace. Such vulnerable consumers will not be in a position to make rational decisions (which underpin the notion of the competitive marketplace protecting the interests of consumers), for a variety of reasons.

[3] Consumer Affairs Victoria, "What we mean by 'vulnerable' and 'disadvantaged' consumers?", Discussion Paper, Melbourne, 2004.

A disadvantaged consumer is a person in persistent circumstances and/or with ongoing attributes that adversely affect their consumption and thereby causing a continuing susceptibility to detriment in consumption.[4] As a result, a disadvantaged consumer repeatedly suffers consumer detriments or, alternatively expressed, generally obtains below-average satisfaction from consumption.

This definition of disadvantaged does reflect the impact that personal characteristics can have on a consumer. A consumer may, of course, be both disadvantaged and vulnerable in relation to specific transactions, just as a consumer may suffer several disadvantages.

Importantly, it should be noted that this definition does not suggest that simple possession of an attribute renders a consumer disadvantaged. For example, it is incorrect to assert, as sometimes occurs, that all senior consumers or all migrant consumers are disadvantaged.

Clearly, disadvantaged consumers will not be protected merely by a competitive market.

[4] Businesses may also fall within the definitions of vulnerable and/or disadvantaged consumers.

2. CURRENT FRAMEWORK AND THE SUITE OF MEASURES USED

2.1 The role of the Commonwealth, the States and Territories and the quest for uniformity

2.1.1 The role of the Commonwealth, the States and Territories

The current consumer policy framework in Australia is based on shared responsibilities between the Commonwealth, State and Territory Governments. The Commonwealth's principal consumer legislation is the *Trade Practices Act 1974 (TPA).* This is supported by State and Territory Fair Trading Acts (in Western Australia there are two relevant Acts - the *Fair Trading Act 1987*, and the *Consumer Affairs Act 1971*).

The scope of the TPA is consistent with the Commonwealth's powers under the Australian Constitution. While there is a range of relevant powers in the Constitution, the TPA is primarily based on the Commonwealth's power to legislate in relation to corporations.

The State and Territory Fair Trading Acts are not restricted to corporations and they apply equally to corporations and to individuals and partnerships. The States and Territories also regulate consumer transactions through a range of other Acts. As previously noted, DOCEP administers 59 Acts but there are many other State and Territory Acts which regulate aspects of consumer transactions that are not in consumer protection/fair trading portfolios.

Equally, at a Commonwealth level, the TPA is not the only Act relevant to consumer transactions, and not all administration is vested in the one agency. While the Australian Competition and Consumer Commission (ACCC) administers the TPA, the Australian Securities and Investments Commission (ASIC) administers the consumer protection provisions of Commonwealth financial services legislation. Other agencies, such as the Australian Communications and Media Authority, the Australian Prudential Regulatory Authority, Food Standards Australia and New Zealand, also have functions relevant to consumer protection.

This shared responsibility for consumer policy means that the Commonwealth, States and Territories must work together if there is to be a complete and consistent consumer policy framework. There are processes in place to achieve this outcome in respect of the ACCC, ASIC and State and Territory consumer protection/fair trading agencies.

At a peak level the Ministerial Council on Consumer Affairs (MCCA) works to promote harmonisation of legislation and its administration across the jurisdictions. Its membership includes the relevant ministers from the Commonwealth (Parliamentary Secretary), each of the States and Territories and New Zealand.

MCCA has a Strategic Agenda, and various standing and ad hoc committees. The heads of consumer agencies regularly meet as the Standing Committee of Officials of Consumer Affairs (SCOCA), and there are permanent advisory committees covering credit, product safety, trade measurement and compliance and enforcement operations. In addition, there are from time to time a number of project specific inter-jurisdictional working parties or groups in place.

There is, therefore, currently recognition of the different roles of the Commonwealth, States and Territories in the formation, maintenance and administration of the consumer policy framework, and a set of processes in place that should allow for effective discharge of those roles. The question for the Commission to consider is whether, in fact, this occurs and, in particular, are there any processes to provide for co-ordination of the various Commonwealth agencies with consumer protection related functions.

DOCEP has some views on how the existing arrangements may be improved and these are dealt with below. However, DOCEP also acknowledges that many of the issues impacting on the roles of the Commonwealth, States and Territories are political in nature and DOCEP does not intend to express a view on these issues.

2.1.2 Harmonisation in the consumer policy framework

While harmonisation and uniformity are different concepts, when referring to harmonisation in this submission, DOCEP is referring to both concepts.

The Commission noted in its *Review of National Competition Policy Reforms* that inconsistencies in the Australian consumer policy framework increased compliance costs, and impeded the development of national markets.[5]

The report of the Australian Government's Taskforce on Reducing Regulatory Burdens on Business also commented that the lack of harmonisation led to "greater compliance costs and burdens for companies that operate nationally, such as food franchises and banks".[6]

Industry also stressed the need for harmonisation in administration, and enforcement as well as regulation. The enforcement of consumer protection laws presents unique challenges where a trader from one jurisdiction is engaging in illegal conduct in another jurisdiction.

In addition to increased compliance costs for business that tend to flow through to consumers, differences between jurisdictions' laws can create uncertainty for both consumers and businesses on the application of relevant laws. This may result in consumers being unaware of their rights or the available remedies,[7] and traders being unaware of their obligations.

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5 Productivity Commission, 2005, Review of National Competition Policy Reforms, pp279-283.

6 Regulation Taskforce, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, p51.

7 Consumers may also assume they have rights when they do not. For example, see the variation in cooling off periods for used car purchases in different jurisdictions.

There are, therefore, two different, though closely related, issues to consider in relation to achieving greater harmonisation in the Australian consumer policy framework. The first concerns the laws that make up that framework. The second concerns the administration of that framework.

Harmonisation of regulatory regimes across the jurisdictions, aligning laws, rules and processes to promote consistency in their application and outcomes, and removing inconsistent or contradictory regulatory requirements, will reduce business compliance costs by creating economies of scale, and reducing duplication of compliance activities. This in turn should have flow-on reductions in consumer costs. Greater uniformity may also reduce the costs of government developing, administering, monitoring and enforcing the regulatory schemes.

Despite its purported benefits, harmonisation across the jurisdictions is not easily achieved given the difficulties in obtaining consensus across the jurisdictions and the understandable differences in legislative priorities within the various jurisdictions.

Additionally, the differences in the economies and political environments of individual jurisdictions within Australia will warrant, individual, localised approaches. Such differences between jurisdictions, like competition between businesses, can be highly effective in stimulating innovation in policy development and regulation.

DOCEP believes that the existing Australian consumer policy framework contains three significant impediments to achieving greater harmonisation:

a) the lack of an accepted rationale for when harmonisation is warranted or desirable;
b) the processes by which projects intended to achieve greater harmonisations are resourced and managed; and
c) the existing mechanisms used to achieve harmonisation.

2.1.3 Assessing the need for harmonisation

There is little empirical evidence to indicate just how significant is the impact of the lack of harmonisation of consumer laws across the country. Nor is there empirical evidence to indicate the impact of non-optimal responses and reduced speed of action, which can result from the need to achieve joint decision-making. However, it seems likely that these costs may be significant.

Nevertheless, it must be noted that moving to a more harmonised regulatory environment will also impose costs on business and government. Both businesses and governments may incur large costs from adopting new administrative systems and processes, and businesses and consumers may also be required to become aware of, and adhere to, new rights and responsibilities.

In many cases, only those transacting across borders will benefit from greater harmonisation. However all consumers and businesses will be affected by the costs of such a transition, as there is no way of limiting the costs to the beneficiaries, at least in the interim.

There are also non-economic costs associated with harmonisation, striking at the heart of Australia's federal system, and the sovereignty and separation of the Australian jurisdictions. Depending on the form of harmonisation being sought, jurisdictions may be reluctant to move toward increased harmonisation where it may:

- require jurisdictions to relinquish some, or all, regulatory control;
- prevent a jurisdiction from making innovative 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, with greater delays in enforcement activity or introducing legislative amendment;
- reduce the resources available, including for enforcement activity if a single regulator model is adopted; and
- 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.

Nevertheless, DOCEP believes that greater efforts should be made to align all the general consumer law now covered by the TPA and State and Territory Fair Trading Acts, given the benefits of such harmonisation. This proposition was strongly supported as far back as 1976 by the Swanson Committee,[8] and seems to have been the aim of governments when the States first moved to model their Fair Trading Acts on Part V of the TPA.

While there has been attention paid to a range of harmonisation issues through MCCA and SCOCA, there has been no co-ordinated process in place over the last 10 years to seek to ensure harmonisation between jurisdictions in regards to the TPA and State and Territory Fair Trading Acts. This is something that could be addressed by MCCA and SCOCA through existing processes.

Western Australia has recently completed a review of the *Fair Trading Act 1987* and the *Consumer Affairs Act 1971*, with a Report of this review to be publicly released shortly. One of the aims of this review was to bring the Western Australian *Fair Trading Act* into line with other States' Fair Trading Acts. It was made clear from this process that there is significant divergence between these Acts.

DOCEP also appreciates that while there is an increasing tendency for businesses and consumers to operate within an Australian marketplace, any move toward greater harmonisation, must acknowledge the differences in the economies and political environments of individual jurisdictions within Australia, and be able to respond in a timely manner to local issues, which demand local approaches.

[8] Trade Practices Review Committee (Swanson Chairman), 1976, Report to the Minister for Business and Consumer Affairs.

In addition to concerns about the various Fair Trading Acts, little consistency has been evident in relation to which issues are deemed suitable for uniform consumer regulation. For example in recent years:

a) credit regulation has remained based on a template legislative model to achieve consistency across State and Territories, even though individual jurisdictions have taken unilateral actions to deal with issues of concern to them;
b) the Commonwealth has declined to become involved in national regulation of property investment advice, preferring individual jurisdictions to take action to regulate this under the aegis of real estate agents' legislation;
c) the Commonwealth, States and Territories have agreed to move to national Commonwealth regulation and administration of trade measurement;
d) a Commonwealth proposal to takeover regulation of product safety has been rejected by the States and Territories; and
e) through a contentious application of the regulatory impact statement process, the Commonwealth has effectively prevented the States and Territories from introducing uniform unfair contract terms legislation (already in place in Victoria), running the risk of inconsistent individual jurisdiction legislation.[9]

2.1.4 Resourcing harmonisation

As noted above, there is currently recognition of the different roles of the Commonwealth, States and Territories in the formation, maintenance and administration of the consumer policy framework, and a set of processes in place that should allow for effective discharge of those roles.

Through these processes, there already exists a structure to prioritise national issues for consideration and action by MCCA member jurisdictions and to establish and maintain uniform approaches to those issues. New Zealand's membership of MCCA and SCOCA also allows for appropriate consideration of trans-tasman issues.

Despite the existence of these processes, there remains a sense of frustration by stakeholders (including the individual members of both MCCA and SCOCA) as to the capacity to progress strategic projects and to achieve uniformity.

Based on its experience as a member of SCOCA, DOCEP believes that one of the key reasons for this lack of progress is the way in which strategic projects, particularly those involving uniform action, are resourced.

Both MCCA and SCOCA are supported by a secretariat based within the Commonwealth Treasury. This secretariat performs a supporting function for MCCA and SCOCA. The Secretariat does not provide, and is not resourced to provide, research or project support for MCCA or SCOCA projects.

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[9] The Issues Paper notes that "*All Australian, State and Territory governments (except Western Australia) have formal gate-keeping processes for new or amended legislation, although actual requirements vary widely across jurisdictions*".

The traditional model adopted by MCCA and SCOCA to advance a particular project is to establish an inter-jurisdictional working party, chaired by one jurisdiction (sometimes by two jurisdictions jointly) with members drawn from those jurisdictions with a particular interest in the subject matter. It is not usual practice for the working party to receive dedicated project support apart from that provided by the members themselves.

The members of these working parties are invariably staff of SCOCA agencies who are not allocated full-time to the work of the working party, rather they take on the work associated with the working party membership in addition to their existing daily duties in their own agency. It is not uncommon for a person to be a member of more than one working party at a time. Not only are the members of the working party part-time, they are also required to give priority to their normal duties – the demands of their own jurisdiction, understandably, come first.

It is not surprising that this model, with its lack of dedicated resourcing, does not produce optimum outcomes.

In recent years, some exceptions to this model have been adopted. In 2004, largely in response to criticism of delays in consumer credit matters, a full-time project officer was employed to assist the Uniform Consumer Credit Code Management Committee (UCCCMC) with its work. This position was paid for by all Australian jurisdictions contributing according to an established formula for MCCA/SCOCA funding of projects.

A full-time Executive Officer position was also funded for the National Indigenous Consumer Strategy and funding support has been provided to Queensland to employ an officer to assist in dealing with its responsibilities as host jurisdiction for several template schemes.

Given local priorities which consumer agencies are funded to implement, it is not surprising that there is a reluctance, indeed often an inability, for dedicated resources to be provided for MCCA projects. However, DOCEP believes that this issue requires further consideration because, in the absence of dedicated resources being provided to advance strategic priorities, there is unlikely to be a major improvement in this fundamental element of the consumer policy framework.

One option that DOCEP believes is worthy of consideration is an expansion of the role of the MCCA/SCOCA Secretariat to include research and project support for strategic projects, particularly those that advance uniformity. Clearly this would require additional funding by jurisdictions. Consideration should also be given to the MCCA/SCOCA Secretariat not always being hosted by the Commonwealth Government but rather being located in one of the State consumer agencies.

If the MCCA/SCOCA Secretariat were to be given an expanded role, location of the Secretariat in either New South Wales or Victoria would make it much more accessible to consumer and business groups and would help to mitigate against any view that the Commonwealth had a dominant role in the functions of the Secretariat.

The resourcing issue is exacerbated by the difficulties inherent in resolving issues through a committee or working party structure. Not only is it difficult to develop solutions that satisfy all parties, but for some jurisdictions it is not possible for the SCOCA member agency to respond on behalf of that jurisdiction without achieving clearance from a central agency such as their Department of Premier and Cabinet or Treasury.

In addition, or as an alternative, to an expanded role for the MCCA/SCOCA Secretariat, DOCEP believes that there would be merit in MCCA/SCOCA moving away from the working party model towards allocating projects to one jurisdiction to progress to the point of a final, draft report. While this jurisdiction would be expected to consult fully in the development of the report, DOCEP believes that, as long as projects are established with appropriate agreed planning, giving ownership of a project to an individual jurisdiction would allow for more effective and efficient advancement of projects.

This model would place more burden on individual jurisdictions in relation to projects for which they have allocated responsibility and there would be a need to ensure that project loads were allocated fairly, however this is simply a part of appropriate project planning. Such an approach would also be likely to create a renewed focus on prioritising projects.

2.1.5 Models for greater uniformity

There are a number of traditional approaches available to achieve greater uniformity in consumer laws between jurisdictions in Australia.[10]

(a) Single national law

A single national law requires Commonwealth legislation. This approach is subject to two major restrictions. Firstly, the Commonwealth Constitution restricts the areas in which the Commonwealth can legislate. Therefore, the Commonwealth must either have a head of power under the Constitution, or the States must refer their relevant constitutional powers, pursuant to s. 51(xxxvii) of the Constitution, 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. Referral of powers obviously requires the agreement of the States.

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[10] Note also that based on CPA principles and the COAG Regulatory Reform Plan of 13 April 2007, in deciding on whether to adopt a uniform, harmonised or jurisdiction-specific model of regulation, regard should be given to:

- the potential for better regulatory practices to be developed through regulatory competition, innovation and dynamism;
- the relative effectiveness and efficiency of the alternative models, including regulatory burdens and any transition costs; and
- whether the issue is state-specific or national, and whether there are substantial differences that may require jurisdiction-specific responses.

The second, restriction on a single national law is that the Commonwealth must be prepared to act.

Recent examples of the complexities of introducing a national law include:

- trade measurement – where the Commonwealth has clear constitutional authority to legislate and a desire to do so and the States and Territories have agreed to move to national legislation and administration by 2010;
- personal property securities – where the Commonwealth lacks full constitutional authority to legislate but has a desire to do so and where the States have agreed in principle, at least, to a referral of constitutional authority;
- product safety – where the Commonwealth lacks full constitutional authority to legislate, has a desire to do so but has not been able to obtain the support of the States; and
- property investment advice – where, despite effective constitutional authority, the Commonwealth rejected approaches by the States and Territories for a single national law on the basis that property investment advice was a matter for the States and Territories, not the Commonwealth.

(b) Template legislation

Template legislation requires one jurisdiction to act as host jurisdiction and enact a 'template' Act with other jurisdictions enacting legislation that refers to the first jurisdiction's legislation. Under this process any change to the original jurisdiction's template Act automatically becomes law in the other jurisdictions.

Template legislation has been the preferred model to achieve a high degree of uniformity between jurisdictions where a single national law is not achievable. Queensland has been the preferred host jurisdiction because of its unicameral parliament, which makes the passage of legislation more certain than in jurisdictions where governments may have to negotiate legislation in an upper house.

Template legislation is usually accompanied by a formal agreement between the parties to establish the mechanisms for maintaining uniformity.

Template legislation is currently used to regulate credit in Australia.[11]

[11] 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. 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 in the other jurisdictions, except Tasmania and Western Australia where additional processes apply.

There are a number of limitations with template legislation in Australia. Queensland has recently expressed some concerns about its role as host jurisdiction. MCCA has provided some funding support to Queensland to take account of the costs that Queensland bears on behalf of other jurisdictions in preparing and processing changes to template legislation. In addition to these costs, of course, the role of host jurisdiction does place additional demands on the Queensland Parliament that have to be managed against competing Queensland State priorities.

This concern by Queensland has also resulted in it withdrawing from proposals that it be the host jurisdiction for template co-operative companies legislation (with New South Wales now offering to be the host jurisdiction).

Both Western Australia and Tasmania have modifications to the template model in place in their jurisdictions to deal with concerns of their respective Legislative Councils.

In Western Australia the Liberal, National and Greens Parties have historically opposed template legislation on the basis that it provides a mechanism for amendments to laws to operate in Western Australia without those amendments having been formally considered by the State's Parliament. A very complex process has been adopted in Western Australia in relation to changes to the Consumer Credit Code to meet these concerns. (See further below.)

In the area of credit, at least, there has also been evidence of frustration by individual jurisdictions about the lengthy process involved in getting agreement of all participating jurisdictions to changes to template legislation. Both the New South Wales and the Australian Capital Territory governments have introduced credit legislation outside of the template process, with the result that uniformity of regulation has not been maintained. The issue of uniformity in credit regulation is discussed later in this submission.

(c) Model legislation

Model legislation involves each State and Territory adopting separate but uniform legislation based on an agreed model.

Model legislation may result in a high level of uniformity at the time of the introduction of legislation but that uniformity tends to be eroded over time to meet the political and policy agendas of individual jurisdictions. Model legislation underpinned the respective Fair Trading Acts, which were intended to mirror parts of the TPA. As noted above, however, amendments to the State and Territory Fair Trading Acts, since their introduction, mean that they are no longer uniform.[12]

[12] 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 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 to 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.

To be effective on a national basis, model legislation also needs the agreement of all jurisdictions to participate. An example of this not happening is the Uniform Trade Measurement Legislation (UTML). Under a formal agreement signed in 1990 between the Commonwealth, the States and the Territories (except Western Australia), all jurisdictions, with the exception of Western Australia, enacted model uniform trade measurement legislation. The current Western Australian Government has introduced new trade measurement legislation based on the UTML model that commenced operation in June 2007.

(d) Uniform legislative provisions

Uniform legislative provisions require each jurisdiction to agree on uniform provisions that they then reflect in their respective legislation.[13]

This approach is similar to model legislation, although it permits non-uniform provisions to be included in the legislation to take account of individual jurisdictional requirements.

(e) Uniform principles

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. This approach is, as far as DOCEP is aware, not currently used in the Australian consumer policy framework.

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. However, DOCEP believes that the single most significant factor, and one which may be incapable of resolution, is the correlation between the political imperatives of individual jurisdictions and the business case for uniformity.

Any proposals for models for achieving uniformity in the consumer policy framework, no matter how rational, that overlook this issue, and the legitimate political and broader policy requirements of individual jurisdictions, are bound to be ignored.

DOCEP believes that there will be no significant advances in the area of uniformity in the consumer policy framework unless there is political acceptance that uniformity as an outcome is of greater merit than individual jurisdictional preferences or requirements. It is this recognition that has resulted in the Council of Australian Government process producing an outcome in areas of trade measurement, personal property securities and business names.

[13] 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.

DOCEP believes that the case for greater uniformity will be advanced by a strategic consideration of those issues regulated within the existing consumer policy framework for the purpose of assessing those that have the strongest case for uniformity, followed by the development of a strategic plan for the staged implementation of that uniformity. Such a strategic plan would need to address the issues of resourcing and project allocation that have been referred to above.

DOCEP would suggest that a hierarchy of needs could inform the assessment of issues to determine those with the strongest case for uniformity. This hierarchy would take into account the level of impact of the issue on the national market, the extent to which the issue involved inter-jurisdictional transactions and the level of economic impact.

At the top of this hierarchy would be those issues demanding the highest level of uniformity, both in legislation and administration. These issues would be those with a high level of impact on the national market, a high level of inter-jurisdictional transactions and a significant economic impact. These issues would warrant Commonwealth legislation and administration

At the bottom of the hierarchy would be issues that impact only on local markets, with no, or very limited, inter-jurisdictional transactions and low level economic impact. These issues would not warrant uniform legislation or administration of any form.

In between would be issues which would warrant various levels of uniformity depending on the extent to which they impact on the criteria referred to.

2.1.6 Attempted uniformity - the Uniform Consumer Credit Code

DOCEP believes that the regulation of consumer credit provides an instructive example of a number of the issues that currently affect the consumer policy framework.

DOCEP understands that the Victorian Government has provided a background paper to assist the Commission in its consideration of the *Uniform Consumer Credit Code* (the Code) as a regulatory model. DOCEP has provided input to this Background Paper and endorses the information presented on an “in principle” basis.

Apart form some general information relating to the Code, this submission will not revisit the policy framework and governance issues raised in the Background Paper. Instead, the intention is to present a specifically Western Australian perspective, and to provide a current example of how Western Australian consumers have arguably been disadvantaged due to the Code’s uniform legislation model.

This example will also demonstrate how the governance arrangements for the Code have directly contributed to an 18-month delay in dealing with what was identified in October 2005 by all State and Territory Ministers for Consumer Protection/Fair Trading to be an issue warranting an urgent regulatory response.

This example also highlights the fact that the current uniformity framework lacks the capacity to respond quickly to emerging issues and abuses identified in specific jurisdictions.

The Code is template legislation passed in Queensland, which is then adopted by all other jurisdictions under template arrangements. All jurisdictions are formally committed to ensuring that the same consumer credit laws apply across Australia under the *Australian Uniform Credit Laws Agreement 1993* (the Uniformity Agreement).

The Uniformity Agreement permits non-uniformity in the following areas:

- interest rate caps;
- licensing schemes for credit providers;
- vesting of jurisdiction in specialist tribunals; and
- establishment of consumer credit trust funds to receive civil penalty payments.

The Code has been in place since 1996, and regulates all stages of the lending process where credit is provided for personal, domestic or household purposes. This includes personal loans, home loans and continuing credit (e.g. credit cards).

The Code does not apply to credit provided for business or investment purposes. The intent of the legislation is to provide appropriate protections for consumers as well as ensuring that product diversity and competition is optimised.

The Ministerial Council for Uniform Credit Laws, which has essentially the same membership as the MCCA, administers the Code. While the Code is essentially "national" legislation, its administration is the responsibility of each of the State and Territory. This includes responsibility for policy development and enforcement.

To assist in the coordination of these responsibilities, MCCA established the Uniform Consumer Credit Code Management Committee (UCCCMC) to carry out the work programme for reform to the Code, and the Fair Trading Operations Advisory Committee (FTOAC) was established to co-ordinate enforcement matters relating to the Code. Both committees are made up of consumer protection officials representing each jurisdiction.

Consumer protection for financial services other than credit is regulated by the Commonwealth through ASIC. ASIC regulation of misleading and deceptive conduct and unconscionable conduct can, however, extend to credit transactions. In this respect, Commonwealth regulation overlaps with the equivalent provisions in State and Territory fair trading legislation.

Apart from the one exception noted above, the Commonwealth does not directly regulate the relationship between credit providers and consumers.

It is widely recognised that Australia's credit market has undergone profound change since the Code was implemented in 1996. These changes include: greater numbers of lenders; increased range of credit products; higher volume of credit flow; more aggressive marketing; and new channels of delivering credit to consumers.

A key change has also been the 'nationalisation' of the consumer credit market with credit providers centralising their operations. This change has not just been restricted to the major banks, but has recently been seen in the payday lending market with the growth of national small-amount lenders.

These changes have put credit regulation in Australia under considerable pressure, and call into question the adequacy of the regulatory scheme. It also raises concerns as to whether the current regime is sufficiently flexible to adapt quickly to the rapid changes in the marketplace.

Consumer Credit Code: Process Summary

The table below relates to the process applicable to the fringe lending initiative, however, this process is typical of processes applicable to projects requiring legislative amendments.

Step	Action
	Intention to develop policy proposal.
	Seek UCCCMC approval to proceed.
	Seek SCOCA approval to proceed.
	Seek MCCA approval to proceed.
	Prepare consultation document setting out options for further regulation of fringe credit providers.
	Obtain UCCCMC approval of consultation document
	Develop consultation plan and obtain UCCCMC approval
	Submit discussion paper and consultation plan to SCOCA for approval.
	Seek SCOCA's approval of the release of the discussion paper and consultation plan.
	Seek MCCA approval of the discussion paper and consultation plan.
	Prepare submission to Qld Cabinet seeking authority to release discussion paper.
	Print, publicise (via newspaper websites and letters to key stakeholders) release of discussion paper.
	Analyse and review feedback and submissions and amend discussion paper accordingly.
	Prepare a decision-making RIS and final Public Benefit Test based on the cost/benefit approach presented in the Discussion Paper supplemented by feedback from stakeholders.
	Submit report to ORR for assessment.
	Incorporate ORR recommendations in the decision-making RIS.
	Seek UCCCMC endorsement of final RIS with recommendations
	Seek SCOCA endorsement of final RIS with recommendations
	Seek MCCA endorsement of final RIS with recommendations.
	Seek Qld Cabinet approval to draft.
	Approach Parliamentary Counsel's Committee in regard to assignment of drafting process
	Drafting of amendments by Parliamentary Counsel.
	Seek Parliamentary Counsels' Committee approval
	Release of RIS with Bill/Regulations for consultation
	Incorporate changes arising out of consultation process into the draft Bill/ Regulations
	Seek Parliamentary Counsels' Committee approval of changes.
	Seek SCOCA/ MCCA approval to introduce.
	Seek Qld Cabinet approval to introduce.
	Introduce into Queensland Parliament/ and or EXCO process.
	(Note: Once amendments are passed/made separate statutory processes apply in WA and Tasmania. Allow minimum time 6 to 8 weeks depending on parliamentary timetable.)

This complex process is seen as an obvious disadvantage of the current scheme. As a result, jurisdictions such as the Australian Capital Territory and New South Wales have recently responded to local pressures to address serious credit issues by acting unilaterally rather than via the normal national channels.[14] This is clearly not ideal, but perhaps understandable in the circumstances.

A specific Western Australian example in regard to this issue is provided at the end of this section.

Western Australian process for adopting Code amendments

Any amendments made in Queensland to either the Code or the Regulations cannot be given effect in Western Australia until a number of statutory steps have been completed. This approach is considerably more complex than the 'automatic' adoption approach in place in other jurisdictions and unfortunately, highly dependent on the Parliamentary timetable and priorities. This consistently leaves Western Australia in potential breach of the Uniformity Agreement, which commits all jurisdictions to maintaining consistent credit laws.

The lack of responsiveness of the current regime clearly has negative consequences for both consumers and industry and is a key area of concern.

With the advent of the financial services reforms, key differences have emerged in the regulation of credit providers to that of other financial service providers. One of these is the comprehensive licensing regime under financial services laws, which can be compared with the 'light touch' approach for credit providers that most States and Territories have adopted, with the exception of Western Australia, which has a licensing system.

Although the Western Australian licensing system is not as comprehensive as that under the financial services laws, it has allowed Western Australia to gain an understanding of the number of credit providers operating in the State and what type of credit arrangements they have in place. Such information provides a valuable evidential basis to address concerns about credit provider behaviour.

This submission does not propose to examine in detail the differences between the financial services laws and regulation of consumer credit, however DOCEP believes that the issue of Commonwealth regulation of consumer credit is one that merits further examination.

[14] Examples include the tabling in the New South Wales Parliament of an exposure draft Bill on mandatory comparison rates (*Consumer Credit (NSW) (Amendment (Comparison Rates) Bill* 2000) and credit card over-commitment legislation in the ACT (*Fair Trading Amendment Act* (2002)).

DOCEP notes that the regulation of consumer credit under Commonwealth financial services laws would conceivably overcome most of the perceived problems of consumer credit regulation providing:

- a nationally uniform approach to deal with emerging consumer credit issues;
- an increased understanding of credit providers operating in the market;
- greater regulatory tools to obtain information and undertakings to address poor market behaviour; and
- responsive in addressing poor market behaviour in a timely manner.

Administrative Issues

As outlined above, the administration of the Code is the responsibility of MCCA, SCOCA and UCCCMC, although MCCA and SCOCA have broader consumer responsibilities than just consumer credit.

UCCCMC is an example of the concerns previously expressed about the way in which projects intended to achieve harmonisation in the consumer policy framework are currently resourced

DOCEP believes that UCCCMC should be better resourced to carry out its duties. Currently UCCCMC is made up of members from each State and Territory consumer agencies that generally fit committee responsibilities with other significant roles within their agencies.

Resourcing of consumer credit is left up to each State and Territory, which can lead to differing consumer credit priorities between States and Territories. Some progress has recently been made with SCOCA funding the engagement of a National Project Officer as mentioned above, and a part-time Credit Legislation Officer to assist UCCCMC in its administration responsibilities.

DOCEP also believes that MCCA should play an increased role with regard to policy research, with the role of the MCCA/SCOCA Secretariat, expanded and resourced to undertake policy research relating not just to consumer credit issues but consumer policy issues of national significance.

Predatory lending practices

The following outlines a specific issue that first came to light in Western Australia in June 2005. It was brought to DOCEP's attention that predatory lenders in Western Australia were targeting highly vulnerable and disadvantaged consumers, usually desperate for cash. These consumers were offered temporary relief from financial hardship, but in the longer term, this relief created further financial hardship. It was apparent that these consumers, generally Centrelink payment recipients, entered into arrangements they did not understand, took on debt that they had no prospect of repaying and were subject to what could be described as unfair, deceptive, abusive and predatory lending practices.

Practices

Predatory lenders offered short-term cash advances (usually between $200 to $500) at an annual percentage rate of approximately 800%. If debtors defaulted, they incurred interest calculated at 5% per day. This can result in an annual percentage rate of over 4000%. In such instances, consumers who obtained initial cash advances of a few hundred dollars often end up owing many thousands of dollars within a relatively short time. Further, these debtors were aggressively pursued through the Western Australian courts and were frequently threatened with imprisonment. This issue was also having negative social impacts on the broader community.

MCCA Support

Given the seriousness of this problem, the then Western Australian Minister for Consumer Protection raised this issue with his MCCA colleagues. The MCCA subsequently unanimously supported the urgent drafting of amendments to the regulations with the objective of closing an apparent regulatory loophole in the Code, and thus ensuring consumers were afforded the protections intended under the Code, for example access to key protections and redress mechanisms provided for under the Code.

Every effort has been made since October 2005, to advance this initiative as quickly as possible. It is concerning that eighteen months on, the following steps still need to be completed:

- submission of the bill facilities regulation to MCCA for approval to request the Queensland Governor in Council to make the regulations;
- forwarding the draft regulation amendment to Queensland Cabinet for Authority to Introduce Significant Subordinate Legislation (this is required as a Regulatory Impact Statement was necessary for this proposal);
- completing Queensland Executive Council processes (once made, the regulation will automatically apply in all jurisdictions apart from Western Australia and Tasmania); and
- completing Western Australia's and Tasmania's statutory processes (minimum of 2 months) for adopting Queensland's (template) regulations.

Reasons for delay

Making amendments to the Code is a highly complex and lengthy process requiring a range of approvals at each stage of the policy development and implementation process.

The implementation process stalled in August 2006, due to Queensland Parliamentary Counsel's concerns about proceeding with the making of the Regulation. These concerns centred around potential inconsistencies between the Code and the Commonwealth's *Bills of Exchange Act 1909*. In light of these concerns, the MCCA opted to formally approach the Commonwealth for assistance in addressing concerns about inconsistencies.

Dilemma

It is acknowledged that the ideal approach would be to delay proceeding with Code regulation amendments until an accommodation by the Commonwealth can be reached to ensure that any new provision is fully effective and enforceable.[15]

The likely timeframe, however, for effecting amendments to the Commonwealth legislation is unknown and is dependent on the Australian Government's priorities. In addition, it should be noted that a Federal election is anticipated in late 2007, which may impact on the timeframe for the Commonwealth's amendments.

The number of small amount lenders exploiting the bill facilities loophole is now increasing across a number of jurisdictions and in turn, the number of disadvantaged and vulnerable consumers affected has increased. As a consequence, State and Territory Ministers are now faced with the dilemma of weighing up the risks associated with proceeding with implementing the Code regulation amendment in advance of the Commonwealth's amendments as compared to the ongoing significant risks to consumers in delaying the regulation amendments.

Questions

This example raises the following important questions:

- Does the current uniform regulatory model provide sufficient capacity to respond to serious issues, which arise in the marketplace?
- Can the current processes for achieving regulatory response to issues be streamlined to reduce the time it takes to respond to serious issues?
- Does the current uniform model provide sufficient scope for individual jurisdictions to respond to local issues?
- If the Commonwealth regulated consumer credit, would it be in a better position to respond quickly to marketplace issues?
- Does the dynamic nature of consumer credit as evidenced by the range of issues which were not envisaged at the time of developing the Credit Code, make it unsuited to being regulated under a template model?
- If the Commonwealth were to regulate consumer credit, would it be responsive to local issues affecting consumers for example, in a regional centre of WA?
- Is it only a matter of time before political imperatives at the individual State/ Territory level will result in the abandonment of the current uniformity arrangements?
- Are consumers necessarily benefiting from their Governments being party to uniform laws?

[15] The Commonwealth has advised that the *Bills of Exchange Act* (Cth) does not constitute a complete statement of law governing bill facilities to the exclusion of State laws – that is, it does not 'cover the field'. Therefore, applying the Code to promissory notes would not be unlawful nor unconstitutional, though any direct inconsistency would render the affected provision of the Code invalid to the extent of that inconsistency.

2.1.7 Administrative uniformity

As noted above, there are two related issues to consider in relation to achieving greater uniformity in the Australian consumer policy framework. The first concerns the laws that make up that framework. This issue has been considered above. The second issue – which DOCEP believes is equally important but often less considered – is the administration of that framework.

The consumer policy framework in Australia is administered by consumer protection/fair trading agencies in each State and Territory and by the ACCC and ASIC at the Commonwealth level. As has already been noted, there is significant cross-over in the jurisdiction of the Commonwealth agencies and the State/Territory agencies.

Experience shows that significant variations exist in the way in which individual agencies administer the laws for which they have responsibility, even where those laws are similar or uniform. This variation is a matter of frustration and expense to those businesses that trade in more than one jurisdiction.

While political considerations are primary in relation to the development of consumer policy in different jurisdictions, it is less so in relation to the administration of that policy. Indeed, in many cases (such as the Commissioner for Consumer Protection in Western Australia) matters such as prosecution policy are expressly removed from political direction. As a consequence, there is considerable opportunity for action by the relevant agencies to establish common practices and protocols that would have an immediate impact on the extent of uniformity in the consumer policy framework.

In recent years there have been a number of initiatives to include co-operation amongst the relevant consumer agencies, including AUZSHARE, and there has been concerted action in relation to some matters, including those undertaken by the Australian Consumer Fraud Taskforce, the membership of which extends to other regulatory agencies such as the Federal Police and Australian Customs. Co-operative arrangements also exist between the Commonwealth agencies and individual State/Territory agencies.

Despite these initiatives, DOCEP believes there is considerable scope for greater co-operative action by agencies. Even where legislation is different in individual jurisdictions, it is often the case that the broad principles are similar and that consistent administrative policies could be developed. For example, the individual Commissioners (or their equivalent) could consider joint educational initiatives, joint media releases or conferences targeting matters of concern, or joint policy statements in relation to the way in which various laws or requirements will be administered.

DOCEP believes that one reason why there has been more focus on the legislative elements of the consumer policy framework is that MCCA and SCOCA are largely concerned with policy issues. The membership of SCOCA includes the Commonwealth Treasury, which is a non-regulatory agency, and the strategic agenda for MCCA/SCOCA reflects a policy focus.

DOCEP took the initiative in 2005 to convene a conference in Western Australia of Australia consumer protection/fair trading agencies with a view to the creation of an Australian Consumer Protection Enforcement Network (ACPEN) to sit alongside SCOCA with a focus on compliance issues. Although ACPEN has continued since then, it has focussed on information sharing and, in DOCEP's view, remains an unfulfilled but valuable concept.

2.2 Consumer involvement in the policy framework

2.2.1 The role of consumers in the consumer policy framework

DOCEP is concerned that consumer voices are significantly under-represented in the development and operation of the Australian consumer policy framework, to the detriment of consumers and to the detriment of achieving the best overall outcomes.

The direct result of this under-representation, which DOCEP notes from experience, is a significant imbalance in the presentation of interests to public policy and decisions-makers. This imbalance can lead to outcomes that favour the protection of better-organised producer groups at the expense of consumer interests.

It is expected that the Commission will itself notice this imbalance in the process of gathering evidence for the Review.

DOCEP believes that it is essential that consumer organisations have a significant stake in the research, development and operation of regulatory frameworks, as it is ultimately consumers who pay for regulation and for all market failure.

In addition to undertaking vital policy research and providing a counter-balance to producer views, DOCEP strongly believes that the perspective provided by consumer advocacy can also serve to hold government service providers and regulators accountable. Such a function is crucial as government remains, in many cases, the provider of goods and services to consumers. This counter-balance is also required as 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.

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:

"Governments can practice leadership in two ways. They can either practice leadership ignorant of citizens' direct concerns and input. Or governments may practice leadership open to citizens' concerns and input. This gives government the chance to tap into wider resources of citizens and civil society in order to develop better policies and gain more trust and legitimacy. Strengthening government-citizen relations is a means for government to fulfil its leadership role in an open way and more effectively, credibly and successfully."[16]

[16] OECD, 2001, Citizens as Partners: Information, Consultation and Public Participation in Policy Making, p23

For “citizens” one can read “consumers” when considering government’s role in relation to consumer policy setting. This paper assumes that the right of consumers to be involved in consumer policy development is a given.

Indeed, the United Kingdom Government has expressly recognised the need for this involvement:

“Having a consumer regime at the level of the best in the world means: (inter alia)

- *Strong consumer advocacy exists at the general policy making level and in special cases.”*[17]

As has the European Union:

“*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.

“(I) believe consumer advocates have a critical role to play in ensuring the continuation of Australia’s prosperity. Consumer advocates must be a loud, consistent and persuasive voice for the needed economic reforms that will serve the interests of consumers. Consumer advocates must, I think, base their advocacy voice on rational, rigorous research. Arguing their case for what is empirically provable, or at least widely theoretically accepted, will enhance the reputation of advocates as protagonists for a goal that exists beyond the demands of any given interest group, a societal goal that is, indeed, the end point of market-based economies such as ours – the advancement of the long-term interests of consumers.”[19]

The Commission has also previously noted that *“(*i)*n a reform-specific context, it is the role of consumer advocates in providing a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to higher prices, reduced service quality or less market innovation, that is most relevant.”* [20]

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17 UK Department of Trade and Industry, 2005, A Fair Deal for All, Extending Competitive Markets: Empowered Consumers, Successful Business, p9

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 Field C, Creating a prosperous and fair Australia – the critical role of consumer advocacy, DOCEP Second Consumer Advocate’s Lecture, June 2006, p12

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

The work of individual consumers and consumer organisations in contributing to consumer policy development is not mutually exclusive. In many cases individual consumers and consumer organisations are able to contribute in like manner. However, there are arguments for a special role for consumer organisations over and above what can be legitimately expected of individual consumers.

Individual consumers and organisations have a range of potentially powerful mechanisms open directly to them 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;
- seeking appointments to 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, the capacity of either individuals or organisations to utilise 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.

"It is a widely shared view that consumer voices are not heard (or sufficiently heard) in political and regulatory processes. Allan Asher, a consumer expert of over 30 years' experience, a former Deputy Chair of the Australian Competition and Consumer Commission, has observed that: '(c)onsumers, although numerous and occasionally able to express their power through collective action, are generally poorly organised and no match for special interest groups."[21]

[21] Field C, op cit, p6.

The former Western Australian Consumer Advisory Council also noted that:

"Industry and government input into consumer affairs is generally resourced through the support of paid staff and collective decision making processes, whilst consumers are often required to speak from an individual perspective, in the absence of a consumer organisation to research and represent their interests. This affects the power imbalance between the three key players of industry, government and consumers."[22]

2.2.2 Consumer organisations in Australia

Even where examples exist of effective individual action they are usually limited to specific one-off issues.

It is for this reason that consumer organisations have grown up to help to advance the interests of consumers 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 have a 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 throughout Australia.

Where consumer organisations do exist, their service delivery role is re-enforced by a widespread government funding model at Commonwealth, State and Territory levels which provides funding on a formula tied to service delivery, leaving little available resources 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.

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[22] Western Australian Consumer Advisory Council, Proposal for the Establishment of a Consumer Research and Advocacy Centre in Western Australia, Discussion Paper, August 2004, p4.

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."[23]

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

Australia has two national consumer organisations, the Consumers' Federation of Australia (CFA) and the Australian Consumers' Association (ACA), now CHOICE.

The CFA is a national peak body with over 100 consumer organisations as members.

The objects of the CFA are to promote the interests of consumers, in particular 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.

CHOICE is a not for profit company limited by guarantee with individual and corporate members. CHOICE produces its well known magazine and Internet based service which provides consumer advice in relation to products and services. CHOICE engages in policy advocacy and is represented on numerous national and state based boards and committees. CHOICE is funded by membership income and fees for services and it employs a full time staff.

While CHOICE 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.[24]

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

[24] CHOICE (formerly the Australian Consumers' Association) website at www.choice.com.au

CHOICE does participate in national consumer policy research and advocacy and it is recognised as the leader in the national consumer debate from a consumers' perspective. However, it has been noted that the ACA, as publisher of *Choice Magazine*, is primarily a business answerable to its readership.[25]

In relation to the role of the ACA, David Tennant has 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.

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."[26]

2.2.3 The United Kingdom's approach

The position in Australia in relation to consumer organisations is often contrasted by commentators with that which prevails in the United Kingdom (UK), in particular with the role of the National Consumer Council (supported by the Scottish Consumer Council, the Welsh Consumer Council and the General Consumer Council for Northern Ireland).

The National Consumer Council (NCC) is a non-departmental government body. The board of the NCC is appointed by the Secretary of State for Trade and Industry and around 75% of the NCC's funding comes from the UK Department of Trade and Industry (DTI). The remainder of the funding comes from a variety of sources for specific projects.

"The National Consumer Council makes a practical difference to the lives of consumers around the UK, using its insight into consumer needs to advocate change. We work with public service providers, businesses and regulators, and our relationship with the Department of Trade and Industry — our main funder — gives us a strong connection within government. We conduct rigorous research and policy analysis to investigate key consumer issues, and use this to influence organisations and people that make change happen."[27]

In giving effect to its stated role, the NCC does not simply respond to government initiatives, in addition it initiates policy research and debate.

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

26 Ibid

27 NCC website at www.ncc.org.uk

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

"…how much better might a review of consumer protection policy and regulation (a la the 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?"*[28]

A body along the lines of the UK's NCC is clearly an option to enhance the role of consumers and consumer organisations in consumer policy research and advocacy in Australia.

Such an option has yet to find support from governments in Australia, however, it will be a matter of interest to see whether the lack of such a body does indeed have an impact on the review of the Australian consumer policy framework being undertaken by the Commission.

Certainly there have been examples in the recent past within Australia where the lack of an independent, resourced and co-ordinated consumer voice has hampered public policy development (for example 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 DTI has recently (in 2006), undertaken a public consultation process on a proposal to strengthen and streamline consumer advocacy in the UK known as "Consumer Voice".

The proposed model has three key elements:

- 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 complaints and the postal services sector to resolve complaints where service providers have not been able 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, to Government, and to the sectoral regulators.

[28] Tennant D, op cit, p9

The proposals set out crucial reforms to consumer representation and redress to provide:

- clarity and simplicity for consumers;
- coherent and cohesive consumer advocacy through "joined up" professional representation for the consumer interest;
- redress for consumers where things go wrong; and
- value for money for consumers.[29]

The UK Government has moved to give effect to the Consumer Voice proposal with the introduction into Parliament on 16 November 2006 of the *Consumers, Estate Agents and Redress Bill*. The Bill's Consumer Voice proposals include measures to strengthen and streamline 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').

In support of this legislation, the UK Government has stated that the:

"…new body will be a more powerful consumer advocate with the critical mass to engage effectively with Government, regulators and industry sectors, and with the benefit of being able to draw on experience and expertise from a number of sectors, as well as providing greater value for money for consumers."[30]

It is worthy of reflection that despite the fact that the existing NCC model has been promoted as a model to which Australia should aspire, the United Kingdom Government is moving to expand and strengthen the NCC's role in consumer advocacy.

2.2.4 Some recent Australian State initiatives

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

In Western Australia the (former) Consumer Advisory Council established to advise the Minister for Consumer Protection on, inter alia, building consumer capacity in Western Australia, recommended the creation of a Consumer Research and Advocacy Centre in Western Australia.

Acting through DOCEP, the Western Australian Government has supported the creation of the Centre for Advanced Consumer Research in partnership with the University of Western Australia.

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29 DTI web site at www.dti.gov.uk/consumers/consumer-support/consumervoice/index.html

30 DTI web site at www.dti.gov.uk/consumers/consumersbill/index.html

This Centre commences operation in the 2007 academic year and it will provide both a research and teaching function, with a national focus for its research program.

The model of 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.[31]

A consortium of non-government consumer agencies in Western Australia 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.

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.[32]

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

2.2.5 Class Actions, super-complaints and representative actions

One specific way in which consumer organisations, in particular, can advocate on behalf of consumers is by the pursuit of legal action to ensure existing consumer rights are upheld or, by way of test cases, to seek to expand the rights of consumers 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.

(a) Class Actions

The 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. As the law and practice of class actions in Australia has developed, so too have the types of claims and also the way in which those actions have been funded. The types of claim have now included claims such as claims on behalf of shareholders and claims on behalf of consumers affected by anti competitive behaviour including price fixing and market sharing arrangements. There has also been a rapid growth in a number of commercial funders of litigation, including class actions.

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

32 Victorian Minister for Consumer Affairs, media release, 18 October 2006

In conventional forms of litigation the parties know the identity of the claimants from the outset of the dispute and one is 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.

The essential elements needed to commence a class action 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 fulfilment of these elements there is no limit to the subject matter of class actions.

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.

Initially class actions were funded primarily by the lawyers for the representative party. The usual features of these funding arrangements were:

- the representative party entered into a cost agreement with its lawyers. The terms of that cost agreement required no payment for services during the term of the class action. In effect, the lawyers acted without payment until the conclusion of the class action;
- the lawyers seek to recover from the respondent part of their costs if the representative party succeeds; and
- the balance of the lawyer's costs were to be deducted from any award of damages.

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).

Although each funding arrangement is negotiated for each claim, in broad terms the litigation funders:

- agree to pay the legal costs of the funded party;
- agree to provide any security required by reason of an order for security for costs;
- take 25-40 per cent of the proceeds of litigation; and
- the funder agrees to pay any adverse costs order against the funded party during the period in which the funding agreement was on foot.

The class action procedure provides a convenient way for a large number of people affected by anti-competitive conduct to seek recompense following an admission of guilt or a successful prosecution by the ACCC or other regulator.[33]

While a class action is aimed at recovery of 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 by the outcome achieved settling some principles or question of statutory interpretation of broad application.

(b) Super-Complaints

The UK's *Enterprise Act 2002* (which came into operation in 2003) introduced a number of changes to competition and consumer law enforcement in the UK. Amongst those changes was the introduction of 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 is intended to be a fast-track system for 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 the interests of consumers.

Only designated bodies can make a super-complaint. Section 11(5) of the *Enterprise Act* provides that a consumer body has to be designated by the Secretary of State for Trade and Industry by order. The Secretary of State can make any organisation a designated consumer body provided it appears to them to represent the interests of consumers of any description and also meets any other criteria published by the Secretary of State.

Under section 205 of the *Enterprise Act* the Secretary of State for Trade and Industry has the power to provide by order for specified sectoral regulators to have duties in relation to super-complaints.

By virtue of Order 2003 SI 1368, 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.

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

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.

The objective of presenting the case is to help the receiving authority undertake a full appraisal of whether any feature or combination of features of a UK market is or appears to be significantly harming consumer interests and what action, if any, should be taken. Super-complainants are not expected to provide the level of evidence necessary for a regulator to decide that immediate action is appropriate. However, they should present a reasoned case for further investigation.[34]

Super-complaints are given fast-track consideration. The regulator with the duty to respond to the super-complaint is required to publish a reasoned response within 90 calendar days from the date the complaint is received.

By virtue of Order 2004 SI 1517, the following bodies have been designated as super-complainants under the *Enterprise Act*:

- The Consumers Association;
- The National Association of Citizens Advice Bureaux; and
- The National Consumer Council.

Energywatch and Watervoice were designated in January 2005 and Postwatch, CAMRA (Campaign and the General Consumer Council of Northern Ireland were designated in October 2005.[35]

The OFT has acted on super-complaints. For example, a super-complaint by the Citizens Advice Bureaux in 2005 resulted in a formal OFT investigation of the payment protection insurance market in the UK and a super-complaint by the Consumers Association and the General Consumer Council of Northern Ireland in 2005 resulted in a formal OFT investigation into bank charges in 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.

The New Zealand review found as follows:

"*Although the super-complaints system is regarded as a success in the United Kingdom, it is not proposed that the Fair Trading Act be amended to provide for such a system in this country. This is because the benefits that have accrued in the United Kingdom since the introduction of the super-complaints system would be unlikely to occur in New Zealand. In the United Kingdom complaints received about consumer protection issues are directed to Trading Standards Authorities (TSA).*

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[34] OFT Super-complaints. Guidance for designated consumer bodies, OFT web site at http://www.oft.gov.uk/NR/rdonlyres/98D1E0AD-11C1-4997-BA27-26C9D93F7487/0/oft514.pdf, p6

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

There are 202 of these. It can, therefore, be difficult for the TSAs to recognise when a number of consumers throughout the country have been affected by a particular trader or where a market failure may be occurring. In New Zealand, in contrast, the Commerce Commission has a centralised complaints processing system which handles all the complaints received by the Commission.

In addition, implementation of a provision similar to the super-complaints system in New Zealand would require significant adaptation to the New Zealand situation. Many of the designated consumer groups in the United Kingdom have government funding or are funded by levies, thereby providing them with the resources to undertake research and policy development. No consumer group in New Zealand is funded in such a way. This is likely to impair their ability to be make super-complaints.

Adopting a super-complaint system would also have implications for the Commerce Commission. The Commerce Commission is an independent Crown entity. It is funded by the government but the government cannot direct the Commerce Commission to investigate particular complaints. Instead the Commerce Commission identifies the market areas that it will investigate as a matter of a priority. Requiring the Commerce Commission to investigate particular complaints brought to its attention by consumer groups within a specified timeframe may affect the Commission's ability to focus on the areas that it has identified as priorities based on its own monitoring of the market and the complaints that it receives.

Before a super-complaint system could be proposed, there would need to be significant information that indicates that the current system would be greatly improved by the introduction of such a provision in the Fair Trading Act. Currently, there are informal arrangements between consumer groups and the Commission to discuss where consumer groups see priorities and how the Commission's priorities compare. Some of the recent Fair Trading Act court cases taken by the Commerce Commission have originated from information supplied to the Commerce Commission by consumer organisations."[36]

Notwithstanding the New Zealand review, DOCEP believes the super-complaints process has much to commend it, and urges the Productivity Commission to give it due consideration.

(c) 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.

[36] New Zealand Ministry of Consumer Affairs, Review of the Redress and Enforcement Provisions of Consumer Protection Law, May 2006, p48

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 UK, 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.[37]

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.[38]

In order to avoid exposing business to spurious or vexatious claims or unwittingly creating a compensation culture, the UK proposals provide for a number of safeguards to be satisfied before a representative action could be brought to court:

- 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.

This proposal would build on the UK's *Competition Act 1998*, which has a provision for the Secretary of State to designate a body to bring a representative action on behalf of a group of consumers who have suffered loss or damage as a result of an infringement of a competition prohibition.

These powers are triggered once the OFT or Competition Commission has made a decision that an infringement has taken place. The designated body may then bring a representative action on behalf of named consumers who have suffered detriment to the Competition Appeals Tribunal who may then make an award in their favour to compensate them for their losses.[39]

Although there is there is no general statutory right for non-government consumer organisations to take representative action in Australia, it is open for consumer organisations, or indeed individual consumers, to take action to enforce consumer laws which have a general market application. Such action is likely to be limited due to the cost of legal action and the risks which may accrue should the action be unsuccessful (although the growth in litigation lenders may ameliorate some of these concerns).

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37 UK Department of Trade and Industry, Representative Actions in Consumer Protection Legislation, 12 July 2006, p4.

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

39 UK Department of Trade and Industry, Representative Actions in Consumer Protection Legislation, 12 July 2006, p7.

Despite these limiting factors, 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 TPA.

In 1986 the Tobacco Institute of Australia published a newspaper advertisement about cigarette smoke under the heading: "A message from those who do ... to those who don't." The ad said in part: "There is little evidence and nothing that proves scientifically that cigarette smoking causes diseases in non-smokers."

The Institute later published a correction after prompting by the then Trade Practices Commission. However, Australian consumer groups - represented by the Consumers Federation of Australia (then known as the Australian Federation of Consumer Organisations, or AFCO) - were unsatisfied and sought a ruling in the Federal Court to ensure the institute would not repeat the earlier advertisement.

The case examined whether there was "little evidence" that environmental tobacco smoke caused disease in non-smokers and whether there was scientific proof. In 1991 the court ruled the original statement was "false and misleading" as of 1986. A powerful outcome based on representative action but one which was taken at some significant risk to the CFA and one which took some five years to produce a result.

As with the super-complaints process, DOCEP would urge the Productivity Commission to give due consideration to the UK's representative action initiative.

2.2.6 Consumer representation on government boards and committees

DOCEP is highly supportive of consumer representation on government boards and committees. This is another avenue by which governments provide for consumer involvement in consumer policy development, and for the advocacy of consumer interests in the administration of government policy.

Effective, resourced consumer representation on government regulatory boards, in particular, can play an important role in combating the risk of industry capture.

Industry stakeholder groups often wield significant influence over regulatory authorities. This can result in outcomes that are detrimental to consumers. These costs cannot simply be overcome by increasing consumer representation on the boards in situations where the pervasive culture of the board and its support staff is industry oriented, as those persons are isolated and left vulnerable to influence.

In an attempt to address the challenges faced by consumer representatives on boards and committees, DOCEP is currently negotiating with a non-government agency in Western Australia to develop a training program for consumer and community representatives on government boards and committees. This training program will not be limited to representatives on traditional consumer boards and committees, but will be designed for the benefit of all individuals who are chosen as consumer or community representatives on government boards and committees.

Further consideration of the processes for consumer involvement in the consumer policy framework across Australia may provide tangible improvements in the efficiency, effectiveness and cost of consumer regulation.

2.3 More flexible policy responses and tools

2.3.1 General consumer protection regulation

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.

The foundation of general consumer protection legislation in Australia is the Commonwealth's TPA, and the Fair Trading Acts of the States and Territories.

The State and Territory Fair Trading Acts, introduced between 1985 and 1992 sought to establish a uniform consumer protection regime by extending the coverage of the TPA, which only applies to corporations, to all types of traders.

The Fair Trading Acts originally mirrored the consumer protection provisions in Part V of the TPA and the associated enforcement and remedy provisions in Part VI. Despite the intention to create a uniform consumer protection framework throughout Australia, the TPA and Fair Trading Acts have diverged significantly over the years, with various diverging amendments made to them across the jurisdictions. The lack of any formal mechanism in place to ensure that uniformity among these statutes is maintained over time also exacerbated this divergence.

2.3.2 The advantages and disadvantages of general regulation

(a) Universal coverage and consistency

As 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:

- 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; and
- applies consistently and fairly across all industries, thereby having efficacy and efficiency benefits.

Unfair Contract Terms

DOCEP is supportive of the enactment of general, nationally consistent unfair contract terms legislation with universal coverage.

In 2005, the Western Australian Government gave "in principle" approval to introduce such legislation in Western Australia.

An unfair contract is generally understood to be one where there is a significant imbalance in the party's rights and obligations under the contract, to the detriment of the consumer. Typically, a supplier will use a standard form contract for the provision of goods and services and the consumer does not have an opportunity to negotiate the terms of the contract.

Furthermore, in many cases the terms of a contract will be included in the 'fine print' in legal jargon, which may be difficult to understand. It can be the case that terms are included in the contract which are one-sided in favour of the supplier, and which are not reasonably necessary for the protection of the suppliers' legitimate interests.

New South Wales, Victoria and other jurisdictions around the world now have legislation specifically directed at this issue. Under the Victorian *Fair Trading Act* provisions, and with universal, cross-industry, application a term in a standard form consumer contract is unfair if:

"contrary to the requirements of good faith and in all the circumstances it causes a substantial imbalance in the parties rights and obligations under the contract to the detriment of the consumer".

An unfair term is void and of no effect. The Victorian *Fair Trading Act* provides for particular terms to be prescribed by regulation as unfair terms and for the Director General to seek declarations and injunctions where a trader uses an unfair term in a consumer contract.

Given that Australia is a relatively small national market, general, cross-industry unfair terms legislation would be highly desirable in order to keep compliance costs to a minimum.

In WA, the views expressed to DOCEP by consumers, principally in the car hire industry and mobile telecommunications, and stakeholders of retirement villages also support the introduction of unfair contract terms legislation, like of Victoria's in Western Australia.

(b) 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. 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.

As general regulation is often less prescriptive than industry-specific regulation it gives traders more flexibility in how they comply with the law. This reduces their compliance costs (which are passed on to consumers), and increases flexibility and innovation. However, if what constitutes compliance is unclear, that uncertainty may temporarily, raise the compliance costs for business.

If traders are required to comply with multiple Acts, there may be confusion among traders as to the combined effects of these Acts, which could lead to unanticipated costs.

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.

(c) Regulatory capture

Regulatory capture occurs when a group of stakeholders gain undue influence over the development of the regulations or the activities of the regulator.
It is essential to consult all stakeholders in the regulatory process, with the views of interest groups balanced with the public interest when making decisions. This balance can be harder to maintain with industry specific regulation, where, by virtue of the regime's industry-focus, industry-based interest groups may be able to influence those developing the regulation. This risk is more acute if an industry-specific regulator administers the industry-specific regulation.

2.3.3 Industry-specific consumer protection regulation

Each State and Territory also has an array of industry-specific regulation, such as licensing and registration schemes. These areas are of greatest divergence within Australia's consumer protection framework.

It is difficult to define detailed rules that are appropriate for the diverse range of activities usually covered by general regulation. For this reason, industry-specific regulation is narrower in scope, and tends to focus more on the trader. Also, as it primarily applies to a single industry or sector, industry-specific regulation often sets more prescriptive rules than general regulation does.

There are various factors, which have prompted the use of industry-specific regulation across the jurisdictions. Furthermore, the jurisdictions differ by virtue of the industries they regulate, and even where similar industries are regulated by the jurisdictions, how these industries are regulated may also differ.

2.3.4 The advantages and disadvantages of industry-specific regulation

(a) Targeted solutions

Industry-specific regulation targets particular problems in particular industries. 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 extending general regulation to areas it is not intended to cover.

Specific requirements in industry regulation may be easier for traders to understand. Some traders may prefer the clarity of prescriptive rules that tell them exactly what they need to do to comply.

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.

(b) Easier enforcement

Industry-based regulation may also be easier to enforce than general regulation, particularly when it is highly specific, setting 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.

(c) 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 is essential.

2.3.5 Consideration of appropriate policy responses

DOCEP believes that 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.

Given that general regulation is already in force, industry-specific regulation is more suited to addressing issues that are beyond the scope of general regulation. But it does not necessarily follow that the introduction of industry-specific regulation will automatically rectify the problem at hand. This is especially the case if the industry is difficult to define or is constantly changing.

Industry-specific regulation is most appropriate when:

- general regulation is not working;
- the general regulation cannot be improved to address the problem;
- the problem is big enough to warrant further action;
- specific regulation can effectively target the problem and the industry involved; and
- the problem and the industry are stable enough to make detailed action effective over time.

Non-regulatory solutions should also be considered as means of addressing the problem. Potentially, the problem may be better addressed without government intervention.

In all cases, it is also important to consider the costs and benefits of regulatory and non-regulatory alternatives, to ensure that intervention is justified and the option chosen generates the greatest social and economic benefits over its costs.

The European Union Directive

The Productivity Commission may wish to consider recent policy developments in the UK and the wider European Union, where the UK is currently giving consideration to the introduction of the European Union Directive on Unfair Commercial Practices (the Directive).[40] As a member of the European Union, the UK is under an obligation to have the Directive transposed into UK law by 12 June 2007 and in force by December 2007.

The Directive creates a general duty for businesses not to trade unfairly. This general duty applies to all business sectors and it is intended to act as a safety net protecting consumers from unfair commercial practices, which are not otherwise unlawful. Because the Directive creates a general duty, it applies not only to existing practices but also to any new, emerging practices and markets. This attribute helps to prevent the protections it provided from becoming outdated or being avoided by creative changes in market behaviour. The creation of a general duty also provides the opportunity for simplification of the consumer protection framework in the United Kingdom and the repeal of overlapping legislation.

[40] Unfair Commercial Practices Directive (2205/29/EC)

The UK DTI issued a consultation document on the Directive[41] The UK Government's response to the public consultation was published in December 2006.[42] In that response the UK Government advised that in implementing the Directive it would repeal provisions in 22 of the 29 existing laws, which regulated matters covered by the Directive.

The UK experience in introducing the principles based Directive offers an example of the replacement of industry specific legislation with broad principles based legislation.

The Irish Government has recently enacted new legislation to update its consumer policy framework and to implement the European Union Directive. As an example of this, section 41 of the Irish *Consumer Protection Act 2007* provides for a general prohibition on unfair commercial practices.

2.3.6 Codes of conduct

Part IVB of the TPA provides for mandatory or voluntary industry codes of practice to be prescribed to regulate the conduct of industry members towards other industry members or towards consumers. Section 51AEA of the TPA allows a code of practice made under a state law, to operate concurrently with a code made under Part IVB of the TPA. The uptake of such industry codes in Australia has been minimal. To date, only one mandatory code has been made under the TPA. [43]

Similarly, Western Australia's use of the mandatory code of practice provisions in its Fair Trading Act has been very limited. Three codes of practice have been enacted under the Western Australian *Fair Trading Act*, and only two currently operate.

A *Fair Trading (Health and Fitness Industry) Code of Practice* commenced under section 43 of the Western Australian Victorian *Fair Trading Act* on 27 January 1989. It expired on 26 January 1992 and was not renewed. A new *Health and Fitness Industry Code of Practice* came into effect on 1 January 2005.

A Fair Trading *Retirement Villages Code of Practice* is also in force. This complements provisions in the *Retirement Villages Act 1992*. The original Retirement Villages Code of Practice commenced in 1993 and subsequent codes have been made following two reviews under section 43 of the Western Australian *Fair Trading Act*.

A significant reason why codes of practice are rarely used as a regulatory mechanism for consumer protection and fair trading in Western Australia is the complex and onerous nature of the procedures required to establish a code of practice.

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41 UK Department of Trade and Industry, 2005, The Unfair Commercial Practices (UCP) Directive

42 UK Department of Trade and Industry, 2006, Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive

43 The Franchising Code of Conduct. However, a code of practice for the petroleum industry is being developed.

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 burdensome on business and government.

It is possible for some industries take responsibility for positive market outcomes through self-regulation, by establishing voluntary codes of conduct, with rules on product and trading standards, transparent dealings and dispute resolution, for example. When used effectively, such measures can avoid costly disputes, enhance business reputation and increase consumer confidence.

Such voluntary self-regulation strategies may benefit business by improving their reputation, increasing consumer confidence and giving ethical businesses an advantage over their competitors. An effective voluntary code may also avoid the need for government intervention.

However, if serious market problems arise, governments may not favour such forms of 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.

While industries may appreciate the benefits of co-regulation or self-regulation, it is DOCEP's experience that such forms regulation lack promotion, monitoring and enforcement within the industries they are said to regulate.

Given that self-regulation and co-regulation have been developed with industry in many different contexts by consumer agencies in Australia with mixed success, DOCEP is open to the concept of industry self-regulation and co-regulation, only where appropriate.

Holiday Accommodation Managers

DOCEP defines a holiday accommodation manager as someone working on behalf of owners of property ordinarily used for holiday accommodation to arrange the letting of their premises for periods not exceeding three consecutive months. Currently, under the *Real Estate and Business Agents Act 1978* (the REBA Act) holiday accommodation managers are required to be licensed as real estate and business agents because their activities fall within the definition of a "real estate transaction".

The holiday accommodation management industry is unique because of its relatively recent emergence, and because of its hybrid nature in that it crosses both the tourism and real estate industries. Importantly, when the REBA Act was drafted there was no significant holiday accommodation management industry. Hence, it is possible that the REBA Act was not intended to regulate the activities of holiday accommodation managers.

Consultation with stakeholders revealed that many perceived the REBA Act to be inappropriate for the regulation of holiday accommodation managers, particularly in light of the current low consumer risk identified.

A voluntary accreditation program was therefore developed by DOCEP and other industry stakeholders to replace the current legislative regulatory framework that applied to the holiday accommodation management industry.

Some of the key elements of the accreditation programme include:

- a requirement for accredited holiday accommodation managers to operate a separate clients' bank account for the purpose of achieving higher standards of financial accountability;
- the development of a new Code of Ethics that extends the customer relations focus of the current Code and applies best-practice business conduct in relation to essential holiday accommodation management activities;
- the development of a new dispute resolution process modelled upon the best-practice benchmarks of accessibility, fairness, independence, accountability, efficiency and effectiveness;
- the development of a new Dispute Resolution Panel with the authority to fine an accredited holiday accommodation manager, revoke their accreditation for a minimum of six months, or to suspend accreditation for up to three months while a decision on accreditation revocation is considered; and
- the development of a new naming policy whereby should a holiday accommodation manager have their accreditation revoked, the Accreditation Committee would make a formal request to the Commissioner for Consumer Protection (the Executive Director of Consumer Protection) to publicly name the business.

2.4 Alternatives to regulation – education and disclosure

Education and information disclosure are two strategies that are often promoted as alternatives to regulation. Indeed, both are specifically mentioned in the Commission's Issues Paper.

DOCEP believes that both strategies have a legitimate place in the consumer policy framework. However, DOCEP believes that there has been inadequate consideration given to the effectiveness of both of these strategies. It is not uncommon to have one or both of these strategies promoted as responses to market failure on the basis of a simple assumption that they will be effective.

On the contrary, DOCEP believes from experience that both have serious deficiencies and DOCEP recommends that further research should be conducted into the effectiveness of both strategies before they are supported as effective alternatives to regulation.

On this point DOCEP notes that the Western Australian Centre for Advanced Consumer Research will shortly be offering a three year PhD scholarship to examine the effectiveness of disclosure.

2.4.1 Education

Like all consumer agencies in Australia, DOCEP conducts general and specific education programs for both consumers and traders. The main objectives with regard to DOCEP's educational programs are to raise awareness of DOCEP's role and services and to educate consumers and traders with respect to their rights and responsibilities.

To be truly effective in the consumer protection context, DOCEP believes that education programs should be constructed with a view to changing behaviour – of both consumers and traders. However, DOCEP believes that behaviour changing educational programs are beyond the financial means of all consumer agencies in Australia.

Behaviour changing educational programs, to the extent that they work at all, require long term, extensive promotion: they are expensive.

The Commission may wish to contrast consumer education programs with public health campaigns, such as those targeting smoking and AIDS, or road safety campaigns. DOCEP believes there is no general consumer program capable of comparison. The only recent mass media consumer campaign has been that undertaken on behalf of the Commonwealth's Financial Literacy Foundation. That campaign could not, however, be categorised as one intended to change behaviours.

2.4.2 Disclosure

Disclosure of information pre-transaction is often promoted as a light touch alternative to substantive regulation. Reliance on disclosure is based on the premise that the disclosed information will enable consumers to make informed decisions and thus effectively manage their own risk. Disclosure is relied on extensively in the financial services industry and it is a fundamental element of consumer credit regulation.

Information provision is fundamental to the functioning of the market, and it should be considered as one of a number of consumer policy tools worthy of consideration. However, the disclosure of information can have a number of limitations.

As previously noted, behavioural economics challenges the assumption that people are rational actors who are self-interested and make decisions with complete information. For example, people tend to interpret information in a manner that supports their own opinions, people pay less attention to statistical evidence than to their own experience or stories, which are high profile or have gained recent media attention. In these circumstances, disclosure of information will have little effect.

Disclosure of information is particularly problematic in relation to transactions that are capable of unilateral variation by the trader. Curiously, consumer credit transactions, where disclosure is most common, are also transactions where it is standard practice for the credit provider to have the capacity to unilaterally vary the terms of the credit after parties have entered into the transaction.

Disclosure of information, much of which will not be relevant to the specific needs on individual consumers, also runs the risk of confusing readers by providing too much information which can have the effect of overwhelming a consumer to the point where they overlook everything.

In some industries, a lack of alternative choices, or impediments to switching to alternatives means that information provision does not produce the desired outcomes.

2.5 Commonwealth administration

DOCEP is concerned that the rapid expansion of the ACCC's demanding role as a regulator of competition in recent years has served to diminish the capacity of the ACCC to focus on national consumer protection compliance issues.

Consumer matters currently sit amongst the ACCC's obligations with regard to small business rights and obligations and significant industry regulation roles with respect to aviation and airports, bank fees, telecommunications, electricity and gas, insurance, petrol, postal services, rail utilities, waterfront and shipping regulation, and general competition issues under Part IV of the TPA.

There has been much debate as to whether such competition and consumer protection functions are best co-located or separated. While these policy areas are complementary to the extent that they both seek to enhance consumer welfare, they do so from different perspectives, and can be readily distinguished when it comes to compliance and enforcement.

DOCEP believes that the balance that initially existed in the ACCC's functional obligations has been eroded by a continuing practice of increasing the ACCC's responsibilities in structural industry regulation. Organisations reflect their functions. Issues such as staff recruitment, corporate culture, internal resource allocation and agenda setting all reflect the functions of the organisation. The ACCC's functional obligations are now significantly weighted against consumer regulation.

DOCEP believes that the roles of competition and consumer protection regulation would now, and in the future, be better served by separating the functions of the ACCC into two agencies, one responsible for consumer protection and the other for competition policy and structural regulation. This would allow the ACCC or its successor body to focus its energies on competition regulation, which are becoming increasingly complex and demanding, while the needs of consumers are left to a dedicated consumer agency.

This would reflect the model that works well in Western Australia where (in general) consumer protection compliance is vested in DOCEP, while high level competition regulation is vested in the Economic Regulation Authority, a body whose sole focus is competition regulation.

DOCEP concurs with the views of Dr David Cousins, Director Consumer Affairs Victoria, who has noted that:

"*In practice, competition and consumer protection matters are readily distinguished when it comes to enforcement. Separating the functions would avoid the perception of the ACCC being biased in favour of consumers in its competition assessment work.*"[44]

The creation of a new, dedicated Commonwealth consumer agency – and Australian Consumer Commission - would also enable a reconsideration of the splitting of the consumer regulation roles which has occurred between the ACCC and ASIC, something which has led to some confusion and overlap of consumer protection roles at the Commonwealth level. DOCEP believes there is much to support vesting ASIC's consumer regulation role for financial services in the proposed single Commonwealth consumer regulator.

Likewise, while a matter for the Commonwealth Government, DOCEP believes that the creation of a Commonwealth Ministerial portfolio for Consumer Affairs would be of significant benefit in elevating the status of consumer policy at the national level.

[44] Cousins, D., Consumer Affairs Victoria 2007 Lecture: Consumer Affairs; Past, Present and Future", p13.